IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0368

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court, Cascade County, The Honorable Judge Gregory Pinski.

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STATEMENT OF THE CASE

In 1987, Mr. Keefe was originally convicted and sentenced to, among other things, life without the possibility of parole [hereinafter "LWOP"] for each of three deliberate homicides. *State v. Keefe*, 232 Mont. 258, 759 P.2d 128 (1988). On December 8, 2018, after this Court's decision in *Steilman v. Michael*, 2017 MT 310, 389 Mont. 512, 407 P.3d 313, the District Court vacated his sentences and ordered a resentencing proceeding. Memo. and Order, Dkt.8.

On February 15, 2018, Mr. Keefe requested funding to retain several experts from the Office of the Public Defender, which ultimately limited the defense to $2,400, the amount it authorizes for *adults* facing a potential sentence of life without the possibility of parole. Pet'r's Motion for State Funds, Dkt. 13; Pet'r's Renewed Mot. for State Funds, Dkt. 47 at 3. On December 11, 2018, the defense obtained permission from the District Court to submit his request *ex parte* and under seal to the District Court.

Meanwhile, Keefe had also raised a number of issues related to his forthcoming sentencing hearing both arising from the application of *Miller v. Alabama*, 567 U.S. 460 (2012) and to the hearing more broadly. Relevant here, he moved for a jury finding on irreparable corruption and to apply a presumption against a finding of irreparable corruption and imposition of

LWOP. Mot. for Jury Sentencing, Dkt. 26, Mot. to Apply Presumptive Sentencing, Dkt. 32.

On December 11, the District Court entered an order appointing Dr. Robert Page to answer questions concerning Keefe's development and mental health as of the time of the offense. Consolidated Or. Re: Expert Testimony[...], App. at A-001-02. On January 14, 2019, the District Court denied each of Keefe's pending motions, including his requests for funding. Consolidated Order Denying Respondent's Mots., App. at A-003-14.

On April 18, 2019, the District Court held the resentencing hearing to address Keefe's eligibility for LWOP. The court provided four hours for the hearing. At the outset of the hearing, the court informed counsel that it would need the final hour of the hearing to read the decision it had prepared. Resentencing Hr'g Tr. 7:10-11, April 18, 2019 [hereinafter "Tr."]. At the hearing, Keefe objected to, *inter alia*, (1) the District Court's reliance on speculation about the meaning of tattoos which neither the witnesses nor the court had seen or discussed with Keefe, (2) the court's reliance on expert testimony that relied on undisclosed sources, and (3) the court's failure to dismiss the possibility of imposing LWOP in light of the State's failure to offer sufficient evidence of irreparable corruption.

At the conclusion of the hearing, the District Court re-sentenced Keefe to three consecutive sentences of LWOP and five consecutive ten-year sentences related to the burglary and use of a firearm. Sentencing Order, App.015-026. The District Court's ruling referenced how its personal knowledge of the facts of the case and its impact on the community influenced its opinion of Keefe, as well as its belief that Keefe had, at the encouragement of his counsel and as the State had argued, recently concocted a new version of the offense whereby he did not act alone. *Id.* at App.004-05.

Counsel moved for reconsideration before a new judge, citing Mont. Code Ann. § 25-11-102(1),(3),(4), and attaching evidence the State knew its arguments were false. Mot. for Reconsideration, Dkt.68. The District Court denied the motion without considering its merits, holding it was frivolous because Montana code does not authorize such a motion and threatened counsel with sanctions. Order Denying Mot. for Reconsideration, App. at A-027-28.

On June 27, 2019, Keefe gave Notice of Appeal.[1]

[1] Although the Office of the Public Defender captioned this case using the parties from the post-conviction proceedings, this is an appeal from Mr. Keefe's sentence. His new sentence has not yet been subject to post-conviction review. *Burton v Stewart*, 549 U.S. 147, 156 (2007) ("Final judgment in a criminal case means sentence. The sentence is the judgment.").

STATEMENT OF THE ISSUES

1. Whether the District Court unconstitutionally deprived Keefe of expert assistance.
2. Whether the District Court failed to comply with *Miller v. Alabama*, 567 U.S. 460 (2012).
3. Whether it was error for the District Court to admit and rely upon expert testimony where the expert refused to disclose the basis for his opinion.
4. Whether the State's knowing presentation of false evidence and the District Court's partiality and bias violated due process.

STATEMENT OF THE FACTS

Keefe is serving an LWOP sentence for homicide offenses he committed when he was seventeen years old, over three decades ago. At his recent re-sentencing hearing, the District Court's appointed expert testified that Keefe had matured and demonstrated improvement and positive change in ways that are expected from a normally developing individual. Keefe's prison's warden testified that prisoners and staff alike respect him and consider him a model inmate. Keefe has matured despite a tumultuous childhood, marked by familial alcoholism and domestic violence, which left him vulnerable to commit the offenses at issue.

A. The Crime of Conviction

The offense in this case involves the 1985 tragic deaths of three innocent family members, David J. McKay, Marian McKay Qamar, and Constance McKay, during a robbery gone wrong. *See Keefe*, 232 Mont. 258. For his crimes, Keefe has spent over thirty-three years in the custody of the Montana Department of Corrections. Petr's Sentencing Memo. App., Dkt. 59 at A-146.

B. Facts Disclosed at Re-sentencing

Keefe's early life was shaped by instability, violence, and neglect. As a child, he experienced abuse in the household by the partners of his mother, Ms. Vera Sickich. Some of these incidents were reported to Dr. Robert Page.[2] In one incident reported to Page, a boyfriend of Sickich, picked up Keefe by his ears. *Mental Health Evaluation*, Dkt. 56 at 10. Keefe described the actions that precipitated the abuse:

> [B]ecause 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.

Id. Page also reported that once Keefe arrived home from a state facility only to find that his room had been converted to a storage room on the side of the trailer. *Id*. In another incident, a schoolteacher hit Keefe's face so

[2] Page is the expert the District Court appointed before denying Keefe's motion for an independent expert. App. at A-001-2.

hard it knocked out his teeth, leading to a written apology from the school. Dkt.50 at 13. Beyond these traumas, Keefe's mother and her partners were alcoholics and, reflecting on his upbringing, he described his experience as "torture." Dkt. 59 at A-075.

Although Keefe sought out positive attention from his parents, his efforts to garner their love through positive acts were ignored. Keefe tried out for school sports, but his parents attended few if any of his school events. Dkt.56 at 10. Despite attempts to do well in school, he "found that positive behaviors did not result in positive attention from his parents." *Id*. However, Keefe found that stealing did get him attention from his parents, only encouraging further criminal behaviors. *Id*.

Despite this history, Page found there were no "significant developmental experiences, traumatic events, or other life-changing situations that would have had any mitigating factors surrounding his decision to commit crimes." *Id*. at 16. Conceding Keefe did have experiences constituting a "traumatic event," Page nevertheless opined that the experiences did not constitute trauma "to the point that it would cause him to kill three people out of anger." Tr. 106:6-715-16.

Tim Hides, a Probation and Parole officer who testified about his presentencing investigation, also noted the abuse Keefe experienced as a

child and adolescent had made him a "high risk," even though he was not privy to all the information detailing the abuse. Tr. 57:9-58:4.[3]

Page concluded that Keefe's profile "[is] consistent in suggesting that he has responded to efforts at rehabilitation," even suggesting what an appropriate re-entry plan would look like. Dkt. 56 at 15, 18. Page noted that "[o]verall, [Keefe's] profile does not represent significant signs of psychopathology," and "as he has matured through the process of his incarceration, he has demonstrated the acquisition and development of an effective work ethic ... and has not demonstrated proneness toward aggression or violence." *Id*. at 14, 17.

