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 FOR THE APPELLANT AS AMICUS CURIAE

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

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I. STATEMENT OF INTEREST

The Montana Association of Criminal Defense Lawyers (MTACDL) is the Montana affiliate of the National Association of Criminal Defense Lawyers, a nationwide network of more than 10,000 dedicated criminal defense attorneys. MTACDL formed to ensure justice and due process for persons accused of crimes in Montana; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. MTACDL, and its membership, believe that continued recognition and adherence to the rule of law by the judicial, legislative, and executive branches of government is necessary to sustain the quality of the American justice system. To accomplish this mission, MTACDL provides practical and informative continuing legal education to attorneys; files amicus briefs on behalf of its members and at the request of courts; and offers guidance on pressing ethical questions for its members.

II. STATEMENT OF THE ISSUE

The Montana Association of Criminal Defense Lawyers addresses a single question: Whether Montana has violated the Sixth Amendment by sentencing juvenile offenders to life without parole absent a jury finding beyond a reasonable doubt that the child's offenses reflect irreparable corruption and permanent incorrigibility.

III. STATEMENT OF THE CASE

In 1987, Mr. Steven Keefe, a juvenile, was sentenced by a judge to a life sentence without the possibility of parole. *See State v. Keefe*, (1988), 232 Mont. 258, 259, 759 P.2d 128, 129. Mr. Keefe was granted habeas relief in light of *Montgomery* and *Miller*, and received a resentencing hearing on April 18, 2019. At Mr. Keefe's resentencing hearing, the district court did not submit the question of Mr. Keefe's alleged corruption to a jury for a determination made beyond a reasonable doubt. Instead, the district court judge made a finding from the bench that Mr. Keefe's offenses reflected irreparable corruption and permanent incorrigibility. Tr. of Appeal Resentencing Hr'g. at 181, Keefe, (2019) 232 Mont. 258, 759 P.2d 128 (No. 87-92). Mr. Keefe moved for reconsideration. The district court denied the motion without considering its merits.

On June 27, 2019, Mr. Keefe filed a Notice of Appeal. On October 16, 2019, the MTACDL filed an unopposed Motion for Leave to Appear as Amicus Curiae. The motion for leave was granted the next day.

Neither the trial judge presiding over the resentencing nor the district court on reconsideration addressed the application of *Apprendi* to *Miller* resentencing hearings. Application of this criminal procedural requirement would aid the Court in addressing Mr. Keefe's appeal.

IV. SUMMARY OF THE ARGUMENT

The district court erred when it resentenced Mr. Steven Keefe to three consecutive sentences of life without parole without a jury hearing the evidence and making a determination beyond a reasonable doubt that Mr. Keefe's offenses reflected irreparable corruption and permanent incorrigibility.

The Eighth Amendment limits juvenile eligibility for certain sentences. In *Miller v. Alabama*, the United States Supreme Court held that juveniles convicted of homicide may not be sentenced to life without parole without a hearing to determine if the child's offenses reflected irreparable corruption and permanent incorrigibility (the "*Miller* factors"). Per *Montgomery v. Louisiana*, *Miller* applies retroactively, and under *Steilman v. Michael*, *Miller* applies to juvenile sentencing procedures in Montana.

Apprendi v. New Jersey held that factors which increase a punishment beyond its normal bounds must be found by a jury beyond a reasonable doubt, else the sentence is unconstitutional. Because a determination of irreparable corruption and permanent incorrigibility is necessary to constitutionally impose the enhanced sentence of juvenile life without parole, a jury must determine whether those factors are present.

Accordingly, sentencing Mr. Keefe to life without parole in a judicial sentencing hearing violated his constitutional right to have a jury determine whether his convictions made him eligible for such a harsh sentence.

V. ARGUMENT

The United States stands at the precipice of major reform in the way it treats its children. After the juvenile justice system labored for more than three decades under the harmful illusion that juvenile offenders are "superpredators" indistinguishable from adult criminals,[1] *Roper v. Simmons*, 543 U.S. 551 (2005) started a new generation of significant advancements in juvenile justice by recognizing the scientific, psychological, and developmental differences between children and adults. The eleven years of constitutional protections recognized for juveniles between *Roper* and *Montgomery* provide critical context for the issue presented in this case.

