IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0368

STEVEN WAYNE KEEFE,

Plaintiff and Appellant,

v.

LEROY KIRKEGARD, Warden, Montana State Prison,

Defendant and Appellee.

BRIEF OF APPELLEE

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

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2. Did the resentencing hearing comply with the principles of *Miller v. Alabama*, 567 U.S. 460 (2012)?

3. Did the district court sentence Appellant based on accurate information supported by the record?

4. Has Appellant met his burden of establishing that plain error review is appropriate for his allegations of prosecutorial misconduct and judicial bias?

STATEMENT OF THE CASE

On October 15, 1985, 17-year-old Appellant Steven Wayne Keefe shot and killed three people while burglarizing a house near Great Falls. The State charged Keefe with three counts of deliberate homicide and one count of burglary. After a jury found Keefe guilty, the district court sentenced him to three terms of life imprisonment for the homicides, ten years imprisonment for the burglary, and four ten-year terms for the use of a weapon, all consecutive. (Vol. XI Tr. at 31-32.) Keefe appealed, raising a sole issue related to other crimes evidence. *State v. Keefe*, 232 Mont. 258, 759 P.2d 128 (1988). This Court affirmed. *Id*.

In 2017, Keefe petitioned for postconviction relief in the Eighth Judicial District Court, asking for a new sentencing hearing. (Doc. 1.) The court granted the petition, reasoning that although the original sentencing court "found Keefe's youth a mitigating factor for the death penalty" it failed to "account for Keefe's youth, background, mental health, and substance abuse" as sentencing factors in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). (Doc. 8 at 5.) After conducting an individualized assessment of the mitigating factors of Keefe's youth, the court imposed the same sentence as the original sentencing court. (Doc. 66 at 1-12; 4/18/19 Tr. at 182-83.)

STATEMENT OF THE FACTS

I. Keefe's pre-offense background

Keefe grew up with his mother, Vera, and had no father-figure until Vera married Ralph Parmer when Keefe was nine years old. (Doc. 7, Ex. 5 at 11.) After Vera married Ralph, the family would regularly go camping and fishing. (Doc. 7, Ex. 5 at 12.) Keefe reported he was close to Ralph and considered him his dad. (*Id.)* Ralph died of cancer in 1984. (Doc. 7, Ex. 5 at 12; Vol. VIII Tr. at 1114.)

Keefe described his alcohol and drug use as "social" in his youth and denied any chemical dependency issues. (PSI at 9; Doc. 56 at 6, 8; Vol. X Tr. at 49.)

Keefe consistently self-reported that he was not physically or sexually abused. (Doc. 7, Ex. 5 at 12; Doc. 56 at 7; Vol. X Tr. at 23.) However, Keefe's case manager at the Yellowstone Boys and Girls Club averred that Keefe's relationship with Vera was "kind of a love-hate relationship" and Keefe "needed to be independent of her[.]" (Vol. I Tr. at 103.)

By the time Keefe was 17 years old, he had committed over 50 known crimes from 1982 to 1985. (Vol. XI Tr. at 11, 29; PSI at 2-3.) During the same period, Keefe was intermittently committed to various youth treatment facilities in response to his crimes, such as the Yellowstone Boys and Girls Ranch, the Last Chance Group Home, the Ewing Place Group Home, and the Pine Hills Youth Correctional Facility. (PSI at 3-4.) While in treatment, Keefe participated in three extensive psychological evaluations. (Doc. 7, Ex. 5 at 7.) Keefe also ran away from the facilities many times, committed numerous thefts and burglaries, stole several cars, intimidated and was aggressive toward other youths, and failed to make meaningful progress towards rehabilitation. (Doc. 7, Ex. 3 at 4.)

Keefe's crimes gradually increased in severity. (Vol. XI Tr. at 11, 29; PSI at 2-3.) In January 1985, Keefe stole a vehicle and caused a high-speed police chase, resulting in him being run off the road. (Vol. I Tr. at 94.) In April 1985, Keefe went on a multi-city crime spree, breaking into several locations and stealing

multiple cars in one night. (Vol. I Tr. at 97.) In July 1985, Keefe burglarized a residence while the owner was home. (Vol. V Tr. at 709, 711-12.)

Keefe soon began stealing guns from various residences during his burglaries. (Doc. 7, Ex. 3 at 4.) On August 3, 1985, Keefe stole a .22 caliber pistol from a residence. (Vol. V Tr. at 717, 720, 747-48.) On October 2, 1985, Keefe stole a .44 magnum Ruger Redhawk revolver from Ron Garvin's residence, the weapon that he would use in the homicides. (*Id.* at 759.) While at Garvin's house, Keefe also stole a stereo and 200 rounds of .44 magnum bullets with Mid-Way shells. (*Id.* at 759-60.) On October 10, 1985, Keefe stole a .38 caliber handgun from his mother's boss's house. (*Id.* at 725-26, 747.) All of the burglaries occurred in isolated areas in the outskirts of Helena, and Keefe acted alone. (Vol. V Tr. at 684, 724, 747, 749; Vol. VIII Tr. at 1102-05.)

On October 10, 1985, Keefe left his mother's home in Helena and moved into a residence in Great Falls. (Vol. V Tr. at 731-32; Vol. I Tr. at 101.) Keefe explained at trial that he moved to Great Falls because he was "just about ready to turn 18" and "wanted to get out and kind of live my life and start a new life." (Vol. VIII Tr. at 1115.) Toby Yadon and Michael Hayashi were his roommates. (Vol. VII Tr. at 897, 899-900, 941.) Keefe showed both roommates the stolen .44 magnum revolver, and Toby noticed that Keefe had 75 rounds of .44 ammunition. (*Id.* at 900-01, 943, 945.) Toby offered to purchase the revolver

from Keefe for $250, but Keefe declined, reasoning he could get more money for it. (*Id.* at 949-50, 954.)

On October 12, 1985, Keefe rang the doorbell of an isolated home by a river outside of Great Falls belonging to Dr. Paul Wilhelm. (Vol. V Tr. at 838-39, 840, 853.) When Dr. Wilhelm looked outside his window, nobody was there. But, sensing danger, Dr. Wilhelm went outside and fired two warning shots from his gun. (*Id.* at 840-41.) Dr. Wilhelm also found shoeprints nearby, which the police photographed. (*Id.* at 841-42, 878.) An FBI expert would later compare Keefe's tennis shoes to the photographs and match them. (Vol. VI Tr. at 5, 14.)

II. The offense

Dr. David McKay and his wife, Constance McKay, were retired and lived in an isolated area on the outskirts of Great Falls, in a house on a hillside near an open field. (Doc. 7, Ex. 5 at 15; Vol. VI Tr. at 23-24, 34, 52; Vol. VIII Tr. at 1106.) On the afternoon of October 15, 1985, the McKays were preparing for a family dinner. (Vol. VI Tr. at 23.) Their daughter, Dr. Marian McKay Qumar, had flown in from Seattle that morning. She brought along her own three-year-old daughter, Muna Qumar. (Doc. 7, Ex. 5 at 15; Vol. VI Tr. at 201-02.) The McKays also invited their other adult children for dinner, who planned to arrive with their families at 5 pm. (Vol. VI Tr. at 23.)

In the afternoon, Keefe entered through a lower-level double-glass door to burglarize the McKay household. (Vol. VIII Tr. at 1048, 1077; Vol. VI Tr. at 186.) He undid the door latch with his knife. Once inside, Keefe began looking at a stereo when he knocked something over. (Vol. VIII Tr. at 1048-49.) David heard the noise and looked around, while Keefe hid. (*Id.* at 1049.)

David returned to the kitchen and resumed getting things ready for dinner, taking wine glasses out of a shoebox and setting them on the kitchen counter. (Vol. VI Tr. at 70, 78.) Keefe entered the kitchen, came up behind David, and shot him in the back of the head with the .44 magnum, killing him. (*Id.* at 77, 168, 180.)

Marian heard the noise, went to investigate, and encountered Keefe. (*Id.* at 84.) Keefe chased her down the stairwell, which led to a landing and then to the basement. He fired several rounds, hitting Marian in the back and ankle as she was descending the stairs, killing her. (Vol. VI Tr. at 84-85, 174-75; 4/18/19 Tr. at 25.) Keefe then fired and emptied the weapon and reloaded it. (Vol. VI Tr. at 87, 100.)

