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STATE OF MONTANA
Case Number: DA 19-0368

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

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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

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A. Standard of Review

Respondent maintains that the Court should review for abuse of discretion because there is no constitutional requirement to provide the experts at issue. Resp. 23. But constitutional claims are reviewable de novo. *See State v. Haldane*, 2013 MT 32, ¶17, 368 Mont. 396, 300 P.3d 657. However, even if reviewed for an abuse of discretion, Keefe should prevail.

B. The District Court Deprived Keefe of the Tools Necessary to Build His Defense

The constitution limits imposition of a sentence of life without the possibility of parole (LWOP) to juveniles who are irreparably corrupt. That protection is inextricably intertwined with a defendant's mental status. As a result, expert assistance is a necessary tool for presenting such a defense. The District Court deprived Keefe of expert assistance, including his own expert or experts, to address this question. Moreover, the court's expert did not assist Keefe in preparing the defense.

Respondent posits that because Keefe did not allege a "mental disease or defect," no expert assistance was required. Resp. 24. Respondent is wrong on the facts and the law. On the facts, it was the *absence* of a defect that Keefe sought to present. That is, his claim was that the offense reflected "transient

immaturity," as it does for most juveniles, as opposed to "irreparable corruption," a profound mental defect. Dkt. 47 at 4-5. There can be no serious argument about whether Keefe's "'mental condition' was 'relevant to…the punishment he might suffer." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1798 (2017) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985)). It was.

Respondent is also wrong on the law, when arguing that *Ake*'s protections have no application outside insanity defenses in capital cases. Resp. 24-25. The courts do not so confine the protections due process provides. After all, "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw material integral to the building of an effective defense." *Ake*, 470 U.S. at 77.

With the protection drawn thus, it is no surprise that the cases applying it do not adopt the Respondent's narrow interpretation. *See, e.g.*, *United States v. Chase*, 499 F.3d 1061, 1066 (9th Cir. 2007) (due process requires an expert where defendant faced narcotics charges and sought to contest quantity of drugs). The Supreme Court has explained it was "*Ake* error" to deny a capital defendant a psychiatrist where the prosecution has put his future dangerousness at issue, a construct analogous to "irreparable corruption." *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995).

Likewise, courts commonly find counsel ineffective for failing to secure expert assistance even where capital charges or a sanity defense are not at issue.[1] *See, e.g.*, *Sanders v. Ratelle*, 21 F.3d 1446, 1460 (9th Cir. 1994) (ballistics expert); *Ibar v. State*, 190 So.3d 1012, 1018-19 (Fla. 2016) (facial recognition expert). It follows that the defendants in these cases were entitled to the expert assistance in question. Immanuel Kant, *Critique of Pure Reason* 473 (1781) ("The action to which the 'ought' applies must indeed be possible.").

Respondent's reliance on *State v. Hill*, 2000 MT 308, 302 Mont. 415, 14 P.3d 1237 is inapt. There, the defendant disavowed any defense contingent on the presence (or absence) of a mental disease or defect, offering that a "mental disease or defect *will not be at issue in this case*." ¶26. Unlike *Hill*, the required assessment of Keefe's eligibility for the sentence the court imposed placed his "mental condition" at the heart of "his criminal culpability and…punishment he might suffer." *Ake*, 470 U.S. at 80.

[1] Even if this Court adopts Respondent's premise that due process protections should only extend to cases posing the harshest punishments, (Resp. 25), this case qualifies because Keefe faces LWOP for a juvenile offense. *Miller v. Alabama*, 567 U.S. 460, 475 (2012) ("In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.").

Even if there had been doubt on that score, the District Court placed it at issue when it appointed Dr. Robert Page to assess Keefe's mental status, including his capacity for change.[2] Dkt 46. Respondent argues this appointment obviated any need for further expert assistance. Resp. 26. To the contrary, his appointment was inadequate because Page was not appointed to assist in "evaluation, preparation, and presentation of the defense." *McWilliams*, 137 S. Ct. at 1793 (internal alternations and quotations omitted). As in *McWilliams*, Page was "never ordered" to assist the defense, and no expert assistance was otherwise provided. *Id.* at 1801. Thus, his appointment did not meet the Constitution's demands.