At the re-sentencing hearing Page noted that with the parole conditions he suggested, Keefe could succeed if released in to the community. Tr. 108:23-109:2. He did not find a basis for concluding Keefe was a psychopath, and explained "he may well succeed [upon release]." Tr. 87:19-88:3. Explaining that he did not follow the DSM-5 clinical standards strictly, he opined that today a diagnosis of antisocial personality disorder for someone under 18 would not happen, as "it would probably be considered more responsible to use the word 'traits' than ... 'personality disorder.'" Tr. 96:1-8. Page also did not diagnose Keefe with antisocial

[3] Noting, however, that Hides said even knowing information about this traumatic experience would not have been relevant because "it ha[d] nothing to do with the family portion of his life." Tr. 58: 1-4.

personality disorder. Tr. 99:15-16.

Page based his recommendations for a successful plan on release on Keefe's criminal history, explaining "I have no trajectory or history of frequency and duration of criminal activity, other than what I have read in PSIs." Tr. 83:1-4. Over Keefe's objection for inability to review materials relied upon, Page testified that he was unable to assess "rehabilitation" because he did not understand it as a construct. Tr. 86:17-22.

Witnesses at the hearing addressed Keefe's "adamant" efforts to make a positive change through cognitive programming, leadership roles within the prison, and his vocational training experience. Tr. 127:9, 120-31. Regarding his disciplinary record, a corrections officer noted that Keefe has "more clear conduct than most people have time." Tr. 127:20-21. His desire to come to grips with his responsibility for his crime was evident in his incarceration record. *See* Dkt. 56 at A-183.

Former Montana State Prison Warden Michael Mahoney testified in support of Keefe—the first time Mahoney had ever testified on behalf of an inmate. Tr. 134:6-7. Keefe was under the custody of the Montana State Prison during the entirety of Mahoney's tenure. Tr. 132:13-17. Mahoney detailed the progress reflected in Keefe's record, explaining Keefe's poor conduct in his early years at the prison was similar to that of other inmates

who enter the prison at a young—and vulnerable—age. Tr. 135:17-24. Mahoney spoke to Keefe's strong work ethic, offering that he "started moving out of some of the adolescent narcissism, if you will," when he took the job in the reading for the blind program. Tr. 140:16-19. In his experience as warden, Mahoney explained the nature of the programming Keefe participated that helped him to "think beyond 'what's good for me' and [start] looking at developing a goal or a mission in his life to do things." Tr. 142:3-10. From his personal experience with Keefe, testified that he believed "he has matured and grown up and changed his behaviors." Tr. 142:18-20.

Keefe additionally presented the support of family and community members. Ptr's Exs. 2-4, 8-9, Dkt. 63. A leader of the Prison Ministry for the Roman Catholic Diocese of Helena wrote to the court about the efforts that Keefe has undertaken under his guidance. Ptr's Ex. 8. He also offered statements from corrections officers, and a commitment from a reentry house designed for serious offenders to house Keefe in the event he was offered parole. Ptr's Exs. 1, 7, 10.

The State's case for incorrigibility and LWOP focused on the nature of Keefe's crimes. Tr. 160:12-17. Apart from focusing on the tragic and horrific nature of the three homicides, the State also presented testimony from Tim

Hides, suggesting the possibility of unreported disciplinary infractions in Keefe's incarceration record. Tr. 47:9-48:18. The primary basis for this line of questioning was the presence of 16 tattoos on Keefe. Tr. 48:12-16.

Over objection, the State asked Hides his opinion on the meaning of Keefe's three-skull tattoo. Hides testified that "guys that come from the prison, they put the tattoos so they can show them off." Tr. 50:7-8. He admitted that he had not spoken with Keefe about the meaning of his tattoos or even seen the tattoos. Tr. 52:16-18.

Regarding the tattoos, the court *sua sponte* asked for Page's "psychological insight" into Keefe's tattoos. Tr. 66:11-16. Dr. Page opined that the tattoos indicated:

> 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—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.

Tr. 68:15-22. Page never spoke with Keefe about the existence or meaning of the tattoos, and conceded that the tattoos also could be about "displaying pain or serving as a reminder of mistakes." Tr. 90:10-13.[4]

The State attempted to revive the psychological assessments undertaken over three decades ago. Misstating Page's testimony, in closing

[4] As discussed *infra*, there was a post-hearing effort to correct the factual errors regarding Keefe's testimony.

the State argued, "Page has indicated that he's likely still a psychopath. He likely still fits that antisocial personality disorder type." Tr. 157:12-13.[5]

The State also argued at resentencing about the "new story" that Keefe delivered about the facts of the crime (and at Page's prompting) and how it indicated he had not accepted responsibility for the crime. Tr. 85:3-5, 156:4-23. Page reported this story in his mental health evaluation, and during its investigation, the State's investigator had discovered that Keefe had told a "similar story" to prison officials over a decade earlier. Dkt. 56 at 8; Mot. for Reconsideration, Dkt. 68, Ex. 2.

At the close of the evidence, the court heard from a representative from the victims' family, who expressed the pain they still felt from the loss. Seated and shackled, Keefe also offered his words of regret and contrition:

> 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.

Tr. 154:3-22.

[5] Dr. Page actually testified that it was "likely" Keefe "would not [] 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?" Tr. 109:16-20.

STANDARDS OF REVIEW

"[W]hether a district court violated a defendant's constitutional rights at sentencing" is reviewed de novo. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, ¶17, 300 P.3d 657, ¶17. The Court "review[s] 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, ¶14, 428 P.3d 849, ¶14.

SUMMARY OF THE ARGUMENT

This case presents four primary grounds for reversing the District Court's imposition of a sentence of LWOP. First, the District Court declined to provide the defense with experts critical to investigating and presenting Keefe's case. Keefe sought to retain mental health experts and an investigator who would assist him with establishing that a sentence of LWOP was neither lawful nor appropriate. The District Court's denial of defense experts and investigators violated Keefe's state and federal rights.

Second, the District Court ran afoul of the Eighth Amendment's requirements under *Miller v. Alabama*, 567 U.S. 460 (2012). It failed to preclude LWOP as a potential sentence in light of the insufficient evidence of Keefe's irreparable corruption, the threshold showing required for Keefe's eligibility for that sentence. The court also failed to adequately

consider mitigating evidence as required under *Miller* and declined to give any weight to evidence of rehabilitation that arose during Keefe's incarceration. The District Court also failed to apply procedural protections, including jury findings beyond a reasonable doubt and providing a presumption against a finding of irreparable corruption and imposition of LWOP.

Third, the District Court erred by admitting and relying on expert testimony where the expert refused to disclose the basis for his opinion. This failure to provide Keefe with the information relied up in his sentencing violated his right to due process.

Finally, Keefe was deprived of due process because the sentencing proceeding included several key pieces of either false or baseless claims, claims the State knew or had reason to know were wrong. The District Court, in turn, relied on that information in imposing the sentence and disregarded the evidence in the State's possession that undermined the very claims they made.

Individually and collectively, these errors violate Keefe's rights and require reversal.

ARGUMENT

I. The District Court Unconstitutionally Deprived Keefe of Expert Assistance.

Before Keefe's sentencing hearing, he sought the assistance of several experts, including a mental health expert and a mitigation specialist. He first sought funding from the Office of the Public Defender. That office limited Keefe to approximately $2,000 in assistance, the amount it provides for adults facing a sentence of LWOP. Having already allocated that amount to Warden Michael Mahoney, who assessed Keefe's prospects for and actual rehabilitation from a corrections perspective, Keefe was left without his own mental health expert.