Constance was in a concrete root cellar in the garage, getting apples for the dinner. When she exited the root cellar and went through a stairwell door to the hallway landing that connected the basement to the main floor, she saw her daughter Marian lying dead on the floor. (Vol. VI Tr. at 114.) As Constance bent over Marian, Keefe shot her in the back, killing her. (Vol. VI Tr. at 115, 171;

4/18/19 Tr. at 25.) Keefe fired one more shot at Constance on his way out but missed. (Vol. VI Tr. at 119-20.) He left with Constance's purse. (Vol. VI Tr. at 120, 142, 209-10.)[1] Keefe was three months shy of his 18th birthday when he committed the homicides. (Doc. 7, Ex. 3 at 6, 56.)

When the rest of the McKay family showed up for dinner, they discovered the bodies and called the police. (Vol. VI Tr. at 206-08.) A detective searched the home and found Marian's daughter, three-year-old Muna, in a bedroom, alive, under a bed cover. (*Id.* at 65.) The detective took Muna outside to her relatives. (*Id.* at 66-67.) Officers also found six Mid-Way .44 magnum shell casings near the bodies of Constance and Marian. (*Id.* at 59, 69, 87, 101.)

The next day, Keefe asked his housemate Michael to pawn the .44 magnum and stereo stolen from Garvin's residence since he was not yet 18 years old and could not legally do it himself. Michael agreed, and they pawned the gun for $70. (Vol. VII Tr. at 904-05, 923.) Later that day, a Great Falls police officer arrested Keefe on a hold order for his previous Helena burglaries. (*Id.* at 932-34.) Keefe saw the officer coming and walked out to meet him. Keefe repeatedly asked the

[1] Police found English coins near an outside gate that appeared to have been recently dropped. (Vol. VI Tr. at 191-93, 195-96.) A family member testified that the McKays had traveled to England and Constance collected and kept things with her for years. (*Id.* at 210-12.) The purse was never recovered.

officer, "Is that all I'm being charged with?" and the officer replied affirmatively. (*Id.* at 933.) Authorities transferred Keefe to Pine Hills. (Doc. 7, Ex. 4 at 102.)

In November 1985, Keefe confided in his friend George Smith, another youth at Pine Hills. (Vol. VII Tr. at 1047.) They were listening to a song called "War is Stupid" in the facility music room. (*Id.* at 1047-48.) George started talking about war and said he could never kill anyone. Keefe explained that he had killed people and described in detail the McKay homicides, including facts otherwise only known to the police. (Vol. VII Tr. at 1048-49; Vol. X Tr. at 107.) Keefe described the "nice" house, how he entered using his knife, how he knocked over an object while looking to steal a stereo,[2] how he shot the "old man" first from behind, and how he also shot two women after they heard the sounds and investigated. (Vol. VII Tr. at 1049, 1054-55.) When Keefe told George about the triple homicides, he displayed no emotion, anger, or sorrow. (*Id.* at 1049.)

On March 5, 1986, Keefe was arrested for the homicides. (*Id.* at 1008.) Authorities recovered the .44 magnum from the pawn shop, determined it was Garvin's gun by comparing the serial number to Garvin's receipt of sale, and sent the gun and the six Mid-Way shells to the FBI for analysis. (*Id.* at 969-72.) The

[2] Investigators found a book laying upside down, open, on the floor near a stereo and bookshelf. Investigators also found a double door with marks on the edge that appeared to be created by a sharp edge of an object that had been inserted and worked between the doors. (Vol. VII Tr. at 1072, 1077.)

FBI confirmed that the recovered shell casings were fired from Garvin's gun. (Vol. VI Tr. at 69, 101; Vol. VII Tr. at 997-1000.) In a police interview, Keefe admitted that he stole the .44 magnum from Garvin's home, and it was in his continuous possession until he pawned it on October 16, 1985. (Vol. VII Tr. at 1011-12, 1021.) When informed about the ballistics tests, Keefe became "irate" and told the officers there was "no way" the ballistics test would show that the .44 magnum in his possession killed the McKays. (*Id.* at 1011-12.)

III. Keefe's evolving version of the offense

Keefe testified at trial. (Vol. VIII Tr. at 1113-14.) He agreed that he pre-planned all of his burglaries, which occurred in isolated areas. (*Id*. at 1165-66.) Keefe admitted to all of his previous burglaries but denied going to the McKay household and killing the McKays. (*Id*. at 1149-50, 1152.) Keefe admitted he stole the .44 magnum from Garvin's residence and possessed the gun continuously,[3] and that he shot it "twice," but claimed he left it on a shelf at his residence on the day of the homicides. (*Id.* at 1123-24, 1144-45, 1193.) Keefe said that he spent the afternoon of October 15, 1985, running errands at the grocery store, mall, gas station, car wash, and video store. (*Id*. at 1126-39.) Keefe was the

[3] Keefe's fingerprints were also lifted from Garvin's residence and matched by the FBI. (Vol. V Tr. at 771, 828.)

only witness to testify in his defense and did not have any receipts to verify his story. (*Id*. at 1131-32.) The jury disbelieved Keefe's version of events and convicted him of all counts. (Vol. IX Tr. at 1339-40.) During Keefe's subsequent incarceration, Keefe admitted he killed the McKays. (4/18/19 Tr. at 84-85; *see* Doc. 62, State's Ex. 7.)

Keefe told a different story 30 years later before his resentencing proceeding, during which the district court would examine mitigating factors of youth—including the extent of Keefe's participation in the homicides—under Supreme Court guidance in *Miller*. Keefe explained to the author of the updated Presentence Investigation Report (PSI) and to the psychological evaluator that he was in fact at the McKay residence, supplied the stolen gun, and participated in the crime, but he was merely an accomplice to his now-deceased brother-in-law and another unknown male. (Doc. 56 at 8; PSI at 20.) Keefe averred they went to rob the McKay residence, rang the doorbell, and they all stood at the front porch while Keefe asked to use Mr. McKay's phone. (PSI at 20.) Keefe stated that while he went into the house under that pretext, his brother-in-law committed the homicides and told Keefe to check the rest of the house. Keefe said that he found and saved Muna by telling his brother-in-law that nobody else was in the house. (Doc. 56 at 8.) Keefe averred that he did not explain his story in 1986 because he "didn't want to go to prison as a snitch." (Doc. 56 at 9.)

IV. Keefe's 1986 youth character profile and the original sentencing

Dr. George Hossack, a staff psychologist who conducted a 45-day psychological assessment of Keefe at Pine Hills, testified at the 1986 youth transfer and death penalty hearings about Keefe's psychological characteristics. (Vol. I Tr. at 27; Vol. X Tr. at 1.) Dr. Hossack explained that Keefe self-reported his behavior as impulsive, a characterization Keefe admitted he had learned from previous evaluations. (Vol X Tr. at 26.) Dr. Hossack explained that Keefe was not impulsive but instead had "considerable self-control and that what he does illegally, he does with the full knowledge of what will happen to him when he is caught but he just doesn't care." (Vol. I Tr. at 48.) Keefe admitted to Dr. Hossack that he rehearsed his criminal acts in his mind before executing them. (Vol. X Tr. at 11.)

Regarding how Keefe relates to others, Dr. Hossack described Keefe as manipulative and that Keefe's test scores indicated he "wants others to see him as without fault or without deficiencies." (Vol. I Tr. at 52, 46.)

Dr. Hossack testified that Keefe's social deviancy scale showed he was "rebellious and law breaking, antisocial, a social deviant and irresponsible and possibly psychopathic with very little conscience." (Vol. X at 13.) Dr. Hossack

diagnosed Keefe with antisocial personality disorder[4] because Keefe fit the diagnostic criteria.[5] (Doc. 7, Ex. 2 at 9.) Dr. Hossack explained that antisocial personality disorder is not psychosis or a mental disease or defect but is rather a "character disorder." (Vol. I Tr. at 47.)