Even if this Court disagrees, it should grant relief on the question left unaddressed in *McWilliams*: whether the defense is entitled to its own expert. As that Court recognized, *Ake* "seems to foresee that consequence." *Id.* at 1799. Providing for a due process guarantee of partisan presentation of evidence is also consistent with the "proper functioning of the adversary process."[3] *Ake*, 470 U.S. at 77. The Ninth Circuit has so held, and this Court

[2] Respondent obscures the point, but the record should be clear: Page was appointed only after Keefe requested expert assistance. Dkt. 46 at 1.

[3] Counsel were left with questions about Page's methodology, but was unable to address them, lacking an expert. For example, Page had Keefe pretend to be a teenager and answer questions from a personality test. Dkt.56 at 11-13. The reliability of such an undertaking can only be answered through the assistance of an expert.

should do likewise. *See Smith v. McCormick*, 914 F.2d 1154, 1156-60 (9th Cir. 1990).

Respondent's attempts to distinguish *United States v. Pete*, 819 F.3d 1121 (9th Cir. 2016) are unavailing. Resp. 27. First, although it is true that *Pete* concerned the federal statutory right to expert assistance, there is a substantial similarity between the federal statutory standard—reasonable necessity—and the constitutional standard, the "basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Although in *Pete* the court had not appointed its own expert, the case addresses at length the "necessity" of having an expert in *Miller* cases and having an expert review the defendant's development after the imposition of the original sentence. *Pete*, 819 F.3d at 1130-33. As discussed *infra*, the court below refused to consider Keefe's evidence on that subject and did not ask its expert to so inquire.

Respondent suggests that by accepting appointed counsel,[4] Keefe waived any claim that that Office of the State Public Defender (OPD) failed to provide what the Constitution requires. Resp. 28-29. Such a framework would eviscerate the courts' responsibility to ensure that the "right to counsel

[4] Despite being "appointed," counsel have received no compensation either from Keefe or anyone else for their representation, making Respondent's claim that Keefe "hired" counsel misleading. Resp. 21.

is the right to effective assistance of counsel," and place protection of that right wholly in the hands of OPD. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). It is the courts' obligation to ensure that the trials before them are constitutional.

The District Court declined to undertake that responsibility when, aware that OPD had declined to provide expert assistance, it deferred to OPD as "more than capable of determining and approving necessary resources." Dkt. 53 at 11. This failure to exercise discretion "is, in itself, an abuse of discretion" requiring reversal. *State v. Weaver*, 276 Mont. 505, 509, 917 P.2d 437, 440 (1996).

Keefe, facing a sentence akin to death, sought expert assistance in making his case that he was not irreparably corrupt. The District Court declined even to address his requests, abdicating its responsibility to OPD, violating his state[5] and federal rights and requiring reversal.

II. The District Court Violated *Miller v. Alabama*

The District Court replaced the "central intuition [of *Miller*] that children who commit even heinous crimes are capable of change," with

[5] Respondent has not addressed Keefe's state law claims. Br. 22. But forcing Keefe to face a sentence "akin to the death penalty" while only affording him the protections an adult defendant facing life in prison would receive, violates Montana law. Br. 22.

outcome-driven rulings that ultimately denied Keefe the protections afford to him by state and federal law. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016); *see* U.S. Const. amends. VI, VIII, XIV; Mont. Const. art. 2, § 17; Mont. Code Ann. § 46-19-102(2)(d), (3)(i). The District Court failed to apply *Miller* faithfully, and rejected the procedural protections necessary to ensure *Miller*'s standard that recognizes "that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735. Indeed, the record, which included unrebutted evidence of Keefe's rehabilitation, provided insufficient evidence to support a finding of irreparable corruption.

Respondent fails to square the District Court's analysis with these mandates and misconstrues the record. Reversal is required.

