IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0409

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Amy Eddy, Presiding

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STATEMENT OF THE ISSUES

1. Whether, upon the State being unable to rebut Keefe's evidence of post-incarceration rehabilitation after remand from this Court, the district court crafted an appropriate *Miller*[1] remedy by striking Keefe's parole restriction.

2. Whether this Court should consider Keefe's new argument—based on documents never presented at resentencing that this Court has since stricken from the appellate record—that the district court's action of striking his parole restriction was constitutionally insufficient because (as Keefe mistakenly argues) he is not entitled to immediate appearance before the parole board.

3. Whether this Court should consider Keefe's argument that he was entitled to a state-funded defense team of experts rather than the neutral, court-appointed psychological expert he was provided for his resentencing—an identical claim to that raised in *Keefe II*—which Keefe now concedes is inappropriate for this Court's review.

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[1] *Miller v. Alabama*, 567 U.S. 460 (2012)

STATEMENT OF THE CASE AND FACTS

I. The offense and the original proceedings

In 1985, 17-year-old Appellant Steven Wayne Keefe committed a triple homicide while burglarizing a house near Great Falls, shooting and killing Dr. David McKay, Constance McKay, and their daughter Dr. Marian McKay Qamar. *See State v. Keefe*, 2021 MT 8, ¶ 4, 403 Mont. 1, 478 P.3d 830 ("*Keefe II*"). Crime reconstruction showed that Keefe shot Dr. David McKay in the back of the head; then Dr. Qamar encountered Keefe, fled to the stairs, and was shot in pursuit five times; then Keefe reloaded while Constance McKay discovered her daughter on the stairway; and Keefe then shot Constance while she was bending over her daughter. *See State v. Keefe*, 232 Mont. 258, 262, 759 P.2d 128, 131 (1988) ("*Keefe I*").

The day after the murders, Keefe asked a friend to pawn a .44 magnum Ruger Redhawk revolver that he had previously stolen, along with ammunition. *Keefe I*, 232 Mont. at 260, 759 P.2d at 129. After being arrested on charges relating to previous burglaries and being committed to Pine Hills, Keefe told other residents the details of the murders. *Keefe II*, ¶ 4. Through recovering the weapon and conducting ballistics tests, the FBI linked the weapon to the ballistics of two of the fatal shots in the McKay home. *Keefe I*, 232 Mont. at 260, 759 P.2d at 129.

The State charged Keefe with three counts of deliberate homicide and one count of burglary. The matter went to trial, and the jury ultimately convicted Keefe of all counts. *Keefe II*, ¶ 4.

In 1986, after testimony and argument, the district court ruled that Keefe's age was a mitigating factor excluding him from the death penalty's application. (Doc. 7, VII 12/17/86, Transcript of Sentencing Hearing at 26; Doc. 7, VI; 12/15/86, "Transcript of Death Penalty Hearing.") The court imposed three life sentences to the Montana State Prison for each victim, to run consecutively. (Doc. 7, 12/17/86 Tr. at 31; Doc. 104, 12/17/86 "Sentence" at 2-3.) For the burglary, the court imposed a 10-year sentence. The court also imposed four additional 10-year sentences, each offense being committed with a dangerous weapon. (Doc. 7, 12/17/86 Tr. at 31; Doc. 104, 12/17/86 "Sentence" at 2-3.) Thus, Keefe received three consecutive life sentences plus 50 years. Pursuant to Mont. Code Ann. § 46-18-202(2), the court declared Keefe ineligible for parole. (Doc. 7, 12/17/86 Tr. at 32; Doc. 104, 12/17/86 "Sentence" at 4.)

In crafting Keefe's sentence, the original district court considered: the seriousness and circumstances of the crime; the harm to the victims; the community impact; Keefe's extensive criminal history; the lack of any indication of drug or alcohol use or mental or emotional disturbance by Keefe at the time of the crime; and Keefe's limited potential for rehabilitation as described in multiple

psychiatric assessments. (Doc. 7, 12/17/86 Tr. at 26-29.) Summarizing all the factors, the district court concluded: "And in rendering the sentence that I'm about to hand down, I want you to know that it is my intent that you never, ever walk the streets as a free man so long as you shall live. It is my belief that you should be confined behind bars for the rest of your life, with no possibility of getting out." (Doc. 7, 12/17/86 Tr. at 30.)

In 1987, Keefe appealed, raising a sole issue related to other crimes evidence. *Keefe I*. This Court affirmed his conviction in 1988. *Id.*

II. The intervening change in law

In 2012, the Supreme Court determined in *Miller* that a sentencing court considering disposition for a juvenile homicide offender was required to "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller v. Alabama*, 567 U.S. 460, 483 (2012.) The Court explained that during a sentencing hearing, a sentencer 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 Court provided several factors for a sentencing court to consider, including a defendant's age, maturity, family life, the circumstances of the offense, the incompetencies associated with youth, and "the possibility of rehabilitation[.]"