Regarding Keefe's potential for rehabilitation, Dr. Hossack explained that Keefe had been repeatedly evaluated since 1983 but "burned out" of several facilities while committing crimes. Dr. Hossack noted that Keefe's criminality had not been curtailed by any therapy, lockups, or increasing consequences in response to his behavior. (Doc. 7, Ex. 2 at 7.) Dr. Hossack concluded that Keefe's problems did not stem from Keefe's family, school, or prior interventions, but "[Keefe] is the problem." (Vol. I Tr. at 51.) Dr. Hossack thought that Keefe was likely not treatable, opining that treatment typically did not augment antisocial personalities. (Vol. I Tr. at 56; Vol. X Tr. at 13-14.)

Sharon Lordeman, a Deputy Probation Officer and a former case manager at the Yellowstone Boys and Girls Ranch, testified about Keefe's criminal sophistication and developmental maturity. Lordeman observed that Keefe was

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[4] In 1983, Dr. Joseph Rich also diagnosed Keefe with antisocial personality disorder, characterizing Keefe as manipulative, aggressive, and physically violent to other children. (Doc. 7, Ex. 5 at 8-9.)

[5] Dr. Hossack explained that antisocial behavior "starts before the age of 15" with hallmarks such as a lack of conscience, a poor capacity for relationship with families and peers, and fearlessness of danger or punishment. (Vol. X Tr. at 16.)

"very sophisticated, particularly in his deviant acts." (Vol. I Tr. at 103.) Lordeman explained that through experiences with multiple burglaries, Keefe learned how to not leave fingerprints at the scene. (*Id*.) Lordeman testified that Keefe was independent and learned independent-living skills while residing at the Last Chance Youth Home. (*Id*. at 103-04.)

During his PSI interview, Keefe explained that he committed crimes because he was "bored" and knew he would not face major consequences except for "a slap on the hands." (Doc. 7, Ex. 5 at 4.) The PSI author noted that Keefe appeared to have "no remorse for his crimes, nor was he ever afraid of the consequences for these crimes. In reviewing his criminal history, Mr. Keefe's delinquency escalated to the point that he finally killed three innocent people." (*Id*. at 18.)

At sentencing, the court explained that the record showed a "history of escalation" of crimes beginning at "shoplifting, joyriding, escalating to burglary, and now into a triple homicide." (Vol. XI Tr. at 29.) The court found that Keefe needed a "highly structured and controlled residence and treatment" while also observing that "the institutions have tried everything, with no success, and that there is little hope of rehabilitation." (*Id*. at 30.) The court noted that Keefe showed no remorse for the triple homicides, was an "unfeeling person[]" and was "a very dangerous antisocial person." (*Id*.) The court found no mitigating factors existed. The court found no evidence that Keefe used alcohol or drugs, had a

severe mental or emotional disturbance, or acted under the dominion of another person. (*Id*. at 28.) In imposing the life sentences and parole restriction, the court observed that Keefe was a "psychopathic antisocial deviant who should spend the rest of your life behind bars. And that is my intent in handing down this sentence." (*Id*. at 32.)

V. The resentencing

A. The new psychological evaluation

In 2018, Dr. Robert N. Page, a Licensed Clinical Professional Counselor, conducted an updated psychological evaluation for resentencing. (4/18/19 Tr. at 67.) Dr. Page evaluated Keefe's characteristics of youth as directed by the district court. Dr. Page noted that Keefe engaged in "characteristic carelessness and antisocial acts" and had a "passive aggressive attitude." (Doc. 56 at 12.) Dr. Page explained that Keefe "struggled between feeling resentment towards authority and self-derogation which resulted in rapid mood swings." (*Id*.) Dr. Page found that Keefe "demonstrated little or no compassion for others, viewing their difficulties as the product of their own weaknesses." (*Id*. at 13.)

Regarding any peer or family influences impacting Keefe, Dr. Page noted:

> Research indicates that as juveniles, peer and family influences can have a greater impact on the decision making process than that of adults. It does not appear that Mr. Keefe experienced abnormally strong, negative, or chronic influences that would have had an

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

(*Id*. at 15-16.) Dr. Page further observed, "Mr. Keefe's presentation and his self-reported life history do not reveal any significant developmental experiences, traumatic events, or other life-changing situations that would have had any mitigating factors surrounding his decisions to commit crimes." (Doc. 56 at 16.)

Regarding any drug or alcohol influences, Dr. Page explained that Keefe admitted he was sober during the commission of the homicides and did not have a chemical dependency disorder when he was a teenager. (Doc. 56 at 15, 12; 4/18/19 Tr. at 82.)

Regarding Keefe's criminal sophistication and developmental competence, Dr. Page concluded that there were "no questions of competence and that Mr. Keefe was well aware of how his actions would spawn their consequences. Further, it appears that he had little regard for anything other than how his actions would benefit himself." (*Id*.)

In addition to examining the characteristics of Keefe's youth, Dr. Page also evaluated Keefe as a 51-year-old adult. (Doc. 56 at 14.) Dr. Page noted that in Keefe's early days of incarceration he had "a number of behavioral difficulties to professionals resulting in disciplinary write-ups and at least one known escape attempt." (*Id*. at 17.) However, Dr. Page noted that Keefe "has not had a disciplinary write-up in the past 11 years and has not demonstrated proneness

towards aggression or violence." (*Id*.) Dr. Page found that Keefe's dependency and conformity over the last 11 years' incarceration was likely the result "of a lengthy period of incarceration." (*Id*. at 14-15.) Dr. Page explained that while Keefe did not present significant signs of psychopathy, that was consistent with an individual who has been "programmed and controlled over a substantial number of years." (4/18/19 Tr. at 82-83.) Dr. Page added that this did not mean he was not a psychopath or speak to how Keefe might be "outside of [the prison] environment[.]" (4/18/19 Tr. at 83.) Dr. Page noted that if Keefe is "ever allowed parole," he would likely be a low risk for violence "as long as he is tightly supervised." (Doc. 56 at 18.) Dr. Page emphasized that any reentry into the community would have to be "gradual . . . through step down placements and programs that will adequately monitor his reintegration." (*Id*.)

B. The new PSI

The PSI author designated Keefe as high risk. (PSI at 18.) The author explained that Keefe had 15 disciplinary write-ups until 2007, including a prison escape attempt. (PSI at 4-5; 4/18/19 Tr. at 39.) However, in the last 11 years, Keefe was without any write-ups. (4/18/19 Tr. at 39.) Keefe explained in his PSI assessment that his attorneys had advised him to avoid write ups to increase his chances of getting parole. (*Id*.)

The original PSI did not identify that Keefe had any tattoos. (Doc. 7, Ex. 5 at 6; 4/18/19 Tr. at 47-48.) But the updated PSI identified multiple tattoos, including "3 skulls" on Keefe's upper arm, a tattoo with the phrase "guilty until proven innocent," and a tattoo of the grim reaper. (PSI at 1; 4/18/19 Tr. at 49, 67.) Dr. Page explained at sentencing that Keefe's tattoos reflect "a pride for wearing the results of his actions" and a feeling of being "unfairly treated[.]" (4/18/19 Tr. at 69.)

C. The resentencing

At the outset of the resentencing, the court explained that it would not consider Keefe's new story that he was merely an accomplice during the homicides, reasoning that the resentencing was not a retrial of the established facts of the offense. (4/18/19 Tr. at 13.) The court further noted that there were "no facts" in the trial record to support Keefe's theory. (*Id*. at 14.)[6]

Dr. Page testified that the criteria for antisocial personality in 1986, when psychologists used the DSM-III diagnostic tool, and present-day methods are "the same" to a "large degree." (*Id*. at 72.) Dr. Page explained that in 1986, if a person was under 16 years old and fit the criteria for antisocial personality disorder, it was typically referred to as a "conduct disorder." (*Id*. at 75.) Dr. Page reviewed the

[6] Keefe has not pursued his accomplice theory through other available legal avenues.

previous psychological evaluations and concluded the evaluators did nothing wrong. (*Id*. at 78.) Dr. Page also averred that the nature of the homicides themselves helped to reveal "over and above what a diagnostic criteria in a DSM would reveal" for the purposes of evaluating antisocial or psychopathic tendencies. (*Id*. at 78-79.) Dr. Page explained that "most, if not all, of [Keefe's] negative experiences occurred as a result of his own behaviors." (*Id*. at 107.)