A. The District Court Failed to Meaningfully Consider How the Mitigating Aspects of Youth Affected Keefe

The District Court failed to meet its obligation to consider the mitigating aspects of youth. *See Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). The District Court refused to consider probative evidence Keefe's rehabilitation; selectively accounted for Keefe's age without reference to *Miller*'s scientific and legal principles; refused to recognize the effects of childhood trauma; and failed to consider how Keefe's youth affected his ability to assist in his own defense.

i. The Resentencing Court Held Keefe's Actual Rehabilitation Is Irrelevant to Whether He Is Capable of Rehabilitation

The constitution forecloses a sentence of life without the possibility of parole for all but the rare juvenile offender who is incapable of rehabilitation. *Montgomery*, 136 S. Ct. at 735. State law permits consideration of rehabilitation at sentencing. Mont. Code Ann. § 46-18-101(2)(d), (3)(i). Yet the District Court held Keefe's proffered rehabilitation irrelevant because it was post-offense. Dkt. 66 at 2; Tr. 14:2-25. Simultaneously, the court credited speculative theories about his lack of remorse and rehabilitation, relying on the State's post-offense information. Dkt. 66 at 8-9. Having found Keefe's evidence of rehabilitation irrelevant, the District Court necessarily failed to meaningfully consider Keefe's growth, which was recognized by the prison's long-time warden and the District Court's own expert and was reflected in extensive evidence Keefe offered. Respondent repeats these mistakes, ignoring the key constitutional question—whether Keefe is capable of rehabilitation—and making arguments foreclosed by law.

State law provides for "judicial discretion to consider aggravating and mitigating circumstances." Mont. Code Ann. § 46-18-101(3)(d); *see also Pepper v. United States*, 562 U.S. 476, 490 (2011) (noting sentencers should have "the fullest information possible concerning the defendant's life and characteristics," including post-offense rehabilitation). The District Court

reversibly erred by holding that it had no discretion to consider post-crime conduct. *See Weaver*, at 509. Despite its long recitation of state law, Respondent does not explain why the District Court did not err, and this Court should reverse on this basis alone (and also apply principles of constitutional avoidance). *See Donaldson v. State*, 2012 MT 288, ¶10, 367 Mont. 228, 231, 292 P.3d 364, 367.

Like the District Court, Respondent dismisses the U.S. Supreme Court's discussion of post-offense behavior as relevant only to a parole board. Tr. 178:21-23. This is wishful thinking. The Eighth Amendment requires sentencing consideration of post-offense rehabilitation, a point Respondent has not addressed. *See State v. Smith* (1993), 261 Mont. 419, 434, 863 P.2d 1000, 1009 (citing *Skipper v. South Carolina*, 476 U.S. 1 (1986)).

Moreover, understood in context, that discussion in one of the final paragraphs of *Montgomery*, refers to evidence at a forthcoming resentencing proceeding. The passage referred to Montgomery's work and athletic accomplishments in prison. In the preceding passage, the Court had concluded that Montgomery was entitled to challenge the legality of his sentence, despite his conviction having become final long before *Miller*. Although the remedy in *Montgomery* was not parole eligibility, such a

remedy would also resolve the case (as it would here) because a parole hearing could "ensure[] that juveniles whose crimes reflect only transient immunity and who have since matured-will not be forced to serve a disproportionate sentence[.]" *Montgomery*, 136 S. Ct. at 736.[6] The Supreme Court, declining to comment on the veracity of the evidence of Montgomery's rehabilitation, left it to a factfinding court—the resentencing court—to address that evidence in the first instance. Thus, it strains credulity to suggest that the passage in *Montgomery* refers to a parole hearing.

Likewise, in its attempt to discredit the relevance of actual rehabilitation, Respondent distorts *Miller*'s use of the phrase "possibility of rehabilitation," and, in so doing, glosses over the Eighth Amendment's core requirement. Resp. 39. In *Miller*, the language of "possibility" was appropriate given that the Court was describing how a prospective *Miller* hearing should be performed at trial—not at a resentencing under *Miller*. Critically, *Miller* and *Montgomery* embrace the principle that the developmental maturity needed to fully appreciate the consequences of one's actions requires the youth to grow. *Montgomery*, 136 S. Ct. at 735. It is only rare youth incapable of growth who are eligible for LWOP. *Id.* Understood

[6] At the time of the Supreme Court's decision, Louisiana was continuing its pursuit of LWOP for Montgomery.

correctly, it is unremarkable that the Court did not refer to actual evidence of rehabilitation in *Miller* because that evidence would be presented at a hearing before the juvenile offender becomes an adult.