Miller, 567 U.S. at 478. In 2016, *Montgomery* held that *Miller* applied retroactively. *Montgomery v. Louisiana*, 577 U.S. 190 (2016.)[2]

III. The resentencing and second direct appeal

In 2017, Keefe filed a petition for post-conviction relief in district court, contending that his life without parole sentence was unconstitutional in light of *Miller* and asking for the district court to "grant him a new sentencing hearing" or to "drop his 'no parole' term[.]" (Doc. 1 at 1, 13.) District court Judge Gregory Pinski granted the petition and allowed Keefe a new sentencing hearing, finding the original sentencing hearing "insufficient to justify imposition" of the sentence of "life imprisonment without parole." (Doc. 8 at 4-5.) The district court explained 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* and *Montgomery*. (*Id.* at 5.)

Keefe filed a sentencing memorandum and attached letters of support from prison officials, Buddhist and Catholic advisors, as well as certificates and work

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[2] Recently, the Supreme Court granted certiorari "[i]n light of disagreement in state and federal courts about how to interpret *Miller* and *Montgomery*[.]" *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021). The *Jones* decision clarified aspects of *Miller* and *Montgomery*, as further explained in the argument below.

evaluations for various prison jobs Keefe was involved in, in support of his argument that he had rehabilitated since his homicides. (*See* Doc. 59; Doc. 64, Petitioner's Exhibits 1-24.) At the resentencing, Robert Shaw, a former correctional officer at MSP, testified about Keefe's willingness to engage in prison programming regarding educational, vocational, and service-based activities. (DA 19-0368, 4/18/19 Tr. at 119-130, *available at* Doc. 104.) James Mahoney, the former warden at the Montana State Prison, also testified about the programming Keefe was involved in and Keefe's development of maturity and changing his behaviors. (*Id*. at 133-143.) A court-appointed expert, Dr. Page, found that Keefe had "responded to efforts at rehabilitation over a 33-year period of incarceration." (*Id*. at 109.)

The district court initially expressed hesitation as to whether, as a matter of law, it was required to go beyond considering Keefe's mitigating circumstances of youth and consider Keefe's prison behavior in its *Miller* inquiry. (*Id*. at 15-16.) Ultimately, the district court ruled that, to the extent the evidence was relevant, Keefe had not demonstrated he was rehabilitated, citing Keefe's continued refusal to take responsibility for his crimes and Keefe's decision to tattoo three skulls onto his body. (Doc. 66 at 9-10; DA 19-0368, 4/18/19 Tr. at 180-181.) After analyzing all of the *Miller* factors, the district court determined that Keefe's crime represented "irreparable corruption and permanent incorrigibility as defined by the

U.S. Supreme Court[]" and re-imposed the original sentence, including the parole restriction. (Doc. 66 at 10; DA 19-0368, 4/18/19 Tr. at 181-82.)

In 2019, Keefe appealed to this Court, arguing that his life without parole sentence upon resentencing was unconstitutional under *Miller* and *Montgomery*. Keefe explained that there should be a "rebuttable presumption that juveniles are not irreparably corrupt and therefore not eligible for a LWOP [life without parole] sentence." (DA 19-0368, Appellant's Opening Brief at 43.) Keefe asked for the remedy of an opportunity to be eligible for parole:

> The remedy is for this Court to vacate his sentence and order resentencing that does not include a sentence to die in prison. *See Fuller*, 266 Mont. at 423, 880 P.2d at 1342. Keefe may or may not be entitled to release. But "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing him." *Montgomery*, 136 S. Ct. at 736. That is all he seeks, an opportunity to make his case before the parole board.

(DA 19-0368, Appellant's Opening Br. at 26.)

This Court considered the following issues raised by Keefe: (1) whether the district court's failure to appoint Keefe his own expert—rather than an independent, court appointed expert—violated Keefe's right to due process; (2) whether sufficient evidence existed for the district court to conclude Keefe was irreparably corrupt and permanently incorrigible; and (3) whether the question of irreparable corruption and permanent incorrigibility must be presented to a jury.

Keefe II, ¶ 2. After briefing and oral argument, this Court affirmed on issues 1 and 3, and reversed on issue 2.

This Court resolved that the district court was—as a matter of law—required to consider Keefe's rehabilitative evidence demonstrated during his imprisonment. *Keefe II*, ¶¶ 29-30. This Court "agree[d] with the *Briones* court that post-offense evidence of rehabilitation is clearly required to be considered by a court resentencing a juvenile who is serving a sentence of life without parole." *Keefe II*, ¶ 30 (citing *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019)) (vacated and remanded).[3]

This Court also observed that *Montgomery* and *Miller* "in essence, establish a presumption against life without parole sentences for juveniles unless they are 'irreparably corrupt' or 'permanently incorrigible.'" *Keefe II*, ¶ 27. Analyzing exclusively the fifth *Miller* factor, the possibility of rehabilitation, this Court observed that the district court erroneously found Keefe "irreparably corrupt" without "considering the unrebutted evidence of Dr. Page and former MSP supervisor Shaw and Warden Mahoney that Keefe has in fact matured and made

[3] The *Briones* decision was vacated by the United States Supreme Court and remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *United States v. Briones*, 2021 U.S. LEXIS 2278, 2021 WL 1725145, 141 S. Ct. 2589, 209 L. Ed. 2d 727 (May 3, 2021).

progress towards rehabilitation[.]" *Keefe II*, ¶ 27. This Court noted that the district court "disregarded the substantial evidence of Keefe's rehabilitation in the 30-plus years since the homicides." *Keefe II*, ¶ 24. Ruling that "*Miller* commands a resentencing court to consider 'the possibility of rehabilitation' before a juvenile can lawfully be sentenced to life without parole," this Court "vacated and remanded for resentencing in accordance with this opinion." *Keefe II*, ¶ 30, 31.[4]