Keefe then moved for funding from the District Court. The District Court denied the motion, instead relying on its own, previously appointed expert to assess Keefe's psychological and psychiatric makeup. Keefe had no independent expert to assist in responding to the District Court's expert. The District Court's refusal to provide Keefe with the requested experts violated his state and federal rights. *See* U.S. Const. amends. VI, XIV; Mont. Const. art. 2, §§ 3, 4, 17, 24; Mont. Code Ann. § 46-8-101.

A. Keefe Requested the Assistance of Experts to Assess His Mental State, Which Was at Issue in His Sentencing Hearing.

On February 15, 2018, Keefe originally presented a request for funding to retain several experts. Pet'r's Motion for State Funds, Dkt.13. In Keefe's original trial, he did not have expert assistance, even though the State presented, and the District Court relied upon, several mental health

experts. *See Id*. at 3 (citing Sentencing Memo., *State v*. *Keefe*, No. 87-92 (Dec. 17, 1986)). After extended back and forth between the District Court, the Office of the Public Defender (OPD), and counsel, the defense was able to obtain permission from the District Court to submit his request *ex parte* and under seal to the District Court. OPD had limited the defense to $2,400, the amount it authorizes for adults facing a potential sentence of LWOP. Pet'r's Renewed Mot. for State Funds, Dkt. 47 at 3.

On December 11, 2018, at the same time that it allowed the *ex parte*, under seal motion, the District Court ordered a pre-sentence investigation and appointed its own mental health expert, Dr. Robert Page. Dkt. 46. The Court specified questions for Page to address aspects of Keefe's mental health history. *Id*. at 2.

On December 20, 2018, counsel moved the District Court for funding. Dkt. 47. The motion included a request for a mitigation specialist, a forensic psychiatrist, an expert on adaptive functioning, a substance abuse expert, and a developmental psychologist. Keefe explained why each was needed, and provided information regarding specific experts who were willing to serve in these roles.

The mitigation specialist would have prepared a comprehensive psychosocial history, collecting "evidence related to Keefe's childhood

history, educational background, employment, and incarceration history." Dkt. 47 at 11. The forensic psychiatrist would have assisted counsel and the court in understanding Keefe's prior mental health assessments, Page's assessment, and how they may bear on Keefe's culpability within the meaning of *Miller*. *Id*. at 13-14. The adaptive functioning expert would have opined on "Keefe's ability in areas such as communication, self-care, and direction," i.e. areas related to his suitability for parole eligibility. *Id*. at 14-15. The substance abuse expert, in addition to addressing the question the District Court directed to Page, could have assessed Keefe's substance abuse history and its interaction with his development as an adolescent. *Id*. at 15. Finally, the developmental psychologist was "critical both for understanding and for responding to Page's report, if necessary." *Id*. at 17. Keefe provided a budget for each of these experts.

Keefe also provided a declaration from a seasoned trial attorney who, for almost twenty years, has "been teaching capital defense teams and juvenile resentencing teams" how to effectively litigate their cases. Dkt. 47, Ex. 2 at 2-3. He explained the critical role that mitigation specialists and experts play in effective representation of juveniles facing LWOP. *Id*. at 4-8. Finally, Keefe provided the District Court with the Campaign for Fair Sentencing of Youth's *Trial Defense Guidelines*. Dkt. 47, Ex. 3. Those

guidelines also emphasize the critical role mitigation specialists and experts in developmental psychology play in cases where a juvenile is facing a sentence of LWOP. *Id*. at 9, 13.

On January 14, 2019, the District Court denied Keefe's request for funding. The Court held "separate defense experts" were not required because the Court had appointed its own mental health expert and ordered a pre-sentencing investigation: "The Court recently appointed 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." Consolidated Order Denying Respondent's Mots., App. at A-013. Finally, the District Court instructed, "The State of Montana does not have a blank check to provide the expert witnesses requested at the whim of a party." *Id*.

B. The District Court's Denial of Keefe's Request Violated His State and Federal Rights.

"When an indigent defendant places his mental state at issue, either at trial or at a sentencing hearing, the state must assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of

defendant's case." *State v. Smith*, 261 Mont. 419, 429-30, 863 P.2d 1000, 1006 (1993). The assistance of the defense's own expert is required for "conducting an appropriate examination and assisting in evaluation, preparation, and presentation of the defense." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017) (internal alterations and quotations omitted). "Unless a defendant is 'assure[d]' the assistance of someone who can effectively perform these functions, he has not received the 'minimum' to which *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985)] entitles him." *Id*. (first alteration in original).

There is no question that Keefe was (and is) indigent. In light of his indigence, it was incumbent on the court to ensure "he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77.

Moreover, his "'mental condition' was 'relevant to ... the punishment he might suffer.'" *McWilliams*, 137 S. Ct. at 1798 (quoting *Ake*, 470 U.S. at 80). The District Court made that abundantly clear by: (1) appointing its own mental health expert and (2) posing questions concerning Keefe's mental condition to that expert. Dkt. 46; Tr. 66:7-19. Thus, Keefe was entitled to have *his own* expert, both to assess him and assist in his preparation for the sentencing proceeding.

The District Court's "independent" expert did not meet the demands of the constitution. That expert merely answered the questions posed by the Court. He was not available to "assist in evaluation, preparation, and presentation of the defense," as the Constitution requires. *Ake*, 470 U.S. at 83.

The United States Supreme Court recently reversed a sentence of death in a similar situation. There, the sentencing court had appointed an expert to conduct testing and an evaluation, but not for the purpose of assisting the defense in its preparations. *McWilliams*, 137 S. Ct. 1800. The Court explained that where a court appointed expert had not been appointed for the "assistance" function, as well as the assessment, the Constitution's demands are not met. *Id*. Because Page did not "assist in evaluation, preparation, and presentation of the defense," reversal for that reason alone is required.

However, reversal is also required because Keefe did not have access to his own expert to *assess* his mental condition. In *McWilliams*, the high Court did not reach the question of whether a defense expert was also required for an assessment separate and apart from a court assessment. *Id*. However, the Ninth Circuit has held *Ake* requires precisely as much. *Id*. at 1805 (Alito, J., dissenting) (citing *Smith v. McCormick*, 914 F.2d 1153,

1156-60 (9th Cir. 1990)). This requirement is "[c]onsistent with the adversarial nature of the factfinding process and the quasi-scientific nature of psychiatric opinion." *Smith*, 914 F.2d at 1157. "The *Ake* court explicitly rejected the notion that psychiatrists can be expected to reach a unanimous diagnosis of the current medical condition of the defendant and unanimous prognosis as to future conduct or that there is such a thing as 'neutral' psychiatric testimony." *Id*. As then Circuit Judge Scalia observed, "Ordinarily the only effective rebuttal of psychiatric opinion is contradictory opinion testimony." *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984). For this reason, "under *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."[6] *Smith*, 914 F.2d at 1158; *see also Bone v. State*, 284 Mont. 293, 309, 944 P.2d 734, 743-44 (1997) ("[A] criminal defendant is entitled to an appointment of a psychiatrist to assist in the evaluation, preparation, and presentation of a defense.").

Here, the District Court refused to appoint a defense mental health expert of any kind. Its refusal came *after* it appointed its own expert and identified questions for that expert that would unquestionably put Keefe's mental condition at issue in the proceeding. For these reasons, collectively

[6] The Ninth Circuit has also held that the federal statutory entitlement to competent counsel encompasses the right to the appointment of a defense neuropsychologist in sentencing proceedings where a juvenile defendant faces a potential sentence of LWOP. *United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016).

and individually the denial of each one of four mental health experts discussed *supra* violated Keefe's state and federal rights and requires reversal. *See* U.S. Const. amends. VI, XIV; Mont. Const. art. 2, §§ 3, 4, 17, 24; Mont. Code Ann. § 46-8-101.