In light of the empirical differences in brain development between children and adults, the *Roper* court found the imposition of the death penalty on juvenile offenders to be unconstitutional in 2005. Just five years later, the Court held that

[1] The Superpredator Era of the late 1980s and early 1990s refers to a time period marked by a perceived spike in juvenile-committed homicides. Proponents of the narrative identified "superpredator youths" as impulsive, immoral, uncontrollable beings bent on causing mayhem. *See* John J. Dilulio, Jr., The Coming of the Super-Predators, Weekly Standard, Nov. 27, 1995. The superpredator theory was later disproven, but its racist overtones and harmful effects linger in the juvenile justice system.

sentences of life without parole are unconstitutional when applied to juveniles found guilty of non-homicide offenses. *Graham v. Florida,* 560 U.S. 48 (2010). Less than two years passed before *Miller v. Alabama*, 567 U.S 460 (2012), held unconstitutional mandatory life without parole for juveniles found guilty of homicide and required a hearing to assess the youth's potential for rehabilitation before imposing such a drastic sentence. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) made clear that *Miller* announced a substantive constitutional rule that must be applied retroactively. The question before this court and many across the nation is how to appropriately implement *Miller*'s requirements.

The State of Montana has taken steps to further protect the rights of its children: Section 15 of Article II, Part II of the Montana Constitution holds that juveniles are entitled to all the fundamental rights and protections in Montana's Declaration of Rights, "unless specifically precluded by laws which *enhance* the protection of such persons." Mont. Const. Art. II § 15 (emphasis added). In essence, Montana's youth are just as protected as its adults, and at times, have protections greater than those extended to adults.

The case before the Court in *Keefe* presents an opportunity to guard those protections recognized both under Montana state law and federal law by appropriately applying certain fundamental principles of criminal justice to the new landscape for juvenile justice. In *Apprendi v. New Jersey*, 530 U.S. 466

(2000), the United States Supreme Court recognized that facts necessary to impose an enhanced sentence must be found by a jury beyond a reasonable doubt. Under *Miller*, children may not be sentenced to life without parole without a specific finding of irreparable corruption and permanent incorrigibility. To date, the U.S. Constitution does not mandate such a finding for a juvenile to be sentenced to life imprisonment *with* the possibility of parole. Consistent with the holdings in *Miller* and *Montgomery*, the punishment of life without parole must be recognized as an enhanced sentence for juveniles.

To support the enhanced sentence of life without parole, the *Miller* factors must be found by a jury applying the beyond-a-reasonable-doubt standard. The District Court erred first by not submitting the *Miller* factors question to the jury and second by not applying the correct standard to evaluate the evidence presented.

A. The Eighth Amendment Limits Juvenile Sentences

The United States Supreme Court has imposed significant constitutional limits on the punishments that may be imposed on juvenile offenders.[2] In *Graham*, the Court banned the use of juvenile life without parole for non-homicide offenses, *Graham*, 560 U.S. at 74, and *Miller* announced that mandatory juvenile life without parole violated the Eighth Amendment, *Miller*, 567 U.S. at 489. Together, *Graham* and *Miller* establish that juvenile life without parole may only be imposed

[2] *See supra* Section I.

on youth specifically found both (1) to have committed a homicide and (2) to be irreparably corrupt and permanently incorrigible.[3] The Court in *Montgomery* held that *Miller* was a substantive constitutional rule that must be applied retroactively to cases on collateral review. *Montgomery*, 136 S. Ct. at 736.

The fundamental reason for the juvenile punishment limitations imposed by *Graham* and *Miller* is the science-backed differences between children and adults that the United States Supreme Court fully acknowledged in *Roper*. In 2005, when the *Roper* court banned use of the death penalty to punish minors, the Court pointed to three characteristics distinguishing juvenile offenders from their adult counterparts:

> First…[a] lack of maturity and an underdeveloped sense of responsibility…often result[ing] in impetuous and ill-considered actions and decisions…[Second] that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure…[Third] that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Roper, 543 U.S. at 569-70, 578.[4] These three characteristics of youth have become the building blocks of every major juvenile justice case since, and they serve as the framework for the re-sentencing question before the Court today.