Chief Justice McGrath dissented, contending he would have struck the "without parole" provision of Keefe's sentence. *Keefe II*, ¶ 55 (McGrath., C.J., concurring and dissenting). Justice Sandefur also dissented, agreeing with the Chief Justice that the proper remedy was to "remand for entry of an amended judgment striking and excluding the offending parole eligibility restriction." *Keefe*, *II*, ¶ 58 (Sandefur, J., dissenting). Justice Sandefur noted that striking the parole restriction would not "affect[] the balance of [Keefe's] base sentence and thereby merely afford[] him an *opportunity* for parole in the ordinary course of Montana law." *Keefe II*, ¶ 65 (emphasis in original). Justice Sandefur explained that the constitutional point of *Montgomery* and *Miller* would be served by this

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[4] Three members of the Court signed onto the Opinion. Chief Justice McGrath expressed his "dissent to the majority's decision to remand to the District Court for yet another sentencing[,]" while he also recognized the "necessity of providing the District Court with a majority Opinion" and thus "acknowledge[d] that the District Court has discretion to conduct a new hearing." *See Keefe II*, ¶¶ 38, 55.

remedy to the sentence, which does not necessarily offer Keefe release, elaborating that "the Montana Parole Board may never see fit to grant Keefe parole, even if eligible." *Keefe, II*, ¶ 65, n.4.

IV. The third sentencing

Upon remand, the parties appeared before a different district court judge, Judge Amy Eddy. At a May 27, 2021 status hearing, counsel for Keefe indicated that given the "direction from the supreme court," Keefe wanted to resolve the issue quickly. (5/27/21 Tr. at 7.) Defense counsel told the district court, ". . . we are looking for a limited hearing, nothing duplicative of what's already been presented." (*Id*. at 8.)

The State filed a sentencing memorandum, analyzing the *Miller* factors and arguing that Keefe's original sentence was both legal and just. (Doc. 100.) However, the State did not refute any of Keefe's proffered evidence of rehabilitation while in prison. Recognizing this Court's decision and the concurring and dissenting opinions from *Keefe II*, the State recommended that the district court strike Keefe's parole restriction to remedy the *Miller* violation. (*Id*. at 7-9, 16-17.)

Keefe responded that he had already served 35 years in prison and requested that the district court "resentence him to time-served for each count" of the triple deliberate homicide and burglary. (Doc. 102.) Keefe explained his belief that any

alternative sentence might "violate the Eighth Amendment." (*Id*. at 15.) Keefe urged the district court to sua sponte "look at how the sentencing practices regarding good time and calculating parole eligibility apply to a particular sentence" to determine the sentences' actual effective length. (*Id*.) Keefe did not himself proffer any evidence or exhibits explaining the effect of possible sentences that could be imposed.

In preparation for sentencing, the district court reviewed: the sentencing memoranda of the parties; the appendix of letters of support attached to Keefe's sentencing memorandum; all of the Keefe's exhibits[5] submitted for sentencing; and statements from family members of the victims. (7/16/21 Tr. at 14-15, 21.) The court also reviewed the entire 2019 resentencing transcript, and additionally took judicial notice of all of Keefe's previous cases. (7/16/21 Tr. at 14, 21; Doc. 82.)

At the outset of sentencing, the district court observed that Keefe had only ever challenged his parole restriction in his postconviction and direct appeal proceedings. (7/16/21 Tr. at 17.) Defense counsel conceded, "the issue on appeal—on appeal was Mr. Keefe challenging the district court finding that he was irreparably corrupt, and, therefore, allowed a parole restriction in accordance with

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[5] The exhibits included letters of support from Buddhist and Catholic advisors, letters of support from fellow inmates and prison officials, and a letter from an advisor explaining a community reentry plan. (See Def.'s Ex. 1-7; Admitted, Docs. 112-113.)

Montgomery." (*Id*.) However, defense counsel offered a new argument that a sentence merely striking the parole restriction would not offer Keefe an opportunity for release, which counsel believed was required under *Miller*. (*Id*.)

The district court determined that it would consider only whether to strike the parole restriction, explaining: "In reviewing the briefing in the post conviction relief and before the supreme court, [time served] is not the relief you requested. The relief you requested was the opportunity for Mr. Keefe to appear in front of the parole board." (7/16/21 Tr. at 18.) The court noted that Keefe had two opportunities to appeal and challenge other aspects of the validity of his sentence in *Keefe II* and his postconviction relief petition, but failed to do so. (Doc. 111 at 2, n.2; *see* 7/16/21 Tr. at 38.) Finally, while the court recognized that this Court remanded for resentencing to consider *Miller*, it was in the context of an unconstitutional life without parole sentence, thus it was for examining the *Miller* factors "for purposes of a parole restriction." (7/16/21 Tr. at 37; *citing Keefe II*, ¶ 30.)