But the District Court's deprivation of the "basic tools of an adequate defense" did not begin and end with these experts. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Keefe had also requested funding for a mitigation specialist. Mitigation specialists are specially trained to develop social histories and elicit information necessary for reliable psychological and psychiatric assessment. They are regularly used in high stakes sentencing proceedings, particularly when an adult defendant faces the death penalty or a juvenile faces LWOP. Dkt. 47, Ex. 2 at 8; Dkt. 47, Ex. 3 at 9.

Here, Keefe requested the assistance of a mitigation specialist to develop precisely this information. The District Court's treatment of that claim closely mirrors a trial court reversal in what appears to be the only other appellate case addressing the question in a case where a juvenile was facing LWOP. There, like here, in addition to mental health experts, the defendant requested a mitigation specialist. *People v. Williams*, 2019 Mich. App. LEXIS 2532, *4, 2019 WL 2235860 (Mich. App. May 23, 2019). And there, like here, the lower court denied the request without explaining why

the request was excessive or otherwise unwarranted and, instead, limited the defense to approximately $2,500. *Id*. The appellate court reversed, holding that on remand the trial court must consider whether the experts are relevant to the "*Miller* factors" and whether "any other relevant authorities" require the funding in question. In light of the importance of the mitigation specialist here, as well as the District Court's failure to explain why Keefe's request was unwarranted, the same outcome is appropriate here.

Individually and collectively, refusing to appoint experts that were critical to both advocating for Keefe and to understanding the case against him, deprived him of his state and federal rights. Not having access to these experts rendered counsel unable to prepare and present his case, depriving him of his state and federal rights to counsel. U.S. Const. amends. VI, XIV; Mont. Const. art. 2, § 24; Mont. Code Ann. § 46-8-101. Because this deprivation would not have occurred but for his indigence, it violates his right to Equal Protection. U.S. Const. amend. XIV; Mont. Const. art. 2, §§ 4, 15; *Matter of S.L.M.*, 287 Mont. 23, 36, 951 P.2d 1365, 1374 (1997). Because it rendered the sentencing proceeding fundamentally unfair, it violated due process. U.S. Const. amends. XIV; Mont. Const. art. 2, § 17. For the foregoing reasons, Keefe's sentence must be reversed.

II. The District Court Failed to Comply with the Demands of *Miller v. Alabama*, 567 U.S. 460 (2012).

Keefe's case presented the State and the District Court with a straightforward solution: allow him to make his case for parole before the parole board. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016). Keefe was facing a potential LWOP sentence for his juvenile offense. *Miller* excluded virtually all juveniles from that sentence; all but the rare juvenile offender who is irreparably corrupt are ineligible for LWOP. In its decision to impose LWOP, the District Court committed a series of errors that violate *Miller*'s mandates.

A. Where the Unrebutted Evidence Demonstrates Keefe's Substantial Maturation and Improvement, There Is Insufficient Evidence of Irreparable Corruption.

Even viewing all of the evidence in the light most favorable to the prosecution, there is insufficient record evidence to establish that Keefe is irreparably corrupt, *i.e.* that he is eligible for the sentence he is serving. *State v. Booth*, 2012 MT 40, ¶ 7, 364 Mont. 190, ¶ 7, 272 P.3d 89, ¶ 7. For that reason, he, like other such juveniles, must be resentenced to a term that provides an opportunity to "live part of their lives in society." *Moore v. Biter*, 725 F.3d 1184, 1186 (9th Cir. 2013); *see Steilman*, ¶ 21.

It is a "fundamental principle" that due process of law requires that "the prosecution must establish each and every element of the charged

offense by proof beyond a reasonable doubt." *State v. Fuller*, 266 Mont. 420, 422, 880 P.2d 1340 (1994); *see* U.S. Const. amend. XIV; Mont. Const. art. 2, § 17.

Virtually all juveniles—except the rare few who are irreparably corrupt—are ineligible for a sentence of LWOP. As the United States Supreme Court has explained, "[juveniles] 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*, 136 S. Ct. at 736-37. This Court has explained this jurisprudence "illustrate[s] the U.S. Supreme Court's inexorable evolution that all but the rarest juvenile offenders be given an opportunity for redemption and hope of release, which a sentence of life without [the possibility of] parole cannot provide." *Steilman*, ¶ 21.

Here, there is inadequate evidence to support a finding of irreparable corruption. The unrebutted testimony and report of the court appointed expert shows that Keefe's behavior was indicative of normal maturation. Page concluded,

> Empirically measuring 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.

Tr. 109:9-15. He described Keefe's "[g]radual emotional and psychological maturation, along with benefits from programs while incarcerated and his natural progression towards self-improvement are notable." Dkt. 56 at 15. He thought Keefe could, under the right conditions, be released as a "low risk to recommit" crimes of violence. Tr. at 108:23-109:2. He noted that Keefe is not "prone to aggression or violence." Tr. 109:21-23. In sum, Keefe is "a different person [today] than he was at the age of 17." Tr. 110:3-5. Page's conclusions end any question of Keefe's eligibility for LWOP. The unrebutted evidence is that Keefe has improved and is not irreparably corrupt.

The tragedy Keefe perpetrated—the senseless deaths of three innocent victims—cannot on its own suffice to demonstrate irreparable corruption. The crimes in *Steilman* as well as the U.S. Supreme Court cases addressing LWOP sentences were also terrible. *See, e.g.*, Br. of Respondent at 6-7, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646) (describing defendant assaulting the victim with a baseball bat, taking pleasure in the killing, and taking extensive steps, including burning the crime scene, to avoid detection). Yet the U.S. Supreme Court has recognized "children who commit even heinous crimes are capable of change." *Montgomery*, 136 S.

Ct. at 736. It is Keefe's unrebutted evidence of rehabilitation that renders him ineligible for the sentence he is serving.

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.

B. The District Court's Misapplication of the *Miller* Factors and Refusal to Consider Evidence Requires Reversal.

The District Court failed to consider and give weight to the mitigating evidence as *Miller* mandates before imposing an LWOP sentence, violating Keefe's state and federal rights. The District Court refused to consider evidence "that Keefe has been rehabilitated in prison," holding that "no law [would allow] ... the Court to consider" this evidence. Sentencing Or., App. at A-016. "This alone requires remand [for resentencing]." *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc). But the Court also failed to properly consider other information as required by law, further requiring a new sentencing hearing. U.S. Const. amends. VIII, XIV; Mont. Const. art. 2, §§ 17, 22; Mont. Code Ann. § 46-18-101(2), (3).

"*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 [LWOP]." *Steilman*, ¶ 17. As this Court explained, *Miller* requires consideration of the following factors:

> [1] ... chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. [2] ...the family and home environment that surrounds him—and from which he 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. [4] ... that he may 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] ... the possibility of rehabilitation.

Id. at ¶ 16.

The District Court listed the *Miller* factors in its opinion. App. at A-020. However, it refused to meaningfully consider evidence of each factor and declined to consider any evidence of Keefe's rehabilitation.

i. The District Court refused to consider three decades of evidence about Keefe's rehabilitation.

Keefe has been in the custody of the State of Montana since 1986. Dkt. 59 at A-146. He was re-sentenced on April 18, 2019. Yet, the District Court found no legal basis for considering the evidence arising from three

decades of Keefe's life that occurred after the crime or conviction in question:

> [T]here is no law presented to the Court in the sentencing memoranda that it is proper for the Court to consider [post-crime evidence of rehabilitation]. If a juvenile was sentenced to [LWOP] 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 [LWOP] is entitled to a hindsight look-back at some undetermined future point to determine if the court's findings were correct. 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.

