IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0368

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STEVEN KEEFE, on behalf of himself and all others similarly situated,

Plaintiff and Appellant,

v.

LEROY KIRKEGARD, Warden, Montana State Prison,

Defendant and Appellee.

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# *AMICUS CURIAE* BRIEF OF JUVENILE LAW CENTER IN SUPPORT OF STEVEN KEEFE

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

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## STATEMENT OF INTEREST OF *AMICI*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Since its founding, Juvenile Law Center has represented hundreds of young people and filed influential *amicus* briefs in state and federal cases across the country, including before the United States Supreme Court.

## SUMMARY OF ARGUMENT

In 1986, Plaintiff-Appellant Steven Wayne Keefe was convicted of three counts of deliberate homicide and one count of burglary for an offense he committed as a juvenile at age 17. *State v. Keefe*, 232 Mont. 258, 259, 265, 759 P.2d 128 (1988). He was sentenced to three consecutive, mandatory life sentences, an additional consecutive term of fifty years, and the discretionary addition of ineligibility for parole. *Id*. at 259.

On April 18, 2019, Mr. Keefe received a reconsideration of his life without parole sentence in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Mr. Keefe was re-sentenced to life without parole. Sentencing Order, App. 024-025.

The resentencing court deprived Mr. Keefe of the individualized sentencing mandated by *Miller* for all juveniles sentenced to life without parole. The court performed only a cursory analysis of the *Miller* factors and failed to meaningfully consider the mitigating value of age and the attendant characteristics of youth acknowledged by the Supreme Court as indications of diminished criminal culpability. In addition, the court relied exclusively on evidence from Mr. Keefe's original prosecution, stating that, "there is no legal support for the proposition that this Court should resentence Mr. Keefe based on his prison conduct rather than on the record that existed when he was sentenced." Resentencing Hr'g Tr. 179:25-180:5, April 18, 2019 [hereinafter "Tr."]. By refusing to consider Mr. Keefe's exemplary prison record and parts of his most recent psychological profile, the court unreasonably excluded evidence that could have provided substantive rebuttal to its finding of "irreparable corruption and permanent incorrigibility." Tr. 181:22-25.

Mr. Keefe's life without parole resentence is disproportionate to the offenses he committed as a juvenile and was imposed without consideration of *Miller's*

mandated factors; it therefore violates the Eighth Amendment's guarantee against cruel and unusual punishment.

## ARGUMENT

### I. A LIFE WITHOUT PAROLE SENTENCE IMPOSED WITHOUT CONSIDERATION OF YOUTH AND ITS ATTENDANT CHARACTERISTICS IS UNCONSTITUIONAL

The United States Supreme Court has held "that children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama,* 567 U.S. 460, 471 (2012). Their demonstrated "lack of maturity" and "underdeveloped sense of responsibility" can lead to recklessness, impulsivity, and vulnerability to negative influences and outside pressures over which they have limited control. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). This is the "starting premise" of the United States Supreme Court's juvenile sentencing jurisprudence, supporting its fundamental assertion that children have "diminished culpability and greater prospects for reform." *Montgomery v. Louisiana,* 136 S. Ct. 718, 733 (2016). A defendant's youth, therefore, "diminish[es] the penological justifications for imposing [a mandatory life without parole sentence]," making it unfairly disproportionate to the crime committed and unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment. *Miller,* 567 U.S. at 472-73.

*Miller* and its follow-up case, *Montgomery*, together barred all mandatory sentences of life without parole for juveniles and required resentencing or release on

parole for the thousands of juveniles who received this sentence before the landmark rulings. *Montgomery*, 136 S. Ct. at 736. All youth sentenced within the criminal justice system must now be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Miller,* 567 U.S. at 479 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). The sentencer in a juvenile proceeding where the state's harshest penalties are possible must always weigh the "distinctive attributes of youth," and impose only a discretionary sentence of life without parole. *Id.* at 472; *Montgomery*, 136 S. Ct. at 735.

The *Miller* Court enumerated the following factors for consideration by the sentencer, whether judge or jury:

> [(1) The defendant's] chronological age [at the time of the crime] 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 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)] the possibility of rehabilitation.

*Miller*, 567 U.S. at 477-78. The consideration of such attributes should infrequently result in a life without parole sentence being imposed. *Id.* at 479-80; *Montgomery*, 136 S. Ct. at 734. The *Montgomery* Court clarified that the sentence is reserved for

only "the rare juvenile offender whose crime reflects *irreparable corruption*." *Montgomery*, 136 S. Ct. at 734 (emphasis added).