The court reiterated that it had admitted and reviewed all the exhibits of various letters of support offered by Keefe, but nonetheless gave Keefe permission to make an offer of proof of the content of his witnesses' testimonies. (7/16/21 Tr. at 18.) Keefe proffered that his first witness, Rowan Conrad, a therapist and minster at the Montana State Prison, would have testified that he "helped Mr. Keefe

in his rehabilitation."[6] (*Id*. at 19.) Keefe proffered that his second witness, James Ziegler, a board member at Alternatives, Inc., a reentry program in Billings, would have testified as to Keefe's growth in his religious life.[7] (*Id*. at 20.)

Tavie McKay and Anna Muna Saval Qamar testified as to the consequences of the loss of three family members. (*Id*. at 22-29.) Keefe elected to make a personal statement, explaining how he had reformed through finding religion, engaging in prison programming, completing his HiSet diploma, gaining skills, and growing emotionally. (*Id*. at 30-35.)

Keefe reiterated his recommendation for a sentence of time served, but also alternatively argued for the first time that his sentence should run concurrently, contending that such a sentence would offer Keefe a "meaningful opportunity for release[.]" (*Id*. at 38.)

The State countered that Keefe's idea that a consecutive term would not offer Keefe an opportunity to appear before the parole board "is just not correct."

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[6] Keefe had already submitted letters of support from Mr. Conrad. (Doc. 104, A-366; Doc. 59, A-021; Doc. 64, Petitioner's Ex. 4.)

[7] Keefe had already submitted letters from other advisors explaining his spiritual growth from representations from both the Buddhist and Catholic communities, of which the district court expressly considered. (*See* Doc 107, Ex. 2 (letter from Moe Wosepka, Coordinator of Prison Ministry for the Roman Catholic Diocese of Helena, explaining Keefe's rehabilitation through participating in Catholic programming); Doc. 107, Ex. 3 (letter from Pam Campbell, pastoral counselor in the Zen Buddhist tradition, explaining Keefe's growth in meditation.)

(*Id*. at 39.) In support of the State's assertion, Probation and Parole Officer Tim Hides testified that he examined Keefe's potential parole eligibility in light of the State's recommendation and estimated that Keefe could become parole eligible in approximately two years. (*Id*. at 41-42, 43.) Officer Hides also testified that the parole board also had the ability to immediately "commence" consecutive sentences for parole eligibility purposes. (*Id*. at 45.)

Ultimately, in light of the State's concession, and to remedy the unconstitutional life without parole sentence under *Miller*, the district court reimposed the same sentence as the original district court, including the consecutive sentences, but declined to impose a parole restriction. (7/16/21 Tr. at 46-47; Doc. 111 at 3-4.) In crafting Keefe's sentence, the district court explained how it substantively considered the sentencing policy of Montana, including: Keefe's criminogenic needs; Keefe's criminal record; the impact on the victims' families; the seriousness of the offense; and the opportunity for treatment and rehabilitation. (Doc. 111 at 5-6; 7/16/21 Tr. at 48.)

The district court highlighted that this Court ruled there was a "presumption now against sentencing a juvenile to life without the possibility of parole[]" which the State failed to offer evidence to overcome. (7/16/21 Tr. at 47.) Observing that neither party asked to impose a parole restriction and based on the State's concession that it "could not meet the affirmative evidentiary burden required to

impose the parole restriction in this case[,]" the district court declined to apply a parole restriction. (*Id*. at 47-48.) The court further explained how such a sentence striking the parole restriction acknowledged "the positive steps the Defendant has taken since these charges were filed," finding persuasive the "post-offense evidence of rehabilitation that has been presented throughout these proceedings," which had gone "unrefuted by the State[.]" (7/16/21 Tr. at 50; Doc. 111 at 6.)

But the district court went even further than merely striking the parole restriction, with Keefe ultimately receiving an express recommendation that "[a]s soon as possible, the Department of Corrections must make the Defendant available for hearing before a hearing panel of the Board of Pardons and Parole so that the panel may consider the criteria outlined in Mont Code Ann. § 46-23-208." (Doc. 111 at 4; 7/16/21 Tr. at 48.) Keefe did not object to any aspects of his sentence.

SUMMARY OF THE ARGUMENT

Miller held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders[]" and 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. This Court remanded pursuant to *Miller* because, in relation to the parole restriction, the district court failed to consider a mitigating factor at the hearing: the unrebutted evidence of Keefe's prison rehabilitation.

Upon remand, the State conceded it could still not rebut Keefe's proffered evidence of prison rehabilitation. After taking judicial notice of the entirety of Keefe's cases, considering Keefe's letters of support detailing his rehabilitation, and taking into account Keefe's demonstrated rehabilitation from the 2019 resentencing, the district court struck the parole restriction as a remedy in accordance with *Miller*. Thus, Keefe's former life without parole sentence was transformed into a life sentence with the possibility of parole, and the constitutional violation was remedied.

Keefe offers no authority in support of his new theory that his sentence for triple homicide and burglary violates *Miller* and is constitutionally disproportionate under the Eighth Amendment because it was not reduced to time served. And Keefe has waived argument and ultimately cannot factually support his mistaken theory that his consecutive sentences make him unable to appear before the parole

board. Keefe has received the only remedy to which he is entitled. The victims should now finally be able to rely upon the finality of the sentence and judgment.

Regarding Keefe's final issue regarding expert assistance, Keefe concedes that his claim is inappropriate for review because it has already been decided by this Court, and Keefe explains that he merely raises the issue to preserve it for federal review. In any event, Keefe's claim is precluded by res judicata, the law of the case, and collateral estoppel. This Court should decline to consider the issue.