Robert Shaw, a correctional officer, testified for Keefe. (*Id*. at 119.) Shaw testified that Keefe engaged in various prisoner programs such as the canine training program, which Keefe was particularly passionate about. (*Id*. at 125, 127.) Shaw said that he saw a positive change in Keefe, and Keefe had maintained "clear conduct" in recent years. (*Id*. at 128.) Former warden Michael Mahoney also testified for Keefe. (*Id*. at 133.) Mahoney explained that Keefe "always had a job and was always willing to program and do different things." (*Id*. at 137-38.) Mahoney concurred that Keefe "really excelled" at the dog training program. (*Id*. at 138.) Mahoney explained that Keefe had a "very strong work ethic." (*Id*. at 141.) Mahoney averred that Keefe's involvement in programs showed his maturation and development. (*Id*. at 141-143.)

Muna Qumar, the now-adult whose mother and grandparents were killed by Keefe, testified at resentencing. (*Id*. at 148.) Muna testified as to the profound loss, psychological terror, and the resulting mental health issues she experienced as

a result of Keefe's actions, including panic attacks and problems with relationships. (*Id*. at 148-154.) Next, Keefe decided to make a statement before resentencing, expressing his "sympathy" for "what happened" and asked for forgiveness. (*Id*. at 155.)

The State recommended the court impose the same sentence as the original sentencing court, arguing that the evidence showed that there were not any mitigating factors under *Miller* to justify a lower sentence. (*Id*. at 156-162.) Defense counsel argued Keefe's homicides were due to being from a "dysfunctional family" and explained that Keefe was more prone to "risky" behavior because he was young. (*Id*. at 163.) Defense counsel argued Keefe's conduct and various jobs in prison showed his maturation. (*Id*. at 165-170.) Defense counsel recommended that Keefe be given a parole board hearing. (*Id*. at 170.)

The district court discussed the Supreme Court's evolving nature of sentencing guidelines for juveniles as well as the individualized assessment factors of youth in *Miller*. (*Id*. at 173-175.) After extensively evaluating the *Miller* factors, the court determined:

> When the United States Supreme Court said that life without parole for juvenile offenders is inappropriate in all but the most egregious cases, it was referring to this case. Beyond any doubt, this Court finds that Mr. Keefe's crimes do not reflect transient immaturity, but rather

> they represent irreparable corruption and permanent incorrigibility as defined by the U.S. Supreme Court.

(*Id*. at 181-82.) The court therefore imposed the same sentence as the original sentencing court. (*Id*. at 182-83.)

Additional facts regarding the district court's *Miller* findings and claims raised by Keefe are addressed herein.

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion to appoint an independent psychological evaluator to examine Keefe's characteristics of youth for the purposes of a *Miller* resentencing hearing. The court appropriately ensured it was resentencing Keefe based upon updated and accurate information. Keefe had no constitutional or statutory entitlement to a defense team of experts rather than a neutral, court-appointed expert.

The district court's *Miller* findings were supported by substantial record-based evidence. The court conducted a detailed assessment of Keefe's characteristics of youth including his chronological age, family life, the nature of the offense, and the prospects for rehabilitation. Keefe fails to show any error in the court's findings, much less clear error. Keefe's add-on argument that he is entitled to a jury determination regarding his permanent incorrigibility on the basis of *Apprendi* fails because a constitutional directive for sentencing courts to

consider the mitigating factors of youth does not amount to a presumption in favor of a parole-eligible sentence.

The district court did not sentence Keefe based upon misinformation. Dr. Page merely offered that he had consulted various stakeholders for an objective definition of "rehabilitation" and found none. Dr. Page did not ultimately offer an opinion on whether Keefe had been rehabilitated, nor did the court rely on Dr. Page's lack of an opinion on the matter.

This Court should decline to exercise plain error review of Keefe's unpreserved claims alleging prosecutorial misconduct and judicial bias during the resentencing hearing. Keefe raised the claims for the first time in an improper post-judgment motion. Keefe does not ask for plain error review, nor can Keefe meet his burden to establish that such review is warranted. Even so, his claims would fail because the record does not support either claim.

ARGUMENT

I. At sentencing, the district court properly exercised its discretion to appoint an independent psychological evaluator to evaluate Keefe's characteristics of youth.

A. Facts

For the resentencing, Keefe hired private pro bono counsel. (4/9/18 Tr. at 6-7.) Keefe's private counsel later proposed to enter into a contract with the Office

of the State Public Defender (OPD) in order to obtain financial assistance from OPD, with OPD serving as the "in-house attorney[.]" (*Id*. at 11-12.) OPD had no objection but noted that the resentencing was not a "capital case" and likely did not qualify for extensive funding under OPD's rules. (*Id*. at 12-13.) The court urged OPD and Keefe to resolve the matter. (*Id*. at 13, 15.) Private counsel then entered into a Memorandum of Understanding with OPD setting the terms of representation. The court appointed OPD to represent Keefe, with private counsel as contract counsel. (Docs. 18-19.)

Despite OPD's approval of $2400 for Keefe's defense, Keefe nonetheless filed a motion asking the court for state funds for a mitigation expert, a forensic psychiatrist, an adaptive functioning expert, a substance abuse expert, and a psychologist for a total estimated cost of around $52,100. (Doc. 47 at 3, 11-17.) The court denied the motion, reasoning that it had already appointed Dr. Page to provide an evidence-based, objective, unbiased, and independent assessment of Keefe's characteristics of youth for resentencing. The court further noted it had no control of OPD's internal procedures but had confidence that OPD's in-house investigators capably determined adequate resources for Keefe. (Doc. 53 at 11.) Dr. Page assessed Keefe and testified at resentencing. (4/18/19 Tr. at 92.)

B. Standard of review

Motions requesting an examination by a psychiatrist where the existence of a mental disease or defect is not at issue fall within the discretion of the trial court. *State v. Hill*, 2000 MT 308, ¶ 21, 302 Mont. 415, 14 P.3d 1237 (citation omitted). This Court reviews discretionary trial court rulings for an abuse of discretion. *Id.* (citation omitted).

C. *Ake* is inapplicable to Keefe's resentencing proceeding.

Keefe claims that the district court violated his constitutional rights because it appointed a neutral independent expert to evaluate and consider the impact Keefe's youthful characteristics may have had on his commission of the triple homicide. Keefe argues the court should have instead appointed a state-funded defense team of experts, including his own psychologist, to rebut the court's expert. Keefe argues that his right to such experts is enshrined in the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985). (Appellant's Br. at 18, 22.)

The *Ake* Court held:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or receive funds to hire his own. Our concern is that the indigent defendant have access to a

> competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake, 470 U.S. at 83. This Court has emphasized that such psychological assistance is "mandated *only* where the defendant has demonstrated to the court that his sanity at the time of the offenses committed will be a 'significant factor at trial.'" *State v. Mahoney*, 264 Mont. 89, 101, 870 P.2d 65, 73 (1994) (emphasis in original, internal citations omitted); *accord Hill*, ¶ 25 ("The Supreme Court's holding in *Ake* applies only upon a preliminary showing that the defendant's sanity will be an issue at trial.").

Ake is wholly inapplicable to Keefe's resentencing. Keefe had no constitutional or statutory entitlement to a psychologist to aid in his defense when his sanity—i.e. the presence of a mental disease or defect—was not at issue. *See Hill*, ¶¶ 24-25, 28 (citing *Ake*, 470 U.S. at 74 and Mont. Code Ann. §§ 46-14-202, -205). Here, there is no mention in the record, either through the multiple psychiatric assessments or by Keefe himself, that he is psychotic or suffers from a mental disease or defect. To the contrary, Dr. Hossack explained that Keefe had an antisocial personality, which was not a mental disease or defect but rather a "character disorder." (Vol. I Tr. at 47.) Keefe specifically and repeatedly disclaimed that his sanity was a defense issue during the 1986 trial. (Vol. II Tr. at 91-93.) Nor is the presence of a mental disease or defect a

sentencing consideration under *Miller*. *Miller*, 567 U.S. at 477-78. This case is unlike *Ake*, where the district court unconstitutionally deprived the defendant a psychological expert evaluation to assist in an insanity defense at a capital homicide trial when the defendant was a "paranoid schizophrenic" and had delusional thoughts that he was the "'sword of vengeance' of the Lord[.]" *Ake*, 470 U.S. at 71-72, 86; *see also Smith v. McCormick*, 914 F.2d 1153, 1156, 1160 (9th Cir. 1990) (at the time of the homicides, Smith argued he was in "a dissociative state" because of five years of LSD use, and the *Smith* court averred it was "a case involving a potential defense of insanity.").

