

9-4-2020

## PREVIEW; Keefe v. Kirkegard: *Constitutional Implications of Sentencing a Juvenile to Life Imprisonment Without the Possibility of Parole*

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### Recommended Citation

Shelby Towe, PREVIEW; Keefe v. Kirkegard: *Constitutional Implications of Sentencing a Juvenile to Life Imprisonment Without the Possibility of Parole*, 81 Mont. L. Rev. Online 40 (2020), [https://scholarship.law.umt.edu/mlr\\_online/vol81/iss1/6](https://scholarship.law.umt.edu/mlr_online/vol81/iss1/6).

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**PREVIEW; Keefe v. Kirkegard: Constitutional Implications of Sentencing a Juvenile to Life Imprisonment Without the Possibility of Parole**

**Shelby Towe\***

The Montana Supreme Court is scheduled to hear oral arguments in the matter of *Keefe v. Kirkegard* on September 11, 2020, at 9:30 a.m. via Zoom. John R. Mills will likely appear on behalf of Appellant Steven Wayne Keefe, and Timothy C. Fox will likely appear on behalf of Appellee the State of Montana.

**I. INTRODUCTION**

This case comes to the Montana Supreme Court more than thirty-three years after a triple homicide conviction. The issues presented are: (1) whether Keefe was unconstitutionally deprived expert assistance; (2) whether Keefe was provided a proper resentencing hearing in accordance with *Miller v. Alabama*<sup>1</sup>; (3) whether the district court incorrectly relied on expert testimony when fixing Keefe's sentence; and (4) whether Keefe was denied a fair and impartial hearing, thereby violating his constitutional right to due process.<sup>2</sup> It is significant because it considers whether sentencing a juvenile to life imprisonment without parole, absent a jury finding irreparable corruption and permanent incorrigibility, violates the Sixth or Eighth Amendments.<sup>3</sup> Because the bulk of the Court's analysis will hinge on the first two issues, the remaining two issues will not be addressed.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On October 22, 1986, appellant Steven Wayne Keefe was convicted by a jury for three counts of deliberate homicide and one count of burglary.<sup>4</sup> Keefe was sentenced to three terms of life imprisonment for each homicide, one ten-year term for the burglary,

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<sup>1</sup> 567 U.S. 460 (2012).

<sup>2</sup> See Appellant's Opening Brief at 1, *Keefe v. Kirkegard*, <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=290925> (Mont. Oct. 16, 2019) (No. DA 19-0368); Brief of Appellee at 4, *Keefe v. Kirkegard*, <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=290925> (Mont. Apr. 27, 2020) (No. DA 19-0368).

<sup>3</sup> See *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that a finding of irreparable corruption and permanent incorrigibility is required to enhance a juvenile's sentence from life without the possibility of parole to life with the possibility of parole).

<sup>4</sup> *State v. Keefe*, 759 P.2d 128, 133 (Mont. 1988).

and four ten-year terms for the use of a weapon, set to run consecutively.<sup>5</sup> The offenses occurred on October 15, 1985, while Keefe was still a juvenile; he broke into a residence in Great Falls, Montana, and killed three individuals.<sup>6</sup> Keefe had moved to Great Falls shortly before turning eighteen to seek employment, and had already committed more than fifty known non-violent crimes.<sup>7</sup> Keefe endured a difficult family life prior to moving; his father abandoned him and his mother at a young age, his mother neglected him, and he experienced abuse from a school teacher and his mother's partners.<sup>8</sup> The original sentencing court did not consider these factors as mitigating when imposing his sentence.<sup>9</sup>