ARGUMENT

I. This Court should affirm Keefe's sentence, which was determined in accordance with the principles of *Miller*.

Despite Keefe's representation prior to his third sentencing that he wanted to present "a limited hearing, nothing duplicative of what's already been presented[,]" Keefe now argues on appeal that the district court should have never conducted a "truncated" sentencing proceeding, and, accordingly, should have allowed Keefe to reoffer his evidence of rehabilitation through his planned witnesses. (Appellant's Br. at 16, 20.) Keefe also contends that the district court misunderstood this Court's direction and the scope of remand. (*Id*. at 20.)

A. Standard of review

Criminal sentences are reviewed for legality. *State v. Patterson*, 2016 MT 289, ¶ 9, 385 Mont. 334, 384 P.3d 92. This Court's review for legality is confined

to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297.

This Court reviews de novo whether a district court violated a defendant's constitutional rights at sentencing. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657.

B. Applicable law

In *Miller*, the Supreme Court "allowed life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment." *Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021) (*citing Miller*, 567 U.S. at 476.) Indeed, "*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life without parole sentence." *Jones*, 141 S. Ct. at 1314 (*citing Miller*, 567 U.S. at 483.) Ultimately, a sentencer does not even need to state a finding of "permanent incorrigibility" or provide an on-the-record sentencing explanation with an implied finding of permanent incorrigibility. *Jones*, 141 S. Ct. at 1319, 1321. What

matters is that a sentencer has the "discretion to consider the defendant's youth," then the sentencer "necessarily *will* consider the defendant's youth[.]" *Jones*, 141 S. Ct. at 1319 (emphasis in original.)[8]

The *Miller* Court "repeatedly described youth as a sentencing factor akin to a mitigating circumstance." *Jones*, 141 S. Ct. at 1315. In capital cases, a sentencer is afforded "wide discretion in determining 'the weight to be given relevant mitigating evidence.'" *Jones*, 141 S. Ct. at 1316 (*citing Eddings v. Oklahoma*, 455 U.S. 104, 144-15 (1982).) "And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence." *Jones*, 141 S. Ct. at 1316.

C. The district court crafted an appropriate remedy, in accordance with Montana's sentencing policy, to address the *Miller* violation.

Here, the district court followed the mandate of *Miller*: it conducted a hearing to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 577 U.S. at 210 (citing *Miller*, 567 U.S. at 483.) The district court crafted an appropriate sentence to give Keefe a lesser

[8] The State recognizes that prior to *Jones*, this Court held that "*Miller*'s substantive rule requires Montana's sentencing judges to adequately consider" the *Miller* factors for LWOP juvenile sentences "irrespective of whether the life sentence was discretionary." *See Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313

sentence than life without parole in light of his demonstrated rehabilitation, in compliance with *Miller* precluding life without parole sentences for juvenile defendants who are not irreparably corrupt.

Contrary to Keefe's position, neither *Miller* nor the Eighth Amendment demand that Keefe be given a sentence of "time served" for his triple homicide. The holding of *Miller* was merely that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. *Miller* never purported to foreclose a sentencing judge's discretion in imposing any sentence less than life without parole for a youth who is not irreparably corrupt. To the contrary, in *Jones*, the Supreme Court recently reaffirmed the extensive discretion of a sentencing court to weigh evidence and impose any particular sentence for a juvenile homicide offender—so long as the sentencer has the ability to consider mitigating factors:

> It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth. But the key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor.

Jones, 141 S. Ct. at 1319-20.

Contrary to Keefe's claims on appeal that the district court misapprehended the scope of the hearing or its role for sentencing, the district court understood that its task was to "consider[] the *Miller* factors[,]" and specifically to consider whether a life without parole sentence was appropriate under *Miller* in light of Keefe's unrebutted evidence of rehabilitation. *See Keefe*, ¶ 30. Here, the district court expressly considered the mitigating *Miller* factor of youth at issue on remand: Keefe's "possibility of rehabilitation" based on his demonstrated evidence of maturation and growth in prison. The court weighed and considered Keefe's various letters of support from fellow inmates and prison officials and his evidence offered at his 2019 resentencing. Ultimately, the district court found persuasive this mitigating circumstance in crafting Keefe's sentence and striking his parole restriction. As explained in *Jones*, all that is required is that the district court consider the hallmarks of youth and craft a sentence.

The central issue in this case has always been whether Keefe's life without parole sentence was constitutional under *Miller*. It was the basis for the district court to grant Keefe's habeas petition and reopen consideration of his sentence in 2017. (Doc. 8.) And since the inception of Keefe's habeas petition, his requested remedy was consistently to remove his "no parole" term or to give him a parole eligible sentence. (*See* Doc. 1 at 13; DA 19-0368, Appellant's Opening Br. at 26.) Keefe never raised any other challenges to his sentences in his last resentencing,

despite his full and fair opportunity to do so. Keefe has since admitted to his failure to otherwise challenge his sentence. (7/16/21 Tr. at 17) ("the issue on appeal—on appeal was Mr. Keefe challenging the district court finding that he was irreparably corrupt, and, therefore, allowed a parole restriction in accordance with *Montgomery*."); (Appellant's Br. at 19-20) ("[i]t is true" that his requested remedy was being "considered for parole[.]")