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[3] *See* Sara F. Russell, *Jury Sentencing and Juveniles: Eight Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. Rev. 533, 580 (2015).

[4] *See also* Adam Ortiz, *Adolescence, Brain Development and Legal Culpability*, Juvenile Justice Center, American Bar Association, at 2 (Jan. 2004) (quoting

Life without parole should be imposed on a child only in the rarest of circumstances, and only upon a specific determination that the child's offense "reflects irreparable corruption," and not the "unfortunate yet transient immaturity" typical of youth. *Miller*, 567 U.S. at 479-80 ("Although we do not foreclose a sentencer's ability to [impose juvenile life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.") (citing *Roper*, 543 U.S. at 573).

B. Whether a Child Is "Irreparably Corrupt and Permanently Incorrigible" Is a Specific Factual Finding Necessary to Elevate a Juvenile Offender's Punishment to Life Without Parole

Montgomery made clear that "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735. Without such a hearing, a juvenile's punishment may not be taken outside of its normal boundary. This constitutional requirement indicates that life without parole is an "enhanced sentence" for juvenile offenders because youth are not eligible for its imposition absent certain specific findings.

Ruben Gur, Director, Univ. Penn. Medical Center) ("The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable . . . .")

This Court held in *Steilman v. Michael*, 2017 MT 310, 389 Mont. 512, 407 P.3d 313, that sentencing judges must take into account the *Miller* factors and the mitigating characteristics of youth when considering a sentence of juvenile life without parole. *Id.* ¶ 17. The Court recognized that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Id.* (citing *Montgomery*, 136 S. Ct. at 726; quoting *Miller*, 567 U.S. at 480). Importantly, the Montana Supreme Court discerned that "the aspect that is cruel and unusual for juvenile offenders is the sentence of life without parole itself, not whether the scheme under which the sentence is imposed is mandatory." *Steilman*, ¶ 15. Thus, *Miller* created a punishment ceiling which may only be exceeded upon additional findings of fact. *Id.* ¶ 37.

C. Under *Apprendi* and Its Lineage, a Jury Must Be the Deciding Body When Determining Whether a Youth Is Irreparably Corrupt and Permanently Incorrigible

The additional factual finding required under *Miller* must be made by a jury and subjected to the beyond a reasonable doubt standard. In *Apprendi*, the United States Supreme Court expanded the Sixth Amendment right to a jury in criminal trials. *Apprendi* held that "other than the fact of a prior conviction, any fact that increases the penalty from 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; *see also Alleyne v. United States*, 570 U.S. 99 (2013); *Cunningham v.*

California, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring*, 536 U.S. at 584-21 (2002). Thus a jury's finding of fact is required to impose an enhanced sentence.

In *Ring*, the United States Supreme Court applied *Apprendi* to a death penalty case, holding that a jury must assess whether the aggravating circumstances necessary to impose capital punishment are present beyond a reasonable doubt. *Ring*, 536 U.S. at 609. Without such a finding, a defendant may not be exposed to the possibility of the death penalty. *Id.*

The United States Supreme Court has struck down the use of lower burdens of proof for sentence enhancing factors on numerous occasions. Even a sentencing scheme which allows judges to enhance sentences on a finding of "substantial and compelling reasons" does not pass constitutional muster. *See Blakely*, 542 U.S. at 299. Likewise, the *Booker* court found sentencing guidelines to be unconstitutional where they allowed judges to make enhanced sentencing determinations based on a preponderance of evidence standard. *Booker*, 534, U.S. at 234-44. In *Cunningham*, the Court held unconstitutional a sentencing law which "plac[ed] sentence-elevating fact finding within the judge's province." 549 U.S. at 274. Finally, in *Alleyne*, the Court held that a jury must find beyond a reasonable doubt any fact that may raise the sentencing floor (other than the existence of a prior conviction). *See Alleyne*, 570 U.S. at 103. Any standard less than beyond a

reasonable doubt is constitutionally inadequate if the fact under consideration would increase the requisite punishment.