App. at A-016.

Even as the District Court purported to consider rehabilitation, it erroneously determined "Keefe's rehabilitative efforts" were irrelevant. *Id*. at 9. The Court, without discussing any of that evidence offered by Keefe, noted it was "unmoved" by Keefe's proffered rehabilitation because Keefe disputed the State's account of the crime, maintaining he was under the sway of his much older ex-brother-in-law at the time of the offense.[7] *Id*.

The District Court's refusal to consider post-incarceration conduct was error. Juveniles have "'greater prospects for reform'" than adults. *Steilman*, ¶ 15 (quoting *Montgomery*, 136 S.Ct. at 733). The normal course

[7] The court also relied on a tattoo that no testifying witness had actually seen to conclude that Keefe was remorseless. *Id*. How the District Court's reliance on that tattoo was unconstitutional is discussed *infra*.

of "adolescent development diminishes the likelihood that a juvenile offender 'forever will be a danger to society.'" *Montgomery*, 136 S.Ct., at 733 (*Miller*, 567 U.S. at 472–73). In recognition of this reality, only the rare juveniles who are irreparably corrupt are eligible for LWOP. *Supra*.

The Ninth Circuit en banc was recently faced with a record that was silent on whether the sentencing court considered 18 years of post-incarceration rehabilitation. That court remanded for resentencing because "'whether [the juvenile offender] *has* changed in some fundamental way since [the original sentencing], and in what respects, is surely key evidence.'" *Briones*, 929 F.3d at 1067 (quoting *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016)) (emphasis in original). "[W]hen a substantial delay occurs between a defendant's initial crime and later sentencing, the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis." *Briones*, 929 F.3d at 1067. The question of whether a juvenile offender is irreparably corrupt is centered around "whether the defendant is capable of change." *Briones*, 929 F.3d at 1067. "If subsequent events effectively show that the defendant *has* changed or *is* capable of changing, [LWOP] is not an option." *Briones*, 929 F.3d at 1067. As the U.S. Supreme Court has explained, evidence of a prisoner's "evolution from a troubled, misguided youth to a model member of the

prison community" is "one kind of evidence that prisoners might use to demonstrate rehabilitation." *Montgomery*, 136 S.Ct. at 736.[8]

Inexplicably, when confronted with this very passage from *Montgomery*, the District Court did not change course. Tr. 115. The Court failed to assess whether Keefe is one of those "juveniles whose crimes reflected only transient immaturity—and who have since matured," and who therefore cannot "be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery*, 136 S.Ct. at 736.[9] Beyond the Eighth Amendment violation, the court violated Montana's statutory requirement to "provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration back into the community" and to "focus on restorative justice principles." Mont. Code Ann. § 46-18-101(2)(d), (3)(i). Both statutory commands require consideration of the full range of information about the defendant available at the time of sentencing, including post-incarceration conduct.

[8] The requirement that courts must consider evidence of post-incarceration conduct is longstanding precedent. "Equally clear is the corollary rule that the sentence may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (establishing that the lower court erred in finding evidence of the defendant's post-incarceration conduct irrelevant and refusing to consider it as mitigating evidence during sentencing).

[9] As recognized in *Steilman*, Article 2, Section 22 of the Montana Constitution extends the same prohibition against cruel and unusual punishments as found in the Eighth Amendment. *Steilman*, ¶ 13.

Had the District Court considered Keefe's evidence of rehabilitation, it could only have concluded that he had made substantial gains towards rehabilitation and was not "irreparably corrupt." As outlined at length in his sentencing memorandum, Keefe has matured into a model inmate and a productive member of the prison community. Dkt. 59 at 7-18.

At the re-sentencing, Michael Mahoney, the former warden of Montana State Prison (MSP)—who served for decades in that capacity—testified about Keefe's rehabilitation, noting that he witnessed Keefe become a person who was "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." Tr. 142:9-12. He witnessed Keefe change from being full of "adolescent narcissism" into a person whose empathy for others was embodied by his recording books for the blind and training dogs for the disabled. Tr. 140:15-141:25. He testified about Keefe having received a "very atypical," but "very strong recommendation," when a prison where he was temporarily housed recommended Keefe be put in charge of establishing a dog training program at MSP. Tr. 137:5-19. The warden testified that, as someone who had attended decades of parole hearings, he believed Keefe has matured

into a person known for his work ethic and empathy, and could be successful upon release. Tr. 140:10-11, 142:3-12, 145:4-7.

Robert Shaw, who worked as a corrections officer for 28 years alongside Keefe, also testified about his rehabilitation. Tr. 119, 121. He observed Keefe transform from someone who was "problematic" to a person he would be "happy to have ... as a member of [his] own community." Tr. 121:20-25, 131:4-6.

As summarized in the statement of facts, supra, Keefe has actively pursued opportunities for self-improvement over the course of his incarceration. Keefe has also taken steps to atone for his crimes. He has grappled with the pain he has caused, expressing remorse to spiritual counselors and mental health professionals. He has reached out to the victims' family through the Offender Accountability Letter Bank, seeking to bring a modicum of healing to those he has caused immeasurable pain.[10] Tr. 128:18-129:4, Pt'r's Ex. 24.

Keefe's efforts to rehabilitate himself began shortly after he was incarcerated, decades before he had any reasonable hope of release, "so the only plausible motivation for his spotless prison record was improvement for improvement's sake." *Briones*, 929 F.3d at 1066-67. Keefe has not only

[10] Keefe has repeatedly requested a copy of the letter he submitted to that letter bank, but has been denied access on the grounds that the letter no longer belongs to him. Dkt. 58 at 6.

shown he has the capacity for change, he has demonstrated actual, positive change over the decades since his original sentencing. If the District Court had considered this evidence, it would have found Keefe ineligible for LWOP.

ii. The District Court failed to consider the impact Keefe's young age had on his decision-making.

As with rehabilitation, the District Court flatly refused to consider the important impact Keefe's age had on his offense-related conduct. When addressing Keefe's age at the time of the offenses, the District Court placed heavy emphasis on his criminal record, stating "Keefe was very familiar with the criminal justice system, having been convicted of 47 crimes." App. at A-021. Because of his criminal record, the Court found "[Keefe] knew the consequences of his actions and disregarded them." *Id*. However, the Court failed to acknowledge that none of Keefe's prior crimes were violent crimes and instead primarily consisted of property theft. Dkt. 59, at A-065-068. The court erroneously concluded that Keefe was aware of the consequences because he was "mature beyond his age," a conclusion that directly conflicts with Page's findings.[11] App. at A-021; Dkt. 56 at 15-17.

[11] In the expert report prepared by Dr. Robert Page at the direction of the District Court, Page concluded that "Information about 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 . . . immature." Page Report 16.

At the time of the offense, Keefe was seventeen years old. One of the inherent characteristics of youth is that teenagers are unable to fully appreciate the consequences of their actions. *Steilman*, ¶ 15. One of the core reasons for affording youth different sentencing considerations than adults is "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Steilman*, ¶ 15 (quoting *Montgomery*, 133 S. Ct. at 733). The District Court's failure to account for this ran afoul of the Eighth Amendment.