Evidence of actual rehabilitation is more important in a case like Keefe's, where a *Miller* hearing is first held decades after the original conviction. The Ninth Circuit's opinion in *United States v. Briones,* 929 F.3d 1057 (2019) (en banc), like here, dealt with a decades-old conviction, and, like here, the defendant in *Briones* presented substantial evidence concerning his rehabilitation. 929 F.3d at 1066-67. The court reasoned the rehabilitation evidence was "precisely the sort of evidence of capacity for change that is key to determining whether a defendant is permanently incorrigible." *Id.* at 1066-67; *see also Pete*, 819 F.3d at 1131 ("[A]t a resentencing, a district court should consider how the passage of time, including the defendant's maturation and personal development in the interim, affect such sentencing factors as likelihood of rehabilitation and recidivism."). Respondent concedes that *Briones* requires consideration of post-offense rehabilitation efforts in a *Miller* hearing. Resp. 39. Like *Briones*, the District Court's failure to adequately consider Keefe's rehabilitation requires reversal.

The evidence of Keefe's rehabilitation is compelling. Br. 31-33; *see also* Sentencing Mem. 8-18. Keefe's history, as MSP Warden Mike Mahoney testified, shows that while he at first struggled to serve his term as a teenager in an adult prison,[7] eventually Keefe grew up to use his time constructively and build an atypically strong record. Tr. 137:14-19. Indeed, Keefe was able, with time, to get away from negative influences. Tr. 136:14-25. Mahoney's testimony about Keefe's growth was supported and reinforced by the record.

Respondent minimizes this rehabilitation, citing the testimony that a fellow Pine Hills resident, George Smith, made at trial in 1986 in describing Keefe as remorseless. Resp. 8. Not only is this testimony decades old, it was contradicted by the State's investigator. Tr. Vol. VII 1588-89. Moreover, the testimony may better be understood as a youthful Keefe struggling to make sense of the harm he had wrought. *See Graham v. Florida*, 560 U.S. 48, 79, (2010) ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.")

Finally, Respondent argues that "new" details of the crime as disclosed by Keefe undermine his acceptance of responsibility. Resp. 41. At best, this argument is misleading as the State's own investigator found that Keefe had

[7] The record revealed an assault that Keefe faced as a young inmate. App. at A-159.

been sharing these details for at least 15 years. Dkt. 68, Ex. 2. Further, the record contradicts this argument, as noted in a 2010 comment from a prison official: "[Keefe] has shown genuine and spontaneous remorse for [the] crime." Dkt. 59 at A-181. As Keefe stated at the resentencing hearing: "I take full responsibility for what happened." Tr. 154: 5-7; *see also Sentencing. Mem.* at 15-16.[8]

Turning a blind eye to the rehabilitation evidence (which by definition concerns Keefe's eligibility for the sentence he is serving) was erroneous and requires reversal under state and federal law.

ii. The District Court Failed to Consider the Hallmark Features of Keefe's Age

The District Court's analysis side-stepped its obligation to consider Keefe's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 476. Courts must avoid "minimiz[ing] the relevance" of youth and do more than "merely note age as a mitigating circumstance without further discussion." *Tatum v. Arizona*, 137 S. Ct. 11, 12-13 (2016) (Sotomayor, J., concurring). The District Court erroneously minimized

[8] Respondent insists that Keefe's record of rehabilitation and improvement is manufactured at the direction of undersigned counsel. Resp. 41-42. Keefe's lengthy record of rehabilitation predates undersigned being admitted to the bar, much less making Keefe's acquaintance. Tr. 52:5-9.

Keefe's chronological age, conflating maladaptive behavior with maturity. Br. 33-35.