Since the passage of *Miller* and *Montgomery*, the Montana Supreme Court has affirmed that its judges are required to "adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole." *Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313.

### A. *Miller* Applies to Discretionary Sentences of Life Without Parole

Though Mr. Keefe received a discretionary sentence of life without parole, he was indeed entitled by law to a reconsideration of his sentence. The Montana Supreme Court requires that *Miller's* sentencing factors be applied retroactively to anyone sentenced to life without parole as a juvenile, "irrespective of whether the life sentence was discretionary." *Steilman*, 2017 MT at ¶ 17. In establishing this threshold, this Court relied upon *McKinley v. Butler*, where the Seventh Circuit held that, "[t]he relevance to sentencing of 'children are different' also cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors." 809 F.3d 908, 911 (7th Cir. 2016).

Several other jurisdictions have similarly held that life without parole sentences for juvenile offenders, whether mandatory or discretionary, are

unconstitutional unless the trial court considers youth and its attendant characteristics. *See, e.g.*, *People v. Holman*, 91 N.E.3d 849, 862 (Ill. 2017) ("*Miller* applies to discretionary sentences of life without parole for juvenile defendants."); *State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015) ("*Miller* does not stand solely for the proposition that the eighth amendment [sic] demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender."); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) ("[W]hether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment.").

### B. The Sentencer Must Determine Whether the Defendant's Crimes Reflect "Irreparable Corruption"

In holding *Miller* retroactive, the *Montgomery* Court explained that its decision in *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)). This is a "substantive rule of constitutional law" that draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect *irreparable corruption*," allowing for the

possibility of life without parole as a "proportionate sentence [only] for the latter kind of juvenile offender." *Id*. at 734, 736 (emphasis added). In other words, *Montgomery* held that *Miller* established a new constitutional standard for the resentencing of youth, providing that the imposition of a life without parole sentence is barred unless the court determines, in light of all the *Miller* factors, that the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility. *Id*. at 734.

Some jurisdictions have interpreted this holding to establish a presumption against life without parole sentences for juveniles, requiring a sentencer to find, based on competent evidence, that a juvenile offender is "entirely unable to change." *See, e.g.*, *Commonwealth v. Batts*, 163 A.3d 410, 435, 455 (Pa. 2017) (quoting *Miller*, 567 U.S. at 472) ("The sentencer must determine that the offender is and 'forever will be a danger to society.'"). While the Supreme Court noted that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," *Montgomery*, 136 S. Ct. at 735, it also stated that the fact that "this finding is not required . . . speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee." *Id*. In addition, the *Roper* Court previously acknowledged that despite the difficulty "even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable

corruption," studies show "only a relatively small proportion of adolescents . . . develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570, 573 (citing Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014-16 (2003)). *Miller*'s "central intuition" is that even youth who commit heinous crimes are developmentally capable of change. *Montgomery*, 136 S. Ct. at 736. An explicit finding of incorrigibility through the consideration of age and the attendant circumstances of youth, though not explicitly required, ensures *Miller*'s substantive holding is being upheld.

In Mr. Keefe's resentencing hearing, the judge considered the "possibility of rehabilitation" through a cursory analysis of the *Miller* factors, but found himself "unmoved," saying he was "not convinced that [the defendant] accepts full responsibility for his crime." Tr. 175:1-180:10.[1] A purported lack of acceptance of "full responsibility" is not the equivalent of a finding of "permanent incorrigibility"

[1] Though claimed to be "not determinative," the bizarre consideration of Mr. Keefe's tattoos, Tr. 180:11-181:15, in support of this erroneous standard additionally contradicts the judge's own interpretation of *Miller*, which he later describes as a mandate to consider only the facts that existed at the time of the original criminal sentencing. Tr. 179:18-180:5 (A judge should discuss only "the record that existed when he was sentenced by applying the new legal standard to the facts that existed at the time of sentencing.").

or "irreparable corruption." Though the judge goes on to say, "this Court finds that Mr. Keefe's crimes do not reflect transient immaturity, but rather they represent irreparable corruption and permanent incorrigibility as defined by the U.S. Supreme Court," *Id*. at 181:22-82:1, his consideration of defendant's age and characteristics of youth in support of this conclusion fail to incorporate key evidence suggesting the contrary.