The District Court also repeatedly refused to consider any information Keefe offered about the offense that was inconsistent with the State's presentation at trial, without considering that Keefe's reasons for withholding his account of the offense during the original trial are related to him being an immature seventeen-year-old, highly susceptible to outside pressures. App. at A-023. Before any evidence had been admitted, the District Court opened the hearing by describing Keefe's account—that he had been under the influence of his much older ex-brother-in-law—as "cockamamie" and "simply a last-ditch effort by Keefe to inject mitigating evidence into this proceeding that were not established at trial." Tr. 13:12-13. The District Court disallowed any evidence concerning that account. *Id*.

Had the court allowed it, it would have learned Keefe's ex-brother-in-law was a person of interest from early on in the investigation, and was someone who was associated with people who had done construction work on the victims' house and were known to rob homes. Mot. to Reconsider, Dkt. 68, Ex.1. Before the hearing began, the court considered Keefe's account of the offense to be the mere product of a "new found" "strategy" that was a "contrivance" lacking any support in evidence. Tr. 12:25-13:17. But there was evidence to support Keefe's account, which he had been sharing with those who would listen for at least the last fifteen years. Dkt. 68, Exs. 1, 2.

The District Court's refusal to consider evidence of Keefe's age and its impact on the offense violated both *Miller*'s requirement to consider the effects of age and the circumstances of the offense and Montana state law's requirement to consider aggravating and mitigating circumstances in fashioning the appropriate sentence. *Miller*, 567 U.S. at 473–75; Mont. Code Ann. § 46-18-101(3)(d).

iii. The District Court's refusal to consider Mr. Keefe's traumas and tumultuous childhood violates *Miller*.

Miller also requires the sentencing court to consider the impact of childhood and social factors on the juvenile—not limited to certain category or degrees of severity. The District Court found "there is no indication that

[Keefe] was exposed to serious, extensive sexual abuse, drug use, or other acts of abuse and neglect." App. at A-021. However, *Miller* acknowledged the serious impact and damage a "neglectful and violent family background" would have on a child's development, and that this evidence was therefore "'particularly relevant'" as a mitigating factor. *Miller*, 567 U.S. at 476. As such, the District Court's outright dismissal of the acknowledged abuse that Keefe suffered is a clear misapplication of *Miller*.

The District Court refused to consider Keefe's history of abuse and neglect as mitigating because it found Keefe did not experience a single incident severe enough to mitigate a homicide. The Court held:

> While 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.

App. at A-021-22.

However, the Montana and United States Supreme Courts have long held sentencing courts must consider all mitigating factors, even if they do not fall within the nexus of the crime. A sentencing court may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) (emphasis in original). While some

mitigating evidence introduced by defendants "properly may be given little weight," for juvenile defendants "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." *Id*. at 115. *Miller* reiterated this holding, emphasizing "'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' in assessing his culpability." *Miller*, 567 U.S. at 476 (quoting *Eddings*, 455 U.S. at 116).

While the District Court held potentially mitigating circumstances do not need to fall within the nexus of the crime, Tr. 111:5-7, the District Court failed to follow precedent when it refused to consider Keefe's history of trauma as mitigating when it determined he was irreparably corrupt.

Additionally, the District Court relied on the report compiled by Page for its assessment of much of Keefe's family and social history. Tr. 111:15-20. By his own admission, Page did not report incidents of abuse and neglect as trauma because Page did not view them as relevant mitigating circumstances.[12] As a result, Page's report—upon which the District Court

[12] In Page's report, he indicated Keefe's history showed "no suggestions of traumatic events or other significant developmental issues surfaced that would have any mitigating factors surrounding Keefe's criminal actions." Dkt.56 at 11. When Page was asked during the cross-examination whether the abuse experienced by Keefe was

relied for its assessment of the mitigating factors—was fundamentally flawed because it failed to report the full picture of Keefe's traumatic family history. Because of its deficiencies, it should not have been relied upon by the District Court.

The limitations to Page's report were significant. Keefe's mother was an admitted alcoholic raising her children alone, after Keefe's father abandoned the family when he was still a toddler. She often left her children to their own devices while spending time with her boyfriends. Keefe suffered physical abuse at the hands of these boyfriends; in one instance a boyfriend picked Keefe up by his ears and slammed his head into the ceiling. Keefe's mother ultimately remarried a man who also was an alcoholic, and who was so abusive to Keefe a family friend described the abuse as "torture." This abuse was not limited to the home. Keefe was also abused by teachers, one of whom hit Keefe so hard his teeth were knocked out.

As Keefe got older, he was left alone and unattended, neglected by the parents responsible for his care. He began engaging in criminal behavior, which he had learned was the only way to get attention from his parents.

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traumatic, Page stated, "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." Tr. 106:10-15.

Ultimately, Keefe fled his home and began living on his own at the age of fourteen, bouncing between the homes of friends and relatives throughout Montana over the course of the next three years. his dysfunction and instability shaped his development, and ultimately led him to commit the burglary that resulted in the unfortunate deaths of the victims.

The District Court's refusal to assess Keefe's mitigating circumstances and give them weight, simply because they did not fall within the nexus of the crime was an improper application of *Miller*, the statutory requirement to consider mitigating evidence, and requires reversal. Mont. Code Ann. § 46-18-101(3)(d).

iv. The District Court's failure to consider one *Miller* factor altogether is a fatal error that requires remand.

Finally, *Miller* requires the court to assess whether the "incompetencies associated with youth" led to the juvenile offender receiving a more severe sentence than they would have if they were more capable of engaging with the criminal justice system. The District Court failed to assess the fourth factor in its analysis altogether. *See* App. at A-015-26. As sentencing judges are required consider all of the *Miller* factors when sentencing juvenile offenders to LWOP, the District Court's failure to consider the fourth *Miller* factor is an error that requires remand.

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Properly considered, Keefe's social history and his proven record of rehabilitation during his time at Montana State Prison, show he is not irreparably corrupt. The District Court's failure to consider the information the law requires demands reversal.

C. The District Court Failed to Apply Procedural Protections Necessary to Ensure Compliance with *Miller* and *Montgomery*.

The District Court denied Keefe a jury determination regarding whether he was "irreparably corrupt," thereby usurping the fact-finding function. Further, the District Court refused to engage in a presumption against a finding of irreparable corruption. These denials were constitutional errors, and, because the State cannot establish beyond a reasonable doubt that it was harmless, necessitate reversal.

i. The District Court denied Keefe's state and federal constitutional rights to a jury finding of all facts exposing him to an enhanced sentence.

As this Court explained in *Steilman*, "the rule in *Montgomery* 'draws a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption' and allows for the possibility 'that [LWOP] could be a proportionate sentence only for the latter kind of juvenile offender.'" ¶ 21 (quoting *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (internal quotations omitted)). *Miller*, together with its application in *Montgomery*, created a ceiling for

sentencing juvenile offenders absent additional fact-finding regarding whether the juvenile is "irreparably corrupt."[13] Without such a finding, a juvenile is categorically ineligible for a life without parole sentence, and the harshest sentence a court can impose is life with parole. *Montgomery*, 136 S. Ct. at 734.

This fact-finding requirement triggers the Sixth Amendment's right to a jury determination of all facts used to increase punishment under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Blakely v. Washington*, affirmed *Apprendi*'s protections and explained that judicial fact-finding is inadequate to guarantee defendants' Sixth Amendment rights. 542 U.S. 296 (2004). "Irreparable corruption" is "a particular fact [that] must be proved in order to sentence a defendant within a particular range." *United States v. Booker*, 543 U.S. 220, 238 (2005). Because it is a fact that must be found to make Keefe eligible for the sentence he is serving, it violates his Sixth Amendment rights for the judge to have supplanted the jury's role in making that fining. This is underscored by Montana's sentencing statute, which modified after *Apprendi*, provides that a court may only impose a penalty enhancement "if the case was tried

[13] That the U.S. Supreme Court has not yet imposed "a formal factfinding requirement" is irrelevant. *Montgomery*, 136 S.Ct. at 735. That Court declined to impose such a requirement out of deference to "States' sovereign administration of their criminal justice systems," a concern limited to federal courts' regulation of state actors and irrelevant here. *Id*.

before a jury, [and] the jury unanimously found in a separate finding that the enhancing act, omission, or fact occurred beyond a reasonable doubt[.]" Mont. Code Ann. § 46-1-401.