Respondent fails to identify how the Court's analysis satisfies *Miller*, instead downplaying the importance of Keefe's age. It claims that Keefe "moved to Great Falls to assert his independence," and that he "was independent and learned independent-living skills while residing at Last Chance Group Home," suggesting Keefe's maturity. Resp. 32. But this argument distorts the record concerning Keefe's life during this time. Keefe was only at Last Chance for about six weeks to learn "independent living skills." *Id.* at 41. And the same witness who described Keefe's independent skills, also described how he saw himself as "impulsive." Tr. Vol. VII 45. Further, shortly after his short stay at Last Chance Keefe lived for two-and-a-half weeks in an abandoned house close enough to his parents to connect a cord to their house for electricity. Tr. Vol. VII 93. Rather than showcasing independence, the record reveals the teenaged Keefe's "immaturity, recklessness, and impetuosity." *Montgomery*, 136 S. Ct. at 733.

The court's analysis ignores how children are "constitutionally different" or evaluate how Keefe had these characteristics. *Miller*, 567 U.S. at 471. Respondent fails to explain how the District Court met the Eighth Amendment's demands.

iii. The District Court Disregarded Keefe's Experience of Abuse and Neglect

The District Court further erred when it disregarded Keefe's abuse and neglect because such evidence of interference in a juvenile's development is "particularly relevant," and state and federal law require its consideration. *Miller*, 567 U.S. at 476; *see also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); Mont. Code Ann. § 46-18-101(3)(d). The record details Keefe's upbringing in an unstable and economically deprived household. Pet'r Ex. 2, 23. Even outside the home Keefe found no relief, and the institutions designed to protect him only continued the abuse and neglect. Pet'r Ex. 2 at A-004, 13, 23. Yet the District Court refused to consider Keefe's history of abuse and trauma mitigating, disregarding the evidence because it did not "mitigate the heinously violent crimes he committed."[9] Tr. 176; Doc 66 at 8.

Respondent fails to address Keefe's arguments detailing these problems, and instead simply repeats them, while misconstruing the record below. The Response suggests Keefe's trauma, including physical abuse at the hands of his teacher and by his mother's live-in boyfriend, "was not to the extent to provide a mitigating justification for Keefe's behavior." Resp. 34. As explained above, requiring a nexus between mitigating evidence and

[9] Over counsel's objection, the District Court conceded that this requirement was an error but then repeated the same reasoning in the Sentencing Memorandum. Tr. 111:5-7; Dkt. 66 at 7-8.

the offense is unconstitutional and contrary to state law. *Eddings*, 455 U.S. at 113-14; Mont. Code Ann. § 46-18-101(3)(d). Further, suggesting that the trauma experienced must be severe enough to "justify" the crime contradicts *Miller*, which explains that "great weight" should be afforded to such evidence in juvenile sentencing. *Miller,* 567 U.S. at 476.

Respondent argues that the opinions of Page and Dr. George Hossack show Keefe did not experience trauma. Resp. 33-34. But the record reveals that Page's report offers little of value about Keefe's experiences with trauma and abuse. During cross-examination, Page revealed that he wanted "some kind of link between [Keefe's] traumatic experiences…and his choice to murder three people" for these experiences to be relevant. Tr. 106:10-15. Looking for a causal nexus imposed an erroneous standard. *See McKinney v. Ryan*, 813 F.3d 798, 813 (9th Cir. 2015) (en banc).

Moreover, although Respondent cites Hossack's pre-*Miller* conclusions to minimize Keefe's developmental traumas, in fact, Hossack's report shows neglect and a lack of supervision in Keefe's household, as observed by others: "The reports that were completed by others who have evaluated Steve in the past point to the fact that Steve comes from a dysfunctional, possibly psychogenic family." Dkt. 7, Ex.1 (emphasis in original).

Lastly, Respondent claims that Keefe's running away to Great Falls was evidence that he was able to "extricate himself" from his dysfunctional family. However, the record reveals Keefe fled after he had been fired from his job, packing up his car and driving away. Tr. 101-02. Only after arriving in Great Falls did he find a place to stay by convincing a man he had met at a skating rink to let him stay for a few days. Tr. Vol. VII 898-99. Keefe's flight to Great Falls was an impulsive and desperate act by a teenager with few options that ended in tragedy.