Changing course from his representations to the district court for a limited hearing and "nothing duplicitous" from his last sentencing, Keefe now argues that he should have been allowed to present more evidence of his rehabilitation through religious advisors and therapists. But Keefe had already submitted reams of letters of support detailing witnesses' accounts of his rehabilitation—including a letter from one of his planned witnesses and letters from religious advisors about Keefe finding religion—which the district court explained she expressly considered. (*See* Doc. 107, Ex. 2, 3; *see also* Docs. 59, 64, 102, Pet's Ex. 1-24.) In his previous 2019 resentencing, Warden Mahoney, MSP supervisor Shaw, and Dr. Page all testified about Keefe's progress and demonstrated maturity in prison. In preparation for sentencing, the district court read the entirety of the 2019 resentencing transcript. Finally, the State did not present *any* contrary evidence and had already conceded it could not rebut Keefe's rehabilitative evidence. In any event, Keefe only raises a *Miller* Eighth Amendment claim and does not argue

that his due process rights were violated or that the district court relied upon any misinformation in sentencing him. Keefe fails to connect his cursory argument to any prejudice.

Even assuming for the sake of argument that Keefe was entitled to more expansive consideration of his sentence upon remand than simply a *Miller* analysis, this Court need look no further than the written judgment in conjunction with the oral pronouncement of sentence to determine that Keefe's sentence was carefully crafted and a matter of deliberative judgment—in accordance with Montana's sentencing policies. The district court provided ample reasons for the sentence Keefe received. The district court also appropriately incorporated uncontroverted reasoning from this Court's opinion in *Keefe II* and prior decisions in Keefe's cases for the third sentencing hearing. (*See* 7/16/21 Tr. at 49.) And finally, whether to apply a parole restriction is always a matter within a district court's discretion. Mont. Code Ann. § 46-18-202(2).

As Keefe's sentence complied with *Miller* and Montana's sentencing policies, there is nothing further for this Court to review. Keefe cannot further advance an Eighth Amendment proportionality challenge on direct appeal. The sentence for his triple homicide is within the statutory maximum and it does not "shock[] the conscience and outrage[] the moral sense of the community or of justice." *See State v. Paulsrud*, 2012 MT 180, ¶ 19, 366 Mont. 62, 285 P.3d 505;

State v. Shults, 2006 MT 100, ¶ 30, 332 Mont. 130, 136 P.3d 507. This Court should affirm Keefe's sentence.

II. This Court should decline to consider Keefe's second issue regarding his speculation of his parole hearing date as purportedly bearing on the constitutionality of his sentence.

A. Facts

In this proceeding, Keefe filed an opening brief, arguing without factual support that he would not be parole eligible until 2038. (*See* Appellant's Br. at 3, 4, 10, 15, 18 n.5, 21, and 22.) However, Keefe never presented any such information before the district court in his resentencing. Instead, Keefe next opted to file a "Motion for Judicial Notice" in this Court, attaching a purported sentencing calculation and arguing that he should be allowed to present evidence for the first time in this Court concerning his potential parole eligibility date. (10/15/21 Appellant's Opposed Motion for Judicial Notice.) The State objected. (10/22/21 State's Objection to Motion for Judicial Notice.) This Court denied Keefe's motion for judicial notice, citing its own Appellate Rules and observing: "As the purported sentence calculations were not before the District Court at the time of its resentencing hearing, they are not properly before the Court in Keefe's appeal." (11/02/21 Order.) This Court also struck the document from the appellate record. (*Id.*)

Contradicting the only record testimony at sentencing offered by Probation Officer Hides that Keefe would soon be parole eligible and be able to appear in front of the parole board, Keefe speculates that he will "not be parole eligible until he is seventy-one years old[,]" or in "2038." (Appellant's Br. at 22.) Keefe argues that the "*Miller* violation would abate" only when he is "eligible for *release* on parole[.]" (*Id*. at 18, n.5 (emphasis in original).) Keefe erroneously represents that, "[i]n reality, Mr. Keefe has to wait at least another seventeen years before he can appear before a parole board."[9] (*Id*. at 21.) Keefe extraordinarily argues that "[h]ad the district court properly understood the sentencing calculation [that Keefe never presented before the district court]," his sentence would have been different. (*Id*.) While Keefe admits that "[i]t is true" that his requested remedy was being "considered for parole," he contends he suffered prejudice because the district court "failed to assess" whether to "make his sentences concurrent[,]" and,

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[9] *See* December 2021, State of Montana Board of Pardons and Parole Final Board Dispositions. https://bopp.mt.gov/_docs/dispositions/2021/12-2021Final-Dispositions.pdf, page 12 (Keefe appeared before the Parole Board and waived disposition "per inmate request.")

October 2021, State of Montana Board of Pardons and Parole Final Board Dispositions. https://bopp.mt.gov/_docs/dispositions/2021/10-2021-Final-Dispositions.pdf, page 10 (Keefe appeared before the Parole Board and waived disposition "per inmate request.")

This information is publicly available on the Montana Board of Pardons and Parole Website.

presumably, that the consecutive nature of his sentence forecloses his parole board hearing. (*Id*. at 19-20.)