Keefe's resentencing is likely further outside the ambit of *Ake* because it is not a capital case. *See e.g. Ake*, 470 U.S. at 87 (Burger, C.J.; concurring) ("Nothing in the Court's opinion reaches noncapital cases."). Keefe's citations to cases applying *Ake* have a common thread: they are capital cases. (*See* Appellant's Br. at 18-19; citing *Ake*, 470 U.S. 68; *State v. Smith*, 261 Mont. 419, 863 P.2d 1000 (1993); *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017); *Smith*, 914 F.2d 1153. Keefe's resentencing was not a capital proceeding, nor could it be, because youth offenders are constitutionally ineligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005). Rather, the resentencing was merely a proceeding for the court to consider the mitigating factors of youth under *Miller*. Keefe faced no potential increased punishment from being resentenced.

But even assuming that *Ake* was applicable to Keefe's non-capital resentencing hearing where his sanity was not at issue, Keefe still had no constitutional entitlement to procure state funds for a psychological expert of his own choosing. *Ake*, 470 U.S. at 83. Nor does *Ake* and its progeny require sentencing courts to hire a psychiatric expert who is a member of the defense team rather than a neutral expert. The Supreme Court recently declined to answer the broader question presented of whether "*Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert[.]" *McWilliams*, 137 S. Ct. at 1799. Therefore, even if *Ake* could be stretched so far as to apply to Keefe's resentencing, the court's appointment of a neutral psychological expert to evaluate Keefe, along with the court's proper consideration and incorporation of the expert's testimony, still satisfied *Ake*'s directive. *Compare to McWilliams*, 137 S. Ct. at 1796-97, 1800-01 (finding *Ake* violated when the sentencing court imposed the death penalty over defense counsel's objection that it needed more time to consult experts to interpret a new neurological examination concluding the defendant likely had brain damage stemming from a physical injury).

Finally, this Court should reject outright Keefe's additional assertion he is constitutionally entitled to a team of defense experts from state funds. Even under

Ake, Keefe would only be constitutionally entitled to "access" to "one competent psychiatrist" chosen by the trial judge. *Ake*, 470 U.S. at 83, 79.

D. The court properly exercised its discretion to appoint a psychological expert to ensure it was sentencing based on accurate and updated information.

Keefe fails to identify any constitutional directive that a sentencing court must appoint a defense-team psychological expert in *Miller* hearings. Keefe's footnote citation to *United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016) does not advance his cause. (*See* Appellant's Br. at 20, n.6.) In *Pete*, a federal sentencing court held a *Miller* resentencing hearing but refused to follow a federal statutory directive under 18 U.S.C. § 3006A(e) to appoint a psychological expert. Additionally, the court refused to allow a psychological expert to testify at resentencing despite ten years since the petitioner's last psychological assessment. *Pete*, 819 F.3d at 1126-27, 1131. The Ninth Circuit held that the defendant was "sufficiently prejudiced by the failure to appoint a psychological expert before resentencing." *Pete*, 819 F.3d at 1134. Here, the district court *did* appoint a psychological expert to prepare a report and testify at resentencing, and there are no state statutory protections that require more.

In fact, the resentencing court had complete discretion regarding whether a psychological expert was necessary and how to effectuate that purpose. Mont. Code Ann. § 46-18-112(4) ("The court may, in its discretion, require . . . [a] mental

examination of the defendant."). The court exercised its sentencing authority to appoint an independent expert to examine Keefe and also ordered an updated PSI to assess Keefe's character, risks, and needs. Thus, the court ensured it was sentencing Keefe based on accurate information while illuminating the mitigating characteristics of Keefe's youth. Dr. Page compiled his information objectively, relying on diagnostic psychological criterion, Keefe's willing and participatory clinical interview, consultations with both Keefe and his attorneys and the State, and objective data gleaned from interviewing people who knew Keefe. (Doc. 56 at 2-3, 6.) As Keefe points out, some of Dr. Page's conclusions were favorable to him, while some were not. (Appellant's Br. at 6-7.) Nonetheless, both Keefe and the State were given opportunities to question Dr. Page to expound upon his conclusions. (4/18/19 Tr. at 66-112.)

Finally, Keefe availed himself of this State's public defense system, which adequately supplied for his defense. Keefe's private counsel entered into a Memorandum of Understanding with OPD "wherein the private attorneys agree that they will represent indigent clients at a set rate paid for by [OPD]." *Office of the Appellate Defender v. Engel*, 2010 MT 168, ¶ 14, 357 Mont. 182, 236 P.3d 609. OPD set the terms of its representation and paid $2,400 for Keefe's defense. Keefe had full knowledge of the scope of OPD's representation prior to

entering into a contractual defense arrangement with OPD and reaped the benefits from that arrangement. Keefe is entitled to nothing more.

II. Keefe received a resentencing hearing in accordance with *Miller*.

A. Standard of review

Criminal sentences are reviewed for legality. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 386 Mont. 224, 392 P.3d 607. This Court also reviews the district court's findings on which its sentence is based to determine whether they are clearly erroneous. *State v. Shults*, 2006 MT 100, ¶ 34, 322 Mont. 130, 136 P.3d 507.

B. Applicable law

Sentencing courts in Montana are directed to impose sentences to effectuate the following purposes:

> (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
>
> (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;
>
> (c) provide restitution, reparation, and restoration to the victim of the offense; and
>
> (d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

Mont. Code Ann. § 46-18-101(2). Additionally, sentencing courts may consider "any relevant evidence relating to the nature of and circumstances of the crime, the character of the defendant, the defendant's background history, mental and physical conditions, and any evidence the court considers to have probative force." *State v. Otto*, 2017 MT 212, ¶ 11, 388 Mont. 391, 401 P.3d 193.

The United States Supreme Court has imposed additional considerations for a sentencing court to take into account before imposing a life without parole sentence on a youth homicide offender. A sentencing court must conduct "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors" which is necessary to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735 (citing *Miller*, 567 U.S. at 483.) During the hearing, a sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480.

The Supreme Court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735. The *Montgomery* court explained that *Miller* "did not impose a formal factfinding requirement" on the sentencing court. *Id*. But to effectuate the substantive guarantee of *Miller*, a sentencer is prohibited from sentencing "a child

whose crime reflects transient immaturity to life without parole." *Id*. Instead, the sentence is reserved for the "rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 136 S. Ct. at 726 (citing *Miller*, 567 U.S. at 40).

Miller outlined five factors of a mandatory sentencing scheme that "prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 567 U.S. at 461-62.

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

Miller, 567 U.S. at 477-78. This Court concluded in *Steilman* that "*Miller*'s substantive rule requires Montana's sentencing judges to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole, irrespective of whether

the life sentence was discretionary." *Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313.

In summary, in considering whether to sentence a youth criminal defendant to life without parole, a Montana sentencing court must conduct a hearing, consider the sentencing policies of Montana, and adequately consider "youth and its attendant characteristics" as additional sentencing factors under *Montgomery* and *Miller*.

C. The district court adequately considered the *Miller* factors in resentencing Keefe.

Factor one

The district court found that Keefe was criminally sophisticated, developmentally mature, and assertive of his independence at the time of the homicides. The court observed that Keefe, who was 17 years old at the time of the homicides, was mature and "lived independently and away from his parents[.]" (4/18/19 Tr. at 175-76.) The court found that Keefe "knew the consequences of his actions, and he disregarded them." (*Id*. at 176.)