Keefe appealed his convictions in 1988 asserting evidentiary error, and the Montana Supreme Court affirmed.<sup>10</sup> In 2017, Keefe's petition seeking a new sentencing hearing was granted, after which his original sentence was re-imposed following consideration of his youth as a mitigating factor.<sup>11</sup> In December of 2018, following the Court's decision in *Steilman v. Michael*,<sup>12</sup> the district court vacated Keefe's sentence and ordered a resentencing hearing.<sup>13</sup> Prior to the hearing, the district court appointed a psychiatrist to conduct a psychological evaluation of Keefe considering the characteristics of his youth and impact those characteristics may have had on his criminal activity.<sup>14</sup> In April of 2019, Keefe was resentenced to three consecutive life sentences for each homicide count and five consecutive ten-year sentences for the burglary count and use of a firearm.<sup>15</sup> Finally, after Keefe's motion for reconsideration with a new judge was denied, Keefe gave notice of this appeal on June 27, 2019.<sup>16</sup>

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<sup>5</sup> Brief of Appellee, *supra* note 2, at 1.

<sup>6</sup> *Keefe*, 759 P.2d at 129–30; Appellee's Response Brief, *supra* note 2, at 1.

<sup>7</sup> Appellant's Opening Brief, *supra* note 2, at 33; Brief of Appellee, *supra* note 2, at 3–4.

<sup>8</sup> Appellant's Opening Brief, *supra* note 2, at 5–6.

<sup>9</sup> Brief of Appellee, *supra* note 2, at 2.

<sup>10</sup> Brief of Appellee, *supra* note 2, at 1.

<sup>11</sup> Brief of Appellee, *supra* note 2, at 2 (consideration of youth as a mitigating factor was required under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Miller v. Alabama*, 567 U.S. 460 (2012)).

<sup>12</sup> 407 P.3d 313 (Mont. 2017) (holding that a sentencing court must analyze the *Miller* factors when sentencing a juvenile defendant to life imprisonment without the possibility of parole in Montana).

<sup>13</sup> Appellant's Opening Brief, *supra* note 2, at 1.

<sup>14</sup> Appellant's Opening Brief, *supra* note 2, at 2; Brief of Appellee, *supra* note 2, at 14.

<sup>15</sup> Appellant's Opening Brief, *supra* note 2, at 3.

<sup>16</sup> Appellant's Opening Brief, *supra* note 2, at 3.

### III. SUMMARY OF THE ARGUMENTS

When considering a sentence of life imprisonment without the possibility of parole in Montana, the sentencing court is required to analyze a number of mitigating factors related to the juvenile's youth.<sup>17</sup> Upon consideration of these factors, the parties reached opposing conclusions regarding whether Keefe could constitutionally be sentenced to life without the possibility of parole.<sup>18</sup> The parties also dispute whether Keefe is constitutionally entitled to an expert, and whether the district court's appointed psychiatrist sufficed.<sup>19</sup>

#### A. *Appellant's Argument*

First, Keefe argues he was unconstitutionally deprived access to expert assistance because the district court's appointed psychiatrist did not provide more than an examination of Keefe, contrary to the requirements of *Ake v. Oklahoma*.<sup>20</sup> Keefe asserts he was entitled to an expert because his mental condition was a substantial factor at trial.<sup>21</sup> Keefe claims his mental condition was a substantial factor because (1) the district court made it an issue when it appointed an expert to evaluate Keefe; (2) Keefe wanted to argue an absence of a mental defect to prove "transient immaturity"; and (3) a defendant's mental status is "inextricably intertwined" with the issue of irreparable corruption, a requirement for a life sentence without the possibility of parole for a juvenile.<sup>22</sup> Alternatively, Keefe maintains he should be granted relief to address the unresolved question of whether the defense is entitled to its own expert.<sup>23</sup>

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<sup>17</sup> *Steilman*, 407 P.3d at 318–19.

<sup>18</sup> Appellant's Opening Brief, *supra* note 2, at 23; Brief of Appellee, *supra* note 2, at 32.

<sup>19</sup> Appellant's Opening Brief, *supra* note 2, at 13–22; Brief of Appellee, *supra* note 2, at 21–28.