B. Discussion

This Court should decline to consider Keefe's argument on the practical effect of his sentence. The first point is straightforward: Keefe cannot raise and present an argument on appeal based exclusively on evidence he failed to present in the district court. This Court has stricken Keefe's evidence. This necessarily forecloses Keefe's speculative argument on the substantive effect of his sentence.

Next, in passing, Keefe faults the district court's "fail[ure] to assess" whether "to make his sentences concurrent[.]" A sentencing court has "the discretion to order sentences to run either concurrently or consecutively." *State v. Seals*, 2007 MT 71, ¶ 14, 336 Mont. 416, 156 P.3d 15 (citing Mont. Code Ann. § 46-18-401.) But Keefe never raised Mont. Code Ann. § 46-18-401 or raised any objection to his consecutive sentences in *any* of his three sentencing proceedings. As a result, none of the sentencing judges ever had the opportunity to address the issue. 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. In any event, Keefe failed to counter the

State's evidence that the consecutive sentence did not preclude Keefe from becoming parole eligible, thus Keefe has wholly failed to show prejudice from his consecutive sentences.

Finally, from the beginning and throughout his last appeal, Keefe only ever challenged the life without parole aspect of his sentence. Keefe got the remedy of a parole eligible sentence, but now, switches course and argues that he actually wanted a concurrent sentence or time served sentence. Keefe had a full and fair opportunity to raise any issues related to the validity of his sentence in his last appeal but failed to do so. This Court issued a valid and final judgment disposing of any sentencing claims Keefe raised or could have raised. Keefe should be estopped from pursuing his new theories because, with knowledge of his representations he has already succeeded in maintaining his original position, he now takes an inconsistent position, and misleads to injurious effect. *See Vogel v. Intercontinental Truck Body, Inc.*, 2006 MT 131, ¶ 10, 332 Mont. 322, 137 P.3d 573; *see also State v. Darrah*, 2009 MT 96, ¶ 12, 350 Mont. 70, 205 P.3d 792 ("The purpose of judicial estoppel is to protect the integrity of the judicial process. It is an equitable doctrine intended to protect courts from being 'manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.'")

But even assuming for the sake of argument that Keefe has somehow preserved the issue of the practical effect of his sentence bearing on *Miller*, the

claim would still fail. As explained above, *Miller* does not mandate that sentencing courts or appellate courts immediately release juvenile homicide offenders from incarceration if they prove that they are not irreparably corrupt. While the Supreme Court notes that States must provide "some meaningful opportunity to obtain release[]" by not imposing a mandatory life without parole sentencing scheme for juveniles, a State is "not required to guarantee eventual freedom" for an incarcerated juvenile defendant. *Miller*, 567 U.S. at 479 (*citing Graham v. Florida*, 560 U.S. 48, 75.) Even for *nonhomicide* juvenile offenders, while the State is prohibited from imposing a life without parole sentence, the Eighth Amendment "does not require the State to release that offender during his natural life." *Graham*, 560 U.S. at 75. Here, the given sentence striking the parole restriction ensures that Keefe's "hope for some years of life outside prison walls" has been "restored." *Montgomery*, 577 U.S. at 213.

And this Court should reject outright Keefe's contention that *Steilman* somehow concerned what constitutes an appropriate sentence under *Miller* after a district court considers the mitigating circumstances of youth. Rather, *Steilman* concerned whether a term of years sentence brought a defendant within the protections of *Miller* such that the district court should have considered Steilman's youth at sentencing. Steilman argued that "the sentencing court failed to consider the special circumstances" of the 17-year-old homicide offender, and the court

should have done so because his 110-year sentence was a de facto life without parole sentence. *Steilman*, ¶ 1. This Court's analysis of Steilman's length of sentence was solely to answer the "dispositive question" of whether Steilman's sentence even "triggers the Eighth Amendment protections set for in *Montgomery* and *Miller*." *Steilman*, ¶ 22. The *Steilman* Court never even "reach[ed] the merits of whether the District Court considered the special circumstances of Steilman's youth" because Steilman's term of years sentence did not implicate *Miller*. *Steilman*, ¶¶ 3, 24.

This Court should decline to consider Keefe's second issue. But even if it does consider it, the claim necessarily fails.

III. Keefe's third issue was already decided in *Keefe II*. Keefe is precluded from raising the claim on appeal from his resentencing.

A. Facts

Before the district court in 2019 and before this Court in *Keefe II*, Keefe argued that *Ake v. Oklahoma*, 470 U.S. 68 (1985) entitled him to a state-funded defense team of experts instead of the neutral, court-appointed psychological expert he was provided for his resentencing. (DA 19-0368, Appellant's Opening Br. at 18-19; *see Keefe II*, ¶¶ 7-8, 15.) The district court denied his motion for additional experts. This Court held that *Ake* did not apply because Keefe's sanity was never at issue—thus the threshold criteria of applicability of *Ake* were not met.

Keefe II, ¶¶ 17-18. This Court also noted that, in any event, the United States Supreme Court had recently declined to specify whether a neutral or court appointed expert could satisfy *Ake*. *Keefe II*, ¶ 18 (*citing McWilliams v. Dunn*, 137 S. Ct. 1790, 1794 (2017).) Thus, the claim was immaterial to Supreme Court precedent on *Ake*. Finally, this Court noted that, overall, the neutral expert's testimony was favorable to Keefe and his due process rights were not violated. *Keefe II*, ¶¶ 19-20.