## II. THE JUDGE DID NOT HAVE COMPETENT EVIDENCE TO CONSTITUTIONALLY SENTENCE THE DEFENDANT

The Court has an affirmative duty to ensure that proper consideration is given to the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. In addition, a court cannot superficially discuss the *Miller* factors when determining whether the defendant is among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.' *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 136 S. Ct. at 734). Although the sentencing court mentioned Mr. Keefe's age and several other aspects of his youth, there is no indication that it did a "meaningful" analysis of all of the *Miller* factors, or that it made a determination as to whether his crime was merely a reflection of "transient immaturity," or truly signified "irreparable corruption." *Id.* at 13. The resentencing court disregarded the main premise of the Supreme Court's jurisprudence relating to juvenile offenders which

again holds that "children are constitutionally different," and "less deserving of the most severe punishments." *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

### A. The Judge Failed to Perform a Meaningful Analysis of the Mitigating Factors of Youth Required by *Miller*

It is insufficient to merely mention a defendant's age and run through the *Miller* factors in a checklist fashion. *See, e.g.*, *Tatum,* 137 S. Ct. at 12-13 (Sotomayor, J., concurring) (holding that minimizing the *Miller* factors and "merely not[ing] age as a mitigating circumstance without further discussion" is insufficient); *State v. Ramos*, 387 P.3d 650, 662 (Wash. 2017) ("[A] *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified."); *Batts,* 163 A.3d at 435 ("[T]he sentencing court must first find, based on competent evidence, that the offender is entirely unable to change" before it can constitutionally sentence a juvenile to life without parole.).

Firstly, the defendant's youth is described as "17 years old and 88 days short of his 18th birthday," immediately followed by, "Mr. Keefe was mature beyond his age" because he had a "full-time job" and "lived independently." Tr. 175:19-24. This conclusion ignores the Supreme Court's unambiguous instruction to avoid viewing juveniles as "miniature adults." *Miller*, 567 U.S. at 481. By characterizing Mr. Keefe's youth in relation to his 18th birthday, and asserting that his lifestyle was

similar to that of a typical adult, the court improperly minimized his age as a mitigating factor and ignored the multitude of scientific studies cited in *Roper*, *Graham*, and *Miller* regarding juvenile brain development that the Court adopted as fact. None of the Supreme Court's sentencing cases permit a sifting of youth based upon their proximity to their eighteenth birthday.

In addition, the judge's finding of a "conscious disregard for the rights of others, the rules of society, and eventually, the lives of others in his community," because of previous interactions with the law, Tr. 176:7-12, is in direct opposition to caselaw that holds that offending youth have "diminished culpability and heightened capacity for change," even when they have a criminal record. *Montgomery,* 136 S. Ct. at 733. Youth are "more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). Their crimes may reflect only "transient immaturity," as the Supreme Court has recognized that youth have an "underdeveloped sense of responsibility" and engage in reckless behavior. *Roper*, 543 U.S. at 569. In addition, they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id*.

The judge additionally incorrectly focused on the seriousness of the defendant's criminal act, saying, "[t]he Court imposes a parole restriction because

of the seriousness of the crimes. Mr. Keefe murdered three people in cold blood. This is one of the worst crimes in Cascade County history." Tr. 183:11-14. The judge's opinion that "[t]his was a brutal, heinous, abhorrent crime of the worse proportions," *Id*. at 178:7-8, is not itself determinative of whether an individual will ever be capable of being rehabilitated. *Graham*, 560 U.S. at 68 (Crimes committed by youth are "less likely to be evidence of 'irretrievably depraved character.'"). Again, the *Miller* Court reasoned that the "attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. *Montgomery* reiterates that even those children who commit "heinous crimes are capable of change." 136 S. Ct. at 736.

Lastly, the judge dismissed the relevance of evidence of significant developmental experiences and trauma in Mr. Keefe's childhood, including parental neglect and abuse, as well as homelessness Mr. Keefe experienced when he was living apart from the family home. Tr. 163:7-21. The Court has recognized that "children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers" as "they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471 (alterations in original) (quoting *Roper*, 543 U.S. at 569). In addition, *Miller* finds evidence of a "neglectful" family

background to be "particularly relevant" in determining youth criminal culpability. *Miller,* 567 U.S. at 476.