The District Court's refusal to duly consider Keefe's developmental and emotional history, despite the abundant evidence on the record, reversibly violated state and federal law.

iv. The District Court Disregarded How the Incompetencies of Youth Affected Keefe's Culpability

The Constitution requires acknowledgment that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham*, 560 U.S. at 78. The court was required to consider whether a juvenile offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth." *Steilman v. Michael*, 2017 MT 310, ¶16, 389 Mont. 512, 518, 407 P.3d 313.

The District Court made manifest the need to consider Keefe's "youthful incompetencies" when it focused its attention on "new details" of

the crime that Keefe withheld during the initial trial. Resp. 41; Dkt. 66 at 1-2. Yet the District Court's analysis omits consideration of how Keefe's youth affected his ability to assist in his defense and any potential barriers he faced to disclosing the facts in his initial trial. Dkt. 66 at 6. Further, by excluding any surrounding new information about the crime, the District Court excluded available facts that would inform such consideration. Tr. 12:17-20.

The Response first argues that Keefe waived this argument by not affirmatively raising this in its argument below. Resp. 37-38. This ignores the effect of the District Court's ruling excluding presentation of details of the offense, which would have demonstrated that he was under the sway of an older relative who was the principal.

Second, Respondent contends that the District Court's did not have to assess this factor because *Miller* does not require formal fact-finding. Resp. 38. This misstates Keefe's argument and misinterprets *Miller*. Even if *Miller* does not compel factfinding on each factor, consideration of these factors is necessary to "giv[e] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735. The Court's failure to do so requires reversal.

B. The State Failed to Prove Irreparable Corruption

There was insufficient evidence to find that Keefe was "irreparably corrupt." Thus, in sentencing Keefe to die in prison, the District Court contravened *Miller*'s substantive principle "that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. 734 (internal citations omitted).

The court's expert offered unrebutted evidence that Keefe's behavior suggested maturation and "he responded to efforts at rehabilitation over a 33-year period of incarceration." Dkt. 56 at 15. Yet despite this uncontroverted testimony, and the wealth of testimony from those who spent the last three decades with Keefe, including the former warden of the Montana State Prison, the court sentenced Keefe to LWOP.

Respondent focuses its arguments on the crime, and Keefe's past juvenile delinquency. Resp. 42-43. Yet as explained above, this specious argument ignores significant pieces of the record and contravenes *Miller*'s instruction "that children who commit even heinous crimes are capable of change." *Montgomery*, at 736. Keefe has matured and changed, and Respondent has presented insufficient evidence to sustain his eligibility for JLWOP.

C. Respondent Ignores the Constitutional Bases for the Procedural Protections Necessary to Comply with *Miller v. Alabama*

Respondent erroneously focuses on state statutory law and ignores the constitutional basis for Keefe's claims that the Sixth Amendment applies to findings of irreparable corruption and requires a presumption against imposing a sentence of life without the possibility of parole.

i. The Sixth Amendment Requires a Jury Finding on Irreparable Corruption

The parties agree that the Sixth Amendment requires a jury to find additional facts, other than a prior conviction, to increase punishment. Respondent does not contest that "irreparable corruption"—the threshold for eligibility for JLWOP—is a finding of fact. Rather, Respondent's principal argument is this requirement is limited to fact findings required under statutory law. Resp. 50. However, binding Sixth Amendment jurisprudence rejects such a formalistic approach, and instead focuses on the effect of a particular finding. Moreover, except for prior convictions, a jury must determine eligibility for a particular punishment, rendering irrelevant Respondent's observations concerning judicial sentencing.

In two cases, the United States Supreme Court has held a jury must enter a finding on sentencing eligibility factors that, like "irreparable corruption," are the by-product of judicial rulemaking. First, in *Ring v. Arizona*, 536 U.S. 584 (2002) the Court considered whether a jury was

required to make findings on the factors that rendered a defendant death eligible. Those factors were defined by statute. *Id.* at 592-93. However, as Justice Scalia observed, those factors only existed because, in his view, the "Court has mistakenly said that the Constitution *requires* state law to impose such 'aggravating factors.'" *Id.* at 610-11 (Scalia, J., concurring). Nonetheless, the Court, in a seven-to-two majority, held that the Sixth Amendment required a jury finding. *Id.* at 609. It so held because "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