Upon remand, Keefe raised the identical issue again and filed a motion for a defense team expert. The district court denied the motion, observing that Keefe conceded he merely raised the issue "to preserve [it] for subsequent appeals[,]" and finding that the law of the case doctrine foreclosed the issue. (Doc. 90 at 2.) On appeal to this Court, Keefe also concedes and "recognizes this Court's previous decision forecloses this argument" and thus only raises the issue to "preserve it for federal review." (*See* Appellant's Br. at 28.)

B. Standard of Review

This Court reviews a district court's decision regarding law of the case for abuse of discretion. *Notti v. State*, 2008 MT 20, ¶ 66, 341 Mont. 183, 176 P.3d 1040 (overruled on other grounds by *Whitlow v. State*, 2008 MT 140, ¶ 18 n.4, 343 Mont. 90, 183 P.3d 861.)

C. Discussion

As the district court properly determined, Keefe's issue of expert assistance, raised again on remand after this Court's decision, is barred by the law of the case. The issue is also barred by res judicata (claim preclusion) and collateral estoppel (issue preclusion).[10]

"Under the doctrine of law of the case, a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be relitigated." *State v. Gilder*, 2001 MT 121, ¶ 9, 305 Mont. 362, 28 P.3d 488 (citing *State v. Wooster*, 2001 MT 4, ¶ 12, 304 Mont. 56, 59, 16 P.3d 409). This doctrine precludes an appellant from raising issues on appeal which were previously resolved by this Court. *See, e.g., State v. Black*, 245 Mont. 39, 44, 798 P.2d 530, 533 (1990) (*citing State v. Perry*, 232 Mont. 455, 463-65, 758 P.2d 268, 273-74 (1988); *State v. Smith*, 220 Mont. 364, 372, 715 P.2d 1301, 1306 (1986)). The law of the case doctrine also expresses this Court's general reluctance to reopen issues that have been settled during the course of litigation. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 29, 351 Mont. 464, 215 P.3d 649. Applying the law of the case doctrine *generally* arises in the context of binding both the parties and the district court to the decisions of this Court in any

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[10] *Scott v. Scott*, 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997) ("Res judicata, therefore, also properly is referred to as 'claim preclusion,' while collateral estoppel also properly is referred to as 'issue preclusion.'")

subsequent proceedings. *Jacobsen*, ¶ 29 (stating that in this context, the concept is properly referred to as the "Mandate Rule") (*citing* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 18B, § 4478.3, 733 (3d ed., West 2005).

While law of the case is "normally decisive, it does not have the same binding force as the doctrine of res judicata." *Gilder*, ¶ 10. A claim is barred under res judicata if four criteria are met: the parties or their privies are the same; the subject matter of the claim is the same; the issues are the same and relate to the same subject matter; and the capacities of the persons are the same in reference to the subject matter and the issues. *Bragg v. McLaughlin*, 1999 MT 320, ¶ 16, 297 Mont. 282, 993 P.2d 662, *overruled on other grounds by Essex Ins. Co. v. Moose's Saloon, Inc*. 2007 MT 202, ¶ 16 n.2, 338 Mont. 423, 166 P.3d 451. Principles of res judicata procedurally bar a party from raising issues that were or could have been raised on direct appeal. *Gollehon v. State*, 1999 MT 210, ¶ 51, 296 Mont. 6, 986 P.2d 395.

Under the doctrine of collateral estoppel, reconsideration of an issue is barred when: (1) both proceedings involved the same parties or their privies; (2) the same issue was at issue and conclusively decided on the merits in the prior litigation; (3) the prior proceeding afforded the party or privy against who estoppel is asserted a full and fair opportunity to litigate the issue; and (4) the prior

proceeding resulted in a final judgment. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶¶ 16-18, 331 Mont. 281, 130 P.3d 1267.

The principle at stake here—irrespective of its label—is that once an issue has been finally decided, it cannot again be litigated. *State v. Zimmerman*, 175 Mont. 179, 185, 573 P.2d 174, 177 (1977). "[W]here a decision has been rendered by the Supreme Court on a particular issue between the same parties in the same case, whether that decision is right or wrong, such decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal." *Zimmerman*, 175 Mont. at 185, 573 P.2d at 177. Two important policy rationales underlie this principle: judicial economy and the need for finality of judgments. *State v. Perry*, 232 Mont. 455, 463, 758 P.2d 268, 273 (1988) (overruled on other grounds by *State v. Clark*, 2005 MT, 330, ¶ 32, 330 Mont. 8, 125 P.3d 1099.) They stand "for the proposition that there must be an end to litigation at some point." *Perry*, 232 Mont. at 464, 758 P.2d at 273.

Keefe had the opportunity to, and did, raise the expert assistance claim in district court and this Court in *Keefe II*. The same parties are involved. There was a valid and final judgment from this Court, which was not appealed to the Supreme Court. The issue is identical to that raised in *Keefe II*. Under any of the three theories mentioned above, Keefe's claim fails, as Keefe concedes. This Court should not reopen what has already been decided.

CONCLUSION

The State respectfully requests that this Court affirm Keefe's sentence.

Respectfully submitted this 16th day of February, 2022.

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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 7,803 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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