### B. A Judge Must Consider Evidence of Rehabilitation Arising Post-Conviction

The *Montgomery* Court recognized that in the context of the retroactive application of *Miller*, an offender's prison record is "relevant" to the question of whether the juvenile offender has the potential to be rehabilitated. *Montgomery*, 136 S. Ct. at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole," going on to then evaluate the defendant's post-conviction conduct for evidence of rehabilitation or permanent incorrigibility.). Mr. Keefe's resentencing judge stated that he believed this portion of *Montgomery* refers only to "the presentation of [post-sentencing conduct] at a parole hearing, not a resentencing hearing such as this one." Tr. 179:21-24.

While this specific inquiry has not yet been specifically addressed by the Supreme Court, the court below inaccurately claimed that there is "no legal support for the proposition that this Court should resentence Mr. Keefe based on his prison conduct rather than on the record that existed when he was sentenced." *Id*. at 179:25-180:5. Several State Supreme Courts have interpreted *Montgomery* to allow for the consideration of evidence of rehabilitation arising post-conviction. *See, e.g.*, *State v. Zuber*, 152 A.3d 197, 216 (N.J. 2017) (In making a retroactive *Miller* determination, the resentencing court should consider "any rehabilitative efforts since his original

sentence."); *Davis v. State*, 415 P.3d 666, 685 (Wyo. 2018) ("In making a retroactive *Miller* determination, the resentencing court may properly examine a defendant's prison record and any other relevant evidence existing at the time of the hearing."); *Ramos*, 387 P.3d at 665 ("Whether such [post-conviction] evidence should be considered at the time of resentencing to the extent that it bears on the offender's culpability is a question we leave to the discretion of the trial court in each case."). *But see also Holman*, 91 N.E.3d at 864. ("In revisiting a juvenile defendant's life without parole sentence, the only evidence that matters is evidence of the defendant's youth and its attendant characteristics at the time of sentencing.").

Since his original conviction, Mr. Keefe has completed several therapeutic programs, educated and mentored other inmates, worked in a boot shop, furniture factory, and bakery, and explored his spirituality. Tr. 141:1-11, 165:5-167:17; *Mental Health Evaluation*, Dkt. 56 at 6-7. For the past 11 years he has also maintained a record of clear conduct and shown a consistent respect for authority and the rules. Tr. at 166:8-12; *Mental Health Evaluation*, Dkt. 56 at 6-7. Lastly, in his psychological evaluation expert witness Dr. Robert N. Page found that Mr. Keefe has responded to efforts of rehabilitation and no longer shows signs of significant psychopathology. Tr. at 82:23-24, 168:20-25; *Mental Health Evaluation*, Dkt. 56 at 15. Taken in meaningful balance with the other *Miller* factors, this post-conviction evidence of rehabilitation should inform Mr. Keefe's sentencer of the presence of

"transient immaturity" at the time of the original offense, and a clear lack of "irreparable corruption" and "permanent incorrigibility."

Moreover, common sense dictates that any relevant evidence of rehabilitation should be considered when determining whether a juvenile offender has, in fact, been rehabilitated or is permanently incorrigible. The term "permanent incorrigibility" on its face requires a finding of a *permanent* condition; the only way to determine if a particular individual is still incorrigible years or decades later is precisely through the examination of current information regarding rehabilitation, growth and maturity or continued anti-social behavior. Further, fidelity to the federalist principle of a State's sovereign administration of their own criminal justice system, "should not be construed to demean the substantive character of the federal right at issue." *Montgomery*, 136 S. Ct. at 735. The consideration of evidence of "transient immaturity," demonstrated through maturation following a conviction, ensures that juveniles are not forced to serve disproportionate sentences in violation of the Eighth Amendment, given that children are constitutionally distinct, and have "diminished culpability" for the crimes they commit. *Montgomery,* 136 S. Ct. at 733.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court vacate and reverse Mr. Keefe's sentences of life without the possibility of parole and remand for resentencing.

Respectfully Submitted,

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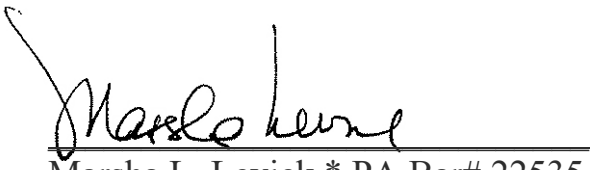

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## CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 5,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance as calculated by my Microsoft Word software.

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I, Benjamin M. Darrow, hereby certify that this 14th day of November, 2019, I have served true and accurate copies of the foregoing Amicus Curiae Brief of Juvenile Law Center in Support of Steven Keefe on the following:

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