1. *Cabana* Does Not Preclude a Jury Hearing for Juvenile Life Without Parole

Taken together, *Apprendi* and its lineage make clear that where a finding of fact is required to enhance a sentence, the Sixth Amendment requires that the factual finding be made by a jury beyond a reasonable doubt. *See Booker*, 543 U.S. at 243-44; *Blakely*, 542 U.S. at 305. The question remaining is how to apply the principles of *Apprendi* to sentencing limitations imposed not by statute, but by the Constitution. According to *Enmund v. Florida*, 458 U.S. 782 (1982), the Eighth Amendment bans capital punishment for a defendant "who does not himself kill, attempt to kill, or intend that a killing take place," even if convicted of capital murder. *Id.* at 797; *Cabana v. Bullock*, 474 U.S. 376, 385 (1986) (*overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497, 503 n. 7 (1987)).

The Court in *Cabana* separated statutory sentencing limitations from Eighth Amendment limitations, reasoning that because an *Enmund* finding is not an element of any capital offense, a jury finding is not required. *Cabana*, 474 U.S. at 385-86 (requiring an *Enmund* finding that the defendant either took a life, attempted to take a life, or intended to take a life in order to constitutionally impose the death penalty); *see State v. Gollehon*, (1993), 262 Mont. 1, 21 864 F.2d 249, 262.

Where *Cabana* appears to preclude the application of *Apprendi* to the constitutional ban on juvenile life without parole for rehabilitation-capable youth, several courts have suggested that *Cabana* would not withstand *Apprendi* if decided now (instead of a decade before *Apprendi*). *See In re Coley*, 283 P.3d 1252 1282 (Cal. 2012) (Liu, J., concurring) ("*Booker* further suggests that absence of any bright line limiting *Apprendi*'s applicability to essential facts established by a legislative enactment."); *Gongora v. Thaler*, 710 F.3d 267, 296 (5th Cir. 2013) (Owen, J., dissenting) ("Neither *Ring* nor *Apprendi*—nor any other decision of the Supreme Court—has explicitly overruled *Cabana*'s holding that a trial judge or appellate court may make the Eight Amendment findings mandated by *Enmund* and *Tison*," but stating that "[w]hether the Supreme Court will continue to adhere to the reasoning and holdings of *Enmund*, *Tison*, and *Cabana* is highly questionable."); *but see*, *State v. Galindo*, 774 N.W.2d 190, 235 (Neb. 2009) (finding a jury is not necessary for an *Enmund* finding).

Moreover, in *Ring*, the Court found that allowing a judge to determine the presence of enumerated aggravating circumstances necessary to impose the death penalty violated the Sixth Amendment jury right. *Ring*, 536 U.S. at 609. The Court did not agree with the State's position that the *Enmund* factors were aggravating factors able to be found by a judge. *Ring* made clear that "[t]he characterization of a fact or circumstance as an element or a sentencing factor is not determinative of

the question 'who decides,' judge or jury." *Id.* at 587. Rather, the relevant legal inquiry is whether the law makes a fact essential to a given punishment." *See Cabana*, 474 U.S. at 386.

Under *Miller*, to impose a life sentence without possibility of release requires a finding of whether a child's offense reflects irreparable corruption and permanent incorrigibility. *Montgomery*, 136 S. Ct. at 735. This finding is an inquiry essential to the imposition of life without parole on a child. *Id.* Therefore under *Apprendi* and *Ring*, a finding of irreparable corruption and permanent incorrigibility must be found by a jury beyond a reasonable doubt, and not by a judge. *Apprendi*, 530 U.S. at 466, 475-77; *Ring*, 536 U.S. at 585; *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) (finding a jury advisory verdict regarding the aggravating or mitigation circumstances was not sufficient to satisfy the Sixth Amendment).

2. *Miller* and *Apprendi* Apply to Montana Law

Miller and *Apprendi* govern the statutory scheme currently operating under Montana state law. Mont. Code Ann. § 46-18-222 imposes a mandatory life sentence without the possibility of release upon those convicted under § 45-5-102. *See* Mont. Code Ann. § 46-18-219. Under § 46-18-223, this mandatory sentence does not apply if "the offender was less than 18 years of age at the time of the

commission of the offense for which the offender is to be sentenced." Mont. Code Ann. § 46-18-222(1); *see also* Mont. Code Ann. § 46-18-223.