D. The District Court Failed to Engage a Presumption Against a Finding of Irreparable Corruption and the Propriety of LWOP.

Miller's recognition of the diminished culpability of youth calls for a presumption against finding irreparable corruption and against imposing a sentencing of LWOP on juveniles. The District Court refused to apply these presumptions, *see* App. at A-004-06, 09, violating *Miller* and *Montgomery* and prejudicing Keefe.

Both common sense and scientific understandings of youth have led the courts to increasingly recognize the reduced penological justifications for punishing youth. The Court in *Roper* noted the "general differences" between juveniles and adults means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper v. Simmons*, 543 U.S. 551, 569, 570 (2002). Recognition of these differences "rested not only on common sense—on what 'any parent knows'—but also on neuroscience." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569).

Presumptions "represent scientific, statistical, or common-knowledge evidence linking the predicate and presumed facts." *State v. Leverett*, 245 Mont. 124, 132, 799 P.2d 119, 123 (1990) (citing 1

Weinstein's Evidence, 300[02] (1989)). Further, the use of presumptions in juvenile sentencing is well established. For instance, the common law recognized the (predicate) fact of a defendant being under the age of fourteen created "the rebuttable presumption of incapacity to commit any felony." *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (internal citations omitted). Here, the (predicate) fact of a defendant being under the age of eighteen creates the rebuttable presumption that juveniles are not irreparably corrupt and therefore not eligible for a LWOP sentence.

Courts across the country have recognized that diminished culpability of youth requires a rebuttable presumption against making a finding of irreparable corruption to ensure *Miller* and *Montgomery* are faithfully applied. In nearly all cases, the Constitution forecloses juvenile LWOP because "a lifetime in prison is a disproportionate sentence for all but the rarest of children." *Montgomery*, 136 S.Ct. at 726. As such, "[a] faithful application of *Miller* and *Montgomery* requires [Montana] to join Pennsylvania and the other states that have concluded there must be a presumption against imposing a life sentence without parole, or its functional equivalent, on a juvenile offender." *Davis v. State*, 415 P.3d 666, 681 (Wyo. 2018); *see also People v. Gutierrez*, 324 P.3d 245, 266 (Cal. 2014); *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015); *State v.*

Seats, 865 N.W.2d 545, 557 (Iowa 2015), *holding modified by State v. Roby*, 897 N.W.2d 127 (Iowa 2017); *State v. Williams*, 820 S.E.2d 521, 522 (N.C. Ct. App. 2018), *review allowed, writ allowed*, 828 S.E.2d 21 (N.C. 2019); *Commonwealth v. Batts*, 163 A.3d 410, 459-60 (Pa. 2017).

Moreover, given the difficulty in determining irreparable corruption, this presumption reduces the risk of unconstitutional sentences. *See Roper*, 543 U.S. at 573. This presumption also correctly places the burden on the State to prove the legality of the sentence it seeks. *See Batts*, 163 A.3d at 453; *see also Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (rejecting a presumption whereby the defendant would have the burden that every homicide is a murder). And applying such a presumption is supported by this Court's recognition that juvenile sentencing should be applied in such a way to "ensure rehabilitation of youth offenders rather than solely retribution." *State v. Strong*, 203 P. 3d 848, 851 (2009); *see also* Mont. Code Ann. § 46-18-222 (limiting sentencing restrictions, including restrictions on parole for offenders under 18 at the time of the offense).

The District Court's denial of jury and presumptive sentencing ran afoul of *Miller*. Such errors were not harmless given the substantial evidence Keefe produced rebutting a finding of irreparable corruption,

which would make him ineligible for a sentence of LWOP and weighs heavily against imposing that sentence. *See Adams v. State*, 2007 MT 35, ¶ 62, 336 Mont. 63, ¶ 62, 153 P.3d 601, ¶ 62 (reversal required unless the court finds beyond a reasonable doubt the outcome would have been the same). For these reasons, this Court should reverse.

III. Failure of the District Court's Expert to Disclose All Information Relied Upon in His Report Violated Keefe's Right to Due Process.

Over Keefe's objection, Page testified that he based his recommendations regarding rehabilitation on information gathered from "some time not only online but discussing this question with a number of attorneys over the past month, including OPD lawyers." Tr. 86:17-22. Page declined to provide further information about this basis for his opinion. *Id*. Keefe's inability to review the information relied upon by the District Court's expert was a violation of his due process right to confront witnesses against him. *Gardner v. Florida*, 430 U.S. 349 (1977).

In *Gardner*, the Supreme Court confronted a case where the defendant did not have access to all of the information used in his sentencing. 430 U.S. at 362. There, information in the presentencing investigation report was not disclosed beforehand to the defendant. *Id*. at 353. The Court held the failure to disclose sections of the presentencing investigation report violated the defendant's due process rights because the

sentence imposed was "on the basis of information which he had no opportunity to deny or explain." *Id*. at 362.

Here, Page's reference to undisclosed "online" resources and discussions with "a number of attorneys" similarly constituted a due process violation for Keefe. As in *Gardner*, Keefe is unsure as to the degree to which Page relied on that undisclosed information and therefore the degree to which the District Court also relied upon it. *See Gardner*, 430 U.S. at 353.[14] Left without a clear understanding of what was learned or relied upon, Keefe, like the defendant in *Gardner*, was left without an opportunity to challenge the "accuracy or materiality of any such information." *Id*. at 356.

Further, the fact that such information was part of a psychological or psychiatric evaluation does not compel confidentiality. The harm in revealing psychiatric and psychological evaluations collapses when a defendant is faced with "the extinction of all possibility of rehabilitation"—death in Gardner's case and LWOP for Keefe. *Id*. at 360.

[14] The fact that Keefe is aware of Page's reliance on the information and yet does not know the extent of the information relied upon distinguishes it from two cases where this Court has considered the mandates in *Gardner*. In *Gollehon*, this Court rejected the claim where the full record was available, while in *Risley*, the Court found no indication in the record of reliance on undisclosed information. *Coleman v. Risley*, 203 Mont. 237, 245, 663 P.2d 1154, 1159 (1983); *State v. Gollehon*, 262 Mont. 1, 24, 864 P.2d 249, 264 (1993).

IV. The Sentencing Hearing Violated Keefe's Due Process Right to a Fair Trial before an Impartial Factfinder.

The State violated Keefe's due process rights by inserting improper argument and testimony based on inflammatory speculation. The District Court compounded this prejudicial misconduct with its own apparent impartiality and failure to scrutinize the evidence before it. Individually and collectively, this misconduct denied Keefe a "trial resulting in a verdict worthy of confidence," *Kills on Top v. State*, 273 Mont. 32, 42, 901 P.2d 1368, 1375 (1995) (internal quotations omitted), and compels resentencing before a new judge.

A. The State's Improper Conduct before the Court Denied Keefe a Fair Trial.

During sentencing, the State elicited and failed to correct false testimony despite contradictory evidence it possessed, offering inflammatory argument not grounded in the record. Such conduct infused unfairness into proceedings, and prejudiced Keefe in violation of his due process rights.