The court's findings are supported by substantial record evidence. Keefe admitted that he rehearsed his criminal activities in his mind before executing them and explained that he knew the consequences of his crimes and disregarded them. (Vol. X Tr. at 11; Doc. 7, Ex. 5 at 4.) Keefe explained that he moved to Great Falls to assert his independence and live his own life. (Vol. VIII Tr. at 1115.) Apart from Keefe's own statements, the findings are also supported by several

psychological assessments. (Doc. 56 at 16 (Dr. Page averred that there were "no questions of competence and that Mr. Keefe was well aware of how his actions would spawn their consequences."); Vol. I Tr. at 48 (Dr. Hossack explaining Keefe was not impulsive but instead had "considerable self-control and that what he does illegally, he does with the full knowledge of what will happen to him when he is caught but he just doesn't care.").) Keefe had the ability to, and did, consciously consider the consequences of his actions and make careful independent judgments. (*Id*.) Keefe was criminally sophisticated, developmentally mature, and independent at the time of the homicides. (Vol. X Tr. at 26; Vol. I Tr. at 103-04; PSI at 2-3.)

Factor Two

The court found no indication that Keefe was exposed to sexual abuse, familial drug abuse, or general abuse and neglect. (4/18/19 Tr. at 176.) The court further observed that there was "no evidence of significant developmental experiences, traumatic events, or other life-changing situations" that would provide sufficient mitigation for his triple homicides. (*Id*.) The court found that there was no evidence that Keefe himself had a substance use disorder. (*Id*. at 176-77.)

The court's findings are substantially supported by record evidence of Keefe's self-reporting in multiple assessments, along with psychological evaluations by Dr. Page and Dr. Hossack. (Doc. 7, Ex. 5 at 12; Vol. X Tr. at 23; Doc. 56 at 7; Vol. I Tr. at 51; *see* Doc. 56 at 16 (Dr. Page explaining that "It

does not appear that Mr. Keefe experienced abnormally strong, negative, or chronic influences that would have had an anomalous impact on his decision making . . . .").) Keefe himself reported a close relationship with his stepfather, repeatedly denied he was physically or sexually abused, and denied any chemical dependency problems. (Doc. 7, Ex. 5 at 12; Doc. 56 at 6-7.) As Dr. Page explained, "most, if not all, of [Keefe's] negative experiences occurred as a result of his own behaviors." (4/18/19 Tr. at 107.)

Keefe counters that he engaged in the homicides because of his family's dysfunction. Keefe argues his mother had a drinking problem, and he was neglected. Keefe points to incidents such as when his mother's previous boyfriend picked him up by the ears, or when his schoolteacher hit him. Keefe contends the district court ignored the evidence of his familial dysfunction. (Appellant's Br. at 38-39.) To the contrary, the court recognized that the testimony of Keefe's family life was "mixed" but nonetheless found no evidence of physical or sexual abuse, substance use disorder, traumatic events, or developmental experiences. (4/18/19 Tr. at 176.) Thus, the court recognized that while there could have been some dysfunction in Keefe's family, it was not to the extent to provide a mitigating justification for Keefe's behavior. *Compare to Miller*, 567 U.S. at 478 (observing in mitigation that the petitioner had a physically abusive family life, both the petitioner and his parents abused drugs and alcohol, the petitioner was high on

drugs during the offense, and the petitioner had tried to kill himself multiple times since kindergarten).

But even assuming that Keefe did have a dysfunctional family life, that is not the end of the inquiry. Rather, the question is whether Keefe could "extricate himself" from the dysfunction. *Miller*, 567 U.S. at 477. The testimony in this regard is clear. Keefe learned independent living skills from the Last Chance Group Home, moved away from his family in Helena when he was almost 18, and was living independently in Great Falls before he committed the triple homicides. (Vol. I Tr. at 103-04; Vol. VIII Tr. at 1115.) Keefe's homicides were not an expression of an inability to extricate himself from his family.

Factor Three

As *Montgomery* and *Miller* indicate, a major factor in the analysis is the youth's characteristics in light of the nature of the crime. The Eighth Amendment forbids a sentence of life without parole for a youth whose "*crime reflects* a transient immaturity[.]" *Montgomery*, 136 S. Ct. at 735 (emphasis added).

The 14-year-old petitioners serving mandatory life without parole sentences in *Miller* help to elucidate this factor. *Miller*, 567 U.S. at 465. The first petitioner participated in a store robbery with a group of friends. *Id*. One of the petitioner's friends brought a gun to the robbery. *Id*. When the clerk threatened to call the police, the petitioner's friend shot and killed the clerk. *Id*. at 466. The petitioner

was convicted of felony murder for his involvement in the crime. *Id*. The second petitioner and a friend attempted to rob a drug dealer (who they had just done drugs with and who supplied drugs to the petitioner's mother) while he was sleeping, but the drug dealer woke up and grabbed the petitioner's throat. *Id*. at 467-68. The petitioner and his friend then beat the drug dealer with a baseball bat and later set his trailer on fire, killing him. *Id*. at 468.

The *Miller* court addressed the danger from mandatory sentencing which foreclosed comparisons between "the 17-year old and the 14-year-old" and the "shooter and the accomplice[.]" *Miller*, 567 U.S. at 477. The court observed that the first petitioner "did not fire the bullet that killed [the store clerk]; nor did the State argue that he intended her death." *Id*. at 478. The court observed that the second petitioner was "high on drugs and alcohol consumed with the adult victim[,]" had previously tried to kill himself multiple times, and had a physically abusive family life. *Id*. at 478-79.

Here, unlike the petitioners in *Miller*, Keefe: (1) was almost the age of majority at the time of the homicides; (2) was not an accomplice nor did he commit the homicides under peer pressure from others; (3) was sober during the homicides; (4) committed the homicides alone; and (5) killed three people, rather than playing a contributory part in killing one person. The district court observed that Keefe "murdered three innocent people in cold blood, execution style."

(Doc. 66 at 8; 4/18/19 Tr. at 178.) The court found that the nature of the offense was particularly egregious because Keefe "did not stop with one victim, he killed and killed and killed." (4/18/19 Tr. at 178.)

The court's findings were supported by substantial facts established at trial. As with his other crimes, Keefe planned his crime in an isolated area and acted alone. But this time, he brought a high-caliber gun with him. Rather than exercising his option of leaving undetected after he dropped the book, Keefe stalked his victims, killed each person from behind, and did not stop after he killed Dr. McKay. Thus, Keefe did not kill out of juvenile impulsiveness, reactivity or surprise, impetuosity, or some intervening circumstance, but instead made the conscious decision to kill again and again. Keefe later bragged about the homicides to a friend, showing no remorse or emotion. There is nothing mitigating about the nature of Keefe's crime.[7]

Factor Four

Keefe argues the district court failed to consider whether he might have been charged and convicted with a lesser offense if not for the incompetencies of youth, despite Keefe's failure to raise and argue this factor in potential mitigation at

[7] Keefe persists that the district court erred in failing to consider his accomplice story. Keefe cites no authority that a sentencing court must consider anything other than facts established and proven beyond a reasonable doubt at trial.

sentencing. In addition to Keefe's waiver of the issue, "*Miller* did not impose a formal factfinding requirement[]" on the sentencing court. *Montgomery*, 136 S. Ct. at 735. And the district court explained that it did take into account this factor. (4/18/19 Tr. at 174-75.) But to the extent this Court would find a formal finding necessary, it is clearly implied in the record. Keefe was 18 years old by the time he was arrested for the homicides on March 5, 1986, thus, was already at the age of majority. (Vol. VIII Tr. at 1113-14.) Previously, Keefe had already committed 50 known crimes and was highly competent with the criminal justice system. (Vol. XI Tr. at 11, 29; *see* PSI at 2-3.) The record does not indicate that the prosecutor intended to charge Keefe with lesser offenses than deliberate homicide, especially given the circumstances of Keefe's offense. Keefe did not enter into a plea agreement and went to trial. Finally, the original trial court confirmed Keefe's knowledge of his rights and his understanding of the proceedings and the charges against him. (Vol. II Tr. at 3-4, 10-11.)

Factor Five

Keefe cannot reasonably argue he had any prospects of rehabilitation at the time of his original sentencing. Keefe had an antisocial personality disorder, an extensive criminal history, had failed at every youth treatment facility, and had just committed three homicides. (Vol. XI Tr. at 28-30.) Instead, Keefe argues the court improperly failed to consider the evidence of his prison rehabilitative efforts.