§ 46-18-223 also states that the exceptions listed in § 46-18-222 (including minor status) shall be found by a preponderance of the evidence in a hearing prior to imposing the sentence. Mont. Code Ann. § 46-18-223(3). A § 46-18-223 hearing provides for a finding that an offender was under the age of 18 at the time of the offense; it does not address the additional factors necessary to enhance a sentence. The statute merely prevents a juvenile from mandatorily being sentenced to life without parole—it does not address the *Miller* factors necessary to impose juvenile life without parole. Per the *Steilman* court, *Miller* clearly applies to Montana juvenile sentencing practices. *Steilman*, ¶17. The findings in *Apprendi* and *Ring* mandate that a jury consider whether the evidence has shown beyond a reasonable doubt that a youth is irreparably corrupt and permanently incorrigible in order to impose a sentence of life without parole upon a child. *See Apprendi*, 530 U.S. at 466, 475-77; *see Ring*, 536 U.S. at 585.

D. Sentencing Mr. Keefe to Juvenile Life Without Parole in a Judicial Sentencing Hearing Unconstitutionally Violated His Sixth Amendment Right to Have a Jury Make a Specific Factual Finding That He Was Irreparably Corrupt at the Time of Sentencing

The District Court erred in two ways when it resentenced Mr. Keefe to life without parole.

The first point of error is that the beyond a reasonable doubt standard should have been applied to the findings during Mr. Keefe's resentencing hearing. Under *Apprendi*, juvenile life without parole requires specific facts to be found beyond a reasonable doubt, a higher evidentiary standard than the preponderance of the evidence standard generally applied in sentencing hearings. *See United States v. Watts*, 519 U.S. 148, 156 (1997) ("[A]pplication of the preponderance standard at sentencing generally satisfies due process.") (citations omitted).

The second error was the District Court's failure to present the question of irreparable corruption and permanent incorrigibility to a jury instead of a judge. Life without parole is a punishment that exceeds the maximum boundary of juvenile sentencing under both Montana law and the Eighth Amendment-when it is imposed without a finding of irreparable corruption and permanent incorrigibility. Mont. Code Ann. § 46-18-223; *Miller*, 567 U.S. at 489. Indeed, the *Miller* court found life without parole "akin to the death penalty," for juveniles, and thus "treated it similarly to that most severe punishment [of capital punishment]." *Id.* at 475.

As such, the evidentiary standards and procedural requirements necessary to impose capital punishment should be inserted into the juvenile sentencing process as well when life without parole is a possibility. Under *Apprendi*, the factual question of permanent incorrigibility that could push Mr. Keefe over that boundary

must be found beyond a reasonable doubt by a jury, and not by a judge. Just as *Ring* required a jury to find the aggravating factors necessary to impose the death penalty, so too must a jury find the facts necessary to impose life without parole upon minors. *See Ring*, 536 U.S. at 609 (in which the court found the "ultimate penalty [of life without parole] for juveniles as akin to the death penalty, [and thus]…treated it similarly to that most severe punishment [of capital punishment]"). Under *Montgomery*, this procedure must be applied both retroactively and to future cases. *Montgomery*, 136 S. Ct. at 734.

The assembly of a jury in all past and present cases in which juvenile life without parole looms will certainly not be convenient. Yet convenience cannot outweigh justice:

> Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State….The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. *It has never been efficient; but it has always been free*."

Ring, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (emphasis added); *see Miller*, 567 U.S. at 475.

VI. CONCLUSION

Imposing a sentence of juvenile life without parole on Mr. Keefe absent a jury hearing on any incorrigibility or corruption violates his constitutional rights.

In light of the above arguments and law, we as amicus respectfully request that the Court reverse Mr. Keefe's life sentence without parole and remand his case to allow a jury to determine beyond a reasonable doubt whether he was irreparably corrupt and permanently incorrigible at the time of his conviction and sentencing.

RESPECTFULLY submitted this 31st day of October, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations, headings, or footnotes, and does not exceed 5,000 words, per Rule 11 of the Montana Rules of Appellate Procedure, 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 31st Day of October, 2019.

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