Next, in *Cunningham v. California*, 549 U.S. 270 (2007), the Court ruled California's sentencing scheme, by which a judge could consider a "nonexhaustive list of aggravating circumstances," including any "criteria related to the decision being made [to impose a greater sentence], violated the Sixth Amendment." *Id.* at 278-79. Because that finding required a finding of fact before a higher punishment could be imposed, the Court held the Sixth Amendment entitles a defendant to have a *jury* find that fact beyond a reasonable doubt. *Id.* at 293-94. It was of no consequence that this fact was a category developed by a judge. The Court explained its functional approach for determining when a jury must find facts: "'the relevant 'statutory

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'" *Id.* at 283 (emphasis in the original) (quoting *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004)). Thus, the effect of the required finding—raising the range of available punishments—prompted the need for a jury finding of eligibility. In *Ring* and *Cunningham* alike, the potential increase in the range of potential sentences gave rise to the jury finding right.[10]

As in *Ring* and *Cunningham*, the Sixth Amendment requires a jury finding on whether Keefe is eligible for the sentence of life without parole. Respondent counters that a conviction of deliberate homicide suffices to establish eligibility for a sentence of life without the possibility of parole. Resp. 44. That is true as a matter of state law,[11] but the Eighth Amendment limits such a sentence to the "irreparably corrupt." *Montgomery*, 136 S. Ct.

[10] The only analogous contrary authority, as discussed by an amicus brief, but not Respondent, preceded *Apprendi* and is almost certainly no longer good law. *See Cabana v. Bullock*, 474 U.S. 376 (1986); Amicus Br. of Mont. Ass'n of Criminal Def. Lawyers at 11-13.

[11] As with sentencing juveniles to life without the possibility of parole, additional factual findings by a jury are *constitutionally* required before a person can be sentenced to death. *State v. Keith* (1988), 231 Mont. 214, 230, 754 P.2d 474 (quoting *Lowenfield v. Phelps*, 484 U.S. 231 (1988)).

at 734. For that reason, the Sixth Amendment requires a jury finding on this factual question.

ii. The Constitution Demands a Presumption Against Imposing LWOP on Juveniles

The Eighth Amendment limits LWOP to the rare juvenile convicted of homicide who is irreparably corrupt. Respondent's refusal to recognize a presumption against a such a sentence, like the trial court before it, reveals a misunderstanding of this constitutional constraint. *Miller* "established" that "the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 472). This Court in *Steilman* recognized the "U.S. Supreme Court's inexorable evolution recognizing that all but the rarest juvenile offenders be given an opportunity for redemption and a hope for release." ¶ 21.

To be sure, these cases do not address the narrow, modest request here: an explicit presumption against such a sentence. Resp. 43-44. But that presumption is integral to the broader holding of the cases collected in the opening brief, which Respondent makes no effort to distinguish.[12] Br. 42-44.

[12] Even if Respondent is correct that no binding precedent establishes the need for such a presumption, this Court has an independent duty to determine whether the federal Constitution requires one. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

The core holding of *Miller* is that most juvenile offenders are ineligible for a sentence of life without the possibility of parole. The court below, therefore, erred in refusing to give meaning to that principle.

III. Keefe Has Had No Opportunity to Examine, Explain, or Rebut the Information Upon Which the District Court Relied

Respondent has not contested that Keefe lacked access to the information upon which the District Court's expert relied. Nor has it attempted to distinguish the controlling precedent. Instead, Respondent argues that Keefe's due process rights were unaffected because Page, despite having relied on undisclosed information, decided that opining on rehabilitation was impossible. Resp. 46-47.

Respondent misses the point. Page's failure to disclose his sources meant that Keefe lacked any "opportunity to . . . explain" the information upon which Page relied to conclude that there was no objective standard for assessing rehabilitation. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Respondent has not addressed deficiency.

Moreover, that this was a sentencing proceeding in no way distinguishes *Gardner*, which was also a sentencing proceeding. *Id.* If anything, the protections here must be greater because Page's report

implicates Keefe's eligibility for the sentence, not the choice among available sentences.

Keefe has had no access to the information relied upon to address key questions concerning his eligibility for JLWOP, and, for that reason, reversal is required.