(Appellant's Br. at 27-33.) Keefe argues he is a "model inmate" and has a "spotless prison record" that was motivated only by his need for personal improvement. (Appellant's Br. at 31, 32.)

While the Supreme Court has directed sentencers to take into account the "possibility of rehabilitation" in examining a juvenile's youthful characteristics, *see Miller*, 567 U.S. at 477-78, it has not addressed whether post-incarceration behavior is relevant for *Miller* resentencing hearings. Keefe's belief that *Montgomery* clarified the issue is mistaken. The *Montgomery* Court observed that a state legislature could remedy *Miller* violations by permitting juvenile homicide offenders currently serving life without parole sentences to be "considered for parole, rather than resentencing them." *Montgomery*, 136 S. Ct. at 736 (citing Wyo. Stat. Ann. § 6-10-301(c) (allowing juveniles to be parole eligible after 25 years). In that context, the *Montgomery* court explained the type of prison rehabilitative evidence that would be helpful. *See id*. Keefe is correct that the Ninth Circuit considers post-incarceration rehabilitative efforts for *Miller* resentencing hearings. *See United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019.) But Keefe does not identify how the plain language of *Miller* or *Montgomery* or any authority from this Court requires as much at resentencing.

Regardless, the district court allowed Keefe to detail his prison rehabilitative efforts, weighed and considered the evidence, and concluded that—to the extent

such evidence was relevant—Keefe failed to show mitigation. (Doc. 66 at 9.) During Keefe's incarceration, Keefe actually attempted to escape prison and was also disciplined for having a shank in his possession, stealing, and drinking and making alcohol. (4/18/19 Tr. at 159; PSI at 4-5.) Keefe argued at resentencing that he was rehabilitated because he participated in a dog training program, was good at accomplishing tasks, and got along with prison staff. (Doc. 59 at 13-14; *see* 4/18/19 Tr. at 119-147.) But Keefe's prison character and behavior is wholly consistent with his character profile as a youth before he committed the homicides.[8] That Keefe participated in programs he had an innate interest in does not alone show rehabilitation. Unlike in *Briones*, where a petitioner was convicted of felony-murder for his role as getaway driver, but spent 18 years in prison

[8] **On Dog Care**: Doc. 7, Ex. 5 "PSI" at 13 (Keefe's grandparents explained that Keefe "loved animals" and "had special skills in communicating with animals."); Doc. 7, Ex. 5 "Youth Evaluation Program Report" (explaining that Keefe was "very kind to a staff member's dog and was pleased to be allowed to walk the dog.") **On Work:** Doc. 7, Ex. 5 "Youth Evaluation Program Report" (a staff member explained that Keefe "worked hard in [his chores] so his work was done, as good or better than the youth he disliked and criticized."); Doc. 7, Ex. 5 "Yellowstone Boys and Girls Ranch Monthly Report" at 1 (assessment averring that Keefe spent a "good deal of time" doing maintenance chores and was "always on time and adjusting to the crew well.") Doc. 7, Ex. 5 Yellowstone Boys and Girls Club Youth Assessment Report at 11 ("Within the classroom, [Keefe] was a good worker.") **On Relationships:** Doc. 7, Ex. 2 at 5 (Keefe is "gregarious" and "seeks companionship, is outgoing, and sociable."); Doc. 7, Ex. 5 at 8 (Dr. Rich describing Keefe as "charming with adults" but also "manipulative[.]").

"without a single infraction of prison rules," *Briones*, 929 F.3d at 1061-62, Keefe's evidence presented here fails to demonstrate that he is no longer the person who brutally executed three people.

Further, as the district court reasoned, even if it was proper to consider Keefe's rehabilitative efforts in prison, Keefe's lack of remorse, ideations through his tattoos, and changing stories of his offense showed that he was not rehabilitated. (Doc. 66 at 9.) Since 1986, Keefe's version of his crime has morphed from him simply stating he was doing errands on the afternoon of the offense, to him accepting responsibility for killing the McKays, to now claiming he was just an accomplice to a now-deceased person and another unidentifiable person. Further, Keefe's decision to tattoo his body with the grim reaper, three skulls, and the phrase "guilty until proven innocent" speaks to his ideations of pride in himself and unfair treatment. Keefe's lack of remorse is strong evidence that he is not rehabilitated. *See e.g. State v. Champagne*, 2013 MT 190, ¶ 50, 371 Mont. 35, 305 P.3d 61 (a sentencing court may rely on lack of remorse as a sentencing factor when there is affirmative evidence of lack of remorse in the record). And Keefe's character and physical characteristics are certainly relevant evidence that a district court may discretionarily consider. *Otto*, ¶ 11. To the extent Keefe's prison character and behavior is relevant, it is far from "spotless" and—by Keefe's own admission—his recent behavior was motivated by advice

from his lawyers, not by a personal need for improvement. (4/18/19 Tr. at 39-40.) Keefe fails to show evidence of rehabilitation.

The district court properly and extensively considered Keefe's youth and its attendant characteristics. But if this Court concludes the court failed to adequately consider Keefe's mitigating characteristics of youth, the illegal sentence likely cannot be remanded for correction. Thus, the proper remedy is remand to the district court for resentencing. *See State v. Day*, 2018 MT 51, ¶ 11, 390 Mont. 388, 313 P.3d 267 (collecting cases). This Court should decline Keefe's unsupported suggestion to give him an automatic parole hearing. (Appellant's Br. at 26.) Parole hearing exceptions for juvenile offenders serving life without parole sentences are neither a constitutional requirement under *Montgomery* and *Miller* nor a policy change or directive from this state's Legislature.

Keefe is permanently incorrigible and irreparably corrupt

As the *Montgomery* court explained, "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those *whose crimes reflect* 'irreparable corruption.'" *Montgomery*, 136 S. Ct. at 726 (emphasis added). Keefe's criminality and antisocial behavior was fully entrenched by the time he committed the homicides. Keefe had already committed around 50 crimes without remorse and with full knowledge of the consequences. Keefe's deliberate and repeated execution-style killings show that his actions were not the product of

impulsivity, impetuosity, or immaturity. Although the State does not concede that permanent incorrigibility or irreparable corruption are formal facts that even need to be proved under *Montgomery* and *Miller*, the district court's findings are supported by the record. *See Montgomery*, 136 S. Ct. at 735 ("*Miller* did not require trial courts to make a finding of fact regarding a child incorrigibility.")[9]

D. Keefe's *Apprendi* argument also fails.

Keefe argues the district court should have convened a jury to decide whether he was irreparably corrupt or permanently incorrigible, which he characterizes as a fact used to "increase [his] punishment" and a penalty enhancement under *Apprendi v. New Jersey*, 530 U.S. 446 (2000). (Appellant's Br. at 40-41.) The *Apprendi* Court formulated the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Here, in denying Keefe's presentencing motion, the district court accurately observed that *Montgomery*, *Miller*, and *Steilman* did not establish any presumption

[9] **Pending Supplemental Authority** – In the next term, the Supreme Court will resolve whether the Eighth Amendment prohibits a sentence of life without parole for juvenile homicide offenders absent a specific finding of permanent incorrigibility. *Jones v. Mississippi*, 18-1259. Although the court here ***did*** make such a finding, it remains an open question whether this finding is even required under *Miller*.

that a youth is not irreparably corrupt, which must be overcome to impose a life sentence without parole. (Doc. 53 at 7.) As explained above, whether a formal factual finding of irreparable corruption is even required under *Miller* is unresolved, and the Supreme Court's forthcoming opinion on the issue likely cautions against a sweeping determination that it is an ultimate fact that increases Keefe's prescribed sentence and must be submitted and proved to a jury. *See* n.9.