First, the State possessed, from the work of its investigator, evidence contradicting their claim that Keefe fabricated the story in preparation for resentencing. Despite asking Page about Keefe's "new story," (Tr. 85: 3-4), despite repeated references to Keefe having only recently disclosed a

culpable third party in an effort to obtain *Miller* relief, State's Sentencing Mem., Dkt. 60, at 8, 11; and despite the trial judge's explicit reliance on that account in reaching it conclusion, App. at A-016; the State failed to inform the District Court of the truth: the State knew Keefe had been sharing his version of the facts for over a decade before he had any actual hope of resentencing. Dkt. 68, Ex. 2.[15] In closing argument, the State reiterated: "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[.]" Tr. 156:11-15. The State's repeated misleading arguments regarding the "new story" violated Keefe's due process rights. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Second, the State's inflammatory argument regarding the significance of Keefe's tattoos—without presenting or acknowledging evidence of the tattoo itself or Keefe's reason for having it—was improper. During the hearing, over objection, the State elicited testimony from Probation and Parole Officer Tim Hides regarding the meaning of the "skulls" tattoo on Keefe's body—despite that Hides had never spoken to Keefe about the

[15] Keefe's version of the events shared with the Court's and State's witness was not a part of Keefe's resentencing argument, but was mentioned at length in the State's Sentencing Memorandum. Dkt.60, at pp. 11-12. Even still, Keefe had evidence, available to the State, providing support for this story, which he was precluded from presenting. *Id. at* Ex. 1; Tr. 12:21-24.

tattoo. Tr. 49:2-13; 50:1-8. Further, the State failed to present any evidence of the tattoo itself, aside from the written characterization of "three skulls"—despite the availability of such records. *See* No. 68, Ex. 3, 4. Yet, during closing the State doubled down on the tattoo's meaning, "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?" Tr. 158:14-20.

This inflammatory argument crossed the line from inference to speculative conjecture not based on facts in the record. Had the State or the District Court bothered to look, they would have seen the skulls in question bear little resemblance to human skulls and do not evoke an "emblem of death," as the State suggested. Dkt. 68, Exs. 3, 4.

The State "has no right in the area of argument to supply the lack of evidence or make greater the weight of the evidence." *Williams v. State*, 658 P.2d 499, 500 (Okla. 1983); *see also Smith v. United States*, 568 U.S. 106 (2013) (admonishing counsel for presentation of "[s]ensationalization, loosely drawn from facts presented during the trial"). Such speculation was inappropriate and infused unfairness into the trial. *See United States v. Olivarra-Gonzales*, 42 F.3d 1403 (9th Cir. 1994) (quotations omitted) (acknowledging inflammatory remarks can be the basis of a due process

claim, but denying claim where remarks were followed by strong curative instruction).

When considering prosecutorial misconduct, the "touchstone" of the due process analysis is "not the culpability of the prosecutor," *Smith v. Phillips*, 455 U.S. 209, 219 (1982), but instead the overall unfairness of the trial. *Donnelly v DeChristoforo*, 416 U.S. 637, 643 (1974).

As discussed *infra*, the State's misconduct was a violation of due process and was particularly problematic because of the District Court's adoption of these false accounts in ruling against him.

B. Judicial Impartiality Resulted in an Unreliable Sentencing Proceeding.

The State's misconduct was compounded by the District Court's apparent bias and failure to scrutinize the State's speculative and unreliable evidence and arguments. Due process ensures that even the appearance of impartiality may require recusal of a judge. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Procedural irregularities and reliance on misinformation are sufficient cause for remand to a new judge. *See State v. Webber*, 448 P.3d 1091, 2019 MT 216, ¶¶ 14, 21 (Mont. 2019) (citations omitted). Here, the District Court expressed partiality, engaged in multiple instances of procedural irregularity, and relied on information presented by the State while refusing to consider related evidence presented by Keefe.

The District Court indicated at the outset of the hearing it would reserve one hour of the four hour hearing "to make [its] findings and its rulings," signaling it had a decision prepared before the parties had the opportunity to present their evidence concerning both Keefe's eligibility for and the propriety of the sentence the State sought and the Court ultimately imposed. Tr. 7:10-11. Despite that the aim of a hearing under *Miller* is to receive evidence relevant under *Miller* including rehabilitation, that the District Court had its opinion already prepared demonstrates this was not a *Miller* evidentiary hearing, but merely a forum to deliver a preordained conclusion. Additionally, in its ruling, the District Court referenced how its personal knowledge of the facts of the case and its impact on the community influenced its opinion of Keefe. App. at A-018-19. These actions reflect the District Court's partiality.

Despite the District Court's insistence it would neither hear evidence of the circumstances of the offense nor of Keefe's conduct since the commission of the crime, it relied heavily on evidence presented by the State of post-offense conduct. App. at A-016, 23. Regarding evidence presented by the State of Keefe's tattoos, the District Court found them "evidence of Keefe's bravado about these killings and his total lack of genuine remorse." *Id*. at A-023. Further, despite noting on the record that

the District Court did not need any testimony about Keefe's confession during the hearing, the District Court dismissed—at the start of the hearing—Keefe's account of the offense as "cockamamie" *See* Tr. 46-49, 66-68, repeating this again in its Sentencing Order, and further characterizing it as "offensive," and noting it "does [Keefe] a disservice in his attempt to convince this Court of his legal position." *Id*. at A-016.

Moreover, the District Court did not engage with the reams of evidence offered by Keefe, including powerful evidence of his rehabilitation. App. at A-015-025; Dkt. 59; Tr. 118-145, 161-169, Ptr's Exs. 1-22. As discussed above, the District Court's appointment of its own mental health expert, while refusing to provide Keefe with one of his own, left him unable to answer the concerns raised by the court expert, violating due process. *See Webber*, ¶ 10. These actions further reflect the Court's bias.

After the hearing, Keefe attempted to correct many of the errors, moving for reconsideration. In the motion, he cited to Mont. Code Ann. § 25-11-102, which provides for a new trial in the event of surprise, insufficiency of the evidence, or "newly discovered evidence that the party could not ... have produced at the trial." Dkt. 68. However, the Court refused to consider any of the arguments or evidence offered, holding the motion was "frivolous" because "[Montana] doesn't have such a motion."

Order Denying Mot. for Reconsideration, App. at A-027-028. The court threatened to sanction counsel if any further motions were filed. *Id. at* A-028. Refusing to even consider the motion was an abuse of discretion and further violated Keefe's due process rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (explaining a state court's arbitrary failure to follow its own laws violates due process).

"Under the due process guarantee a defendant must be given an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life, liberty, or property." *See Webber*, ¶ 10 (internal quotation marks omitted). The District Court and the State repeatedly presented and relied upon evidence that fell short of that guarantee.

That the District Court wrote its decision prior to the presentation of evidence, and relied on extra-record evidence and unsubstantiated argument, undermines the appearance of impartiality that due process requires. *See* U.S. Const. amend. XIV; Mont. Const. art. 2, § 17. Thus, Keefe requests his sentence be reversed and the case be remanded to a new judge for resentencing.

CONCLUSION

Keefe requests this Court vacate his sentences of life without the possibility of parole and remand for resentencing before a new judge, reverse his sentences, or any other relief justice may require.

RESPECTFULLY submitted this 16th day of October, 2019.

/s/ John R. Mills
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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Georgia typeface of 14 points; is doubled spaced except for lengthy quotation or footnotes, and does not exceed 12,000, as allowed per this Court's Order filed on October 1, 2019, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance as calculated by my Microsoft Word software.

Dated this 16th date of October, 2019.

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CERTIFICATE OF SERVICE

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