IV. Keefe's Due Process Rights to a Fair Trial and Impartial Factfinder Were Violated

A. Standard of Review

Respondent argues that plain error review is appropriate for Keefe's judicial misconduct claim. Resp. 47-48. Yet, this argument was raised in briefing before the District Court in a Motion for Reconsideration. Dkt. 68. Neither the court below nor the Respondent here has explained why sections 25-11-102 or 46-16-702 do not permit reconsideration. *De novo* review of this constitutional claim is appropriate. *Haldane*, ¶17. However, even if this Court reviews for plain error, Keefe should prevail.

B. Bias, Speculation, and Extra-Record Evidence Rendered the Hearing Unfair

The District Court (1) precluded Keefe from presenting new evidence concerning the circumstances of the offense, (2) ruled irrelevant any post-offense conduct regarding his rehabilitation, and (3) expressly relied on materially inaccurate information from the State. Seeking to clarify the

record, and relying on sections 25-11-102 and 46-16-702, Keefe filed a motion demonstrating the prejudice from these, and other, irregularities. Dkt. 68. This type of motion has been entertained by Montana courts. *See, e.g.*, *State v. Baker* (1983), 205 Mont. 244, 247-48, 667 P.2d 416, 418. Yet, the court refused to consider the motion, declaring it frivolous. Dkt. 69. In doing so, the District Court committed reversible error. Br. 52-53.

Respondent's defense of the conduct of the State and court below is premised on facts unsupported by the record. First, Respondent claims that Keefe's account of the offense—that his older brother-in-law was the principal—was "new" because it was not presented at trial. That is not the meaning the State used when it argued that the defense was "a story that has been molded and shaped to fit the case law that he believes will get him some kind of relief." Tr. 156:11-15. The State's argument flounders because its own evidence indicated Keefe had been offering the same account for many years prior to the relevant rulings concerning JLWOP. Dkt. 68, Ex. 2. Yet, the District Court repeatedly dismissed Keefe's account as "cockamamie" and an "offensive…attempt to convince [the] Court of his legal position." Tr. 46-49, 66-68; App. A-016.

Respondent suggests that engaging inferences concerning the meaning of Keefe's tattoos, sight unseen and Keefe having had no opportunity to

explain the same, was appropriate. The record speaks for itself in terms of their appearance, (Dkt. 68, Exs. 3, 4) and it was the State's conjecture and the court's reliance on the same that violated his rights.[13] Br. 48-49.

Respondent next argues that Keefe's complaint about judicial bias is limited to a reiteration of complaints concerning legal errors. To the contrary, judicial bias was conclusively established when the court used the *Miller* hearing to reach a preordained outcome. First, by denigrating Keefe's evidence without considering it (or allowing him to present it), and second by setting up a hearing whereby it deemed irrelevant any post-offense conduct indicating maturation and rehabilitation while accepting the State's unfounded and prejudicial claims about conduct from the same time period. Br. 51-52. And lest there be any doubt of the pre-ordained outcome, before hearing a shred of evidence, the court claimed Keefe's story was "cockamamie" and explained it would need at least an hour to announce the ruling it had already prepared. Tr. 7:10-11. When Keefe attempted to correct the record, the court deemed the effort "frivolous" and threatened counsel with sanctions. App. at A-027-028.

[13] The centrality that Keefe's tattoos played in the State's argument and the Court's hearing surprised Keefe as it is not mentioned in the sentencing memorandum.

Finally, Respondent argues that the District Court's reference to the harm to the community conforms with the statutory sentencing principles. Resp. 50. However, citation to the statute does not justify the court's improper reliance on extra-record evidence on the impact of the offense on the community. The District Court distorted itself into "into a tribunal organized to return a verdict of [JLWOP]," and these errors, individually and collectively require reversal. *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

CONCLUSION

Keefe requests that this Court grant the relief requested in his opening brief.

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June 5, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Georgia typeface of 14 points; is doubled spaced except for lengthy quotation or footnotes, and does not exceed 6,000 as allowed per this Court's Order filed on May 27, 2020, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance as calculated by my Microsoft Word software.

Dated this 5th date of June 2020.

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