Additionally, this Court has already concluded that "the statutory maximum punishment for the crime of deliberate homicide when the death penalty is not sought, for the purposes of *Apprendi*, is life imprisonment without the possibility of parole." *State v. Garrymore*, 2006 MT 245, ¶ 32, 334 Mont. 1, 145 P.3d 946; *see* Mont. Code Ann. § 45-5-102(2). That *Montgomery* and *Miller* were decided after *Garrymore* is of no significance because the Supreme Court's opinions never directed state courts to convene a jury to conduct a finding of irreparable corruption, nor did they determine such a finding is an aggravating factor that increases sentences beyond the statutory maximum. To the contrary, in compliance with *Miller*, this Court has directed "Montana's sentencing judges" to "adequately consider the *mitigating* characteristics of youth set forth in the *Miller* factors[.]" *Steilman*, ¶ 17 (emphasis added.) While a court must consider *Miller* factors in potential mitigation, neither this Court nor the Supreme Court has prohibited life without parole sentences for juvenile homicide offenders, which are

nonetheless within the statutory range for deliberate homicide. Keefe's sentence was not based on aggravating or enhancing facts which could have increased his punishment, nor did Keefe have a constitutional entitlement to a parole-eligible sentence. *See* Mont. Code Ann. § 46-1-401 (statutory codification of *Apprendi*); Mont. Code Ann. § 46-18-303 (defining aggravating circumstances).

Finally, in Montana, "[s]entencing courts have exclusive authority to impose criminal sentences." *State v. Brotherton*, 2008 MT 119, ¶ 11, 342 Mont. 511, 182 P.3d 88. Montana's statutory sentencing scheme also "separates the trial phase of a criminal prosecution from the penalty or sentencing phase." *State v. Betterman*, 2015 MT 39, ¶ 19, 378 Mont. 182, 342 P.3d 971 (citing Mont. Code Ann. §§ 46-16-103, 46-18-103). Here, a sentencing court is fully within its authority to competently weigh potentially mitigating sentencing factors and sentence defendants within the statutory range. Mont. Code Ann. § 46-18-101(3)(d). In fact, Montana sentencing courts routinely make factual findings in support of a criminal sentence, which is nonetheless in compliance with *Apprendi*. *See Garrymore*, ¶¶ 16-34 (finding parole restrictions constitutional under an *Apprendi* analysis). The Supreme Court recently explained that *Apprendi* "carefully avoided any suggestion that 'it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.'"

McKinney v. Arizona, 140 S. Ct. 702, 707 (2020) (*citing Apprendi*, 530 U.S. at 481) (emphasis in original). *Apprendi* is inapplicable to Keefe's resentencing.

III. Keefe was not sentenced based on misinformation.

The prosecutor asked Dr. Page about the term "rehabilitation" and its meaning. (4/18/19 Tr. at 87.) Dr. Page explained:

> **DR. PAGE**: I've looked—in fact, I've spent some time not only online but discussing this question with a number of attorneys over the past month, including OPD lawyers, who have access to some of the best—
>
> **DEFENSE**: Objection, Your Honor. We've not had any access to information he's about to rely on.
>
> **COURT**: Overruled.
>
> **DR. PAGE**: That we could not find an actual operational, understandable definition of what rehabilitation is. We assume that it is a hypothetical declaration of somebody who has been cured of the problems that they initially had.

(*Id*. at 87-88.) Dr. Page offered no ultimate conclusion on whether Keefe had been rehabilitated, reasoning that he could not do so without an "absolute operational definition" of the word. (*Id*. at 88-89.)

"Montana recognizes that due process applies to sentencing, but the defendant's liberty interest during sentencing is less than that interest during trial." *State v. Krantz*, 241 Mont. 501, 512, 788 P.2d 298, 305 (1990). Nonetheless, due process guards against "a sentence predicated on misinformation" and requires that

the defendant have an opportunity to "explain, argue and rebut any information" that may lead to a deprivation of life or liberty. *State v. Simmons*, 2011 MT 264, ¶ 11, 362 Mont. 306, 264 P.3d 706.

Keefe raises a non-issue in arguing he should have had access to the information that Dr. Page relied upon. The point that Dr. Page was making was that he did not have the information he needed to make an ultimate conclusion as to whether Keefe had been rehabilitated. Dr. Page explained that he had consulted various stakeholders to find an objective definition that he could apply to his analysis, but found none. Dr. Page did not rely on any of these discussions in offering an opinion, because he did not find an answer to his question. Nor did the district court rely on Dr. Page's digression for the purposes of sentencing. There is no evidence in the resentencing record that the district court deprived Keefe's liberty because of Dr. Page's lack of an opinion on a subject that he had insufficient knowledge to opine upon.

IV. Plain error review is unwarranted for Keefe's claims of misconduct and bias.

This Court refuses to consider issues or arguments raised for the first time on appeal. *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. In order to properly preserve an issue or argument for appeal, a party must first timely

raise an objection or argument in the district court. *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506.

Keefe did not timely object or raise any argument of prosecutorial misconduct or judicial bias during the resentencing hearing. (4/18/19 Tr. at 49, 50, 86, 157.) Rather, after the district court entered judgement and directed the clerk to close the case file—(Doc. 66 at 12)—Keefe raised the claims in a "Motion for Reconsideration before a New Judge[,]" adding outside-the-record exhibits. (Doc. 68.) The court denied the motion, reasoning that Keefe "improperly attempts to inject new theories and evidence into the record that Petitioner could have presented at the April 18, 2019 sentencing hearing." (Doc. 69 at 1.) The court noted that motions for reconsideration in the district court do not exist under Montana law and declined to further entertain the motion. (Doc. 69 at 2.)

Because Keefe failed to properly raise his claims, this Court may only review them under the plain error doctrine. Keefe bears the burden to show that failing to review his claims may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. West*, 2008 MT 338, ¶ 23, 346 Mont. 244, 194 P.3d 683. Notably, Keefe fails to ask this Court to invoke plain error review. If any of Keefe's claims reasonably had merit, Keefe

should have raised them at the sentencing hearing rather than in an improper post-judgment motion.

Moreover, Keefe cannot meet his burden to show that plain error is warranted. Keefe does not raise any cognizable prosecutorial misconduct claims. Keefe avers that the prosecutor erred in describing his accomplice story of the offense as "new." But the prosecutor did not err because the story was "new" as it is nowhere in the trial record and raised for the first time in the resentencing record. Even assuming error, Keefe fails to show prejudice. Keefe's accomplice story was irrelevant because the court explained it relied on the facts of Keefe's offense that were established at trial in examining the *Miller* factors. Keefe also argues the prosecutor said "inflammatory" commentary on Keefe's tattoos. (Appellant's Br. at 48-49.) While arguing the prosecutor should not have commented on the tattoos' potential meaning, Keefe offers his own opinion that the three skulls "bear little resemblance to human skulls[.]" (Appellant's Br. at 49.) The evidence of Keefe's tattoos was in the PSI and considered by the district court, and further explained by the testimony of Dr. Page. Regardless, the district court found them "not determinative" of the *Miller* factors. (Doc. 66 at 9.) While the district court considered the tattoos as valid sentencing considerations, there is no evidence in the record that the court was improperly inflamed by them.

Keefe's claim of judicial bias similarly fails. Keefe's complaints are largely based upon the district court's rulings. However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *State v. Howard*, 2017 MT 285, ¶ 24, 389 Mont. 356, 405 P.3d 1263 (citation omitted). Indeed, "baseless inquiries into a judge's impartiality" because of "adverse rulings" results in "chaos" and undermines confidence in the judiciary. *Boland v. Boland*, 2019 MT 236, ¶ 40, 397 Mont. 319, 450 P.3d 849. Keefe's claims not based on the court's judicial rulings fail too. First, Keefe's claim that the court was "signaling" it had a decision prepared is wholly speculative and unsupported in the resentencing transcript. (4/18/19 Tr. at 8.) Next, the court's allocution about the nature of the offense and its impact on the Great Falls community was necessary and appropriate under the sentencing policies of Montana. Mont. Code Ann. § 46-18-101(1)(b) (sentencing policy is to "protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders. . . ."). Finally, Keefe's insistence that the sentencing court was required and failed to consider "facts" of the offense not established at trial not only rings hollow for lack of legal support but also does not evince judicial bias.

CONCLUSION

This Court should affirm Keefe's conviction and sentence.

Respectfully submitted this 27th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 11,998 words, excluding certificate of service and certificate of compliance.

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