<sup>20</sup> 470 U.S. 68 (1985) (stating that an indigent defendant is entitled to an expert to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" if certain requirements are met); Appellant's Opening Brief, *supra* note 2, at 18–22.

<sup>21</sup> Appellant's Opening Brief, *supra* note 2, at 18; Appellant's Reply Brief at 1–6, *Keefe v. Kirkegard*, <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=316586> (Mont. June 5, 2020) (No. DA 19-0368).

<sup>22</sup> Appellant's Opening Brief, *supra* note 2, at 18; Appellant's Reply Brief, *supra* note 21, at 1–6.

<sup>23</sup> Appellant's Reply Brief, *supra* note 21, at 4 (the Supreme Court of the United States declined to answer whether defense counsel is entitled to their own expert

Next, Keefe argues he was deprived of a proper *Miller* hearing because the district court declined to give meaningful consideration to the mitigating factors of Keefe's youth at the time of the offense.<sup>24</sup> Keefe argues it was error for the district court to disregard his evidence of post-incarceration conduct because juveniles have heightened capacity for improvement and integration back into society, and the evidence overwhelmingly supports Keefe's rehabilitative efforts, refuting a finding of irreparable corruption at the time of the offenses.<sup>25</sup> Further, Keefe contends *Miller* provides that evidence of childhood trauma and neglect are relevant to a finding of irreparable corruption, thus it was error for the district court to overlook Keefe's childhood trauma and neglect.<sup>26</sup> Due to the error from the insufficient *Miller* hearing, Keefe argues his sentence of life imprisonment without the possibility of parole is violative of the Eighth Amendment's ban on cruel and unusual punishment because it is disproportionate to his offenses committed as a juvenile.<sup>27</sup>

Finally, Keefe argues he was entitled to jury resolution regarding whether Keefe was irreparably corrupt because such a finding enhances his sentence by making him ineligible for parole.<sup>28</sup> Keefe maintains that it violates the Sixth Amendment to sentence juveniles to life imprisonment without the possibility of parole in Montana absent a jury finding that the juvenile's offenses reflect irreparable corruption and permanent incorrigibility rather than transient immaturity.<sup>29</sup> Keefe claims these errors were not harmless, and as a result, he is entitled to a new sentencing hearing in front of a new judge.<sup>30</sup>

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as part of the defense team, *Ake*, 470 U.S. at 83, but Keefe maintains that *Ake* alludes to the conclusion that the defense is entitled to their own expert).

<sup>24</sup> Appellant's Opening Brief, *supra* note 2, at 23–27; Appellant's Reply Brief, *supra* note 21, at 7.

<sup>25</sup> Appellant's Opening Brief, *supra* note 2, at 27–33; Appellant's Reply Brief, *supra* note 21, at 11–12 (citing *United States v. Briones*, 929 F.3d 1057 (9th Cir. 2019) to assert that evidence of rehabilitation is important to determine whether the defendant was irreparably corrupt and permanently incorrigible at the time of the offense).

<sup>26</sup> Appellant's Opening Brief, *supra* note 2, at 36–39.

<sup>27</sup> Appellant's Opening Brief, *supra* note 2, at 41–42.

<sup>28</sup> Appellant's Opening Brief, *supra* note 2, at 40–42 (arguing that *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and MONT. CODE ANN. § 41–1–401 require that any fact used to enhance a sentence must be found by a jury beyond a reasonable doubt).

<sup>29</sup> Appellant's Opening Brief, *supra* note 2, at 41–42.

<sup>30</sup> Appellant's Opening Brief, *supra* note 2, at 54.

*B. Appellee's Argument*

The State of Montana disputes that Keefe was unconstitutionally deprived of expert assistance because the district court's appointment of a psychiatrist to evaluate him provided him with access to "one competent psychiatrist."<sup>31</sup> Further, the State asserts that Keefe was not entitled to an expert because he did not demonstrate that the presence of a mental disease or defect was at issue and his case is not a capital case.<sup>32</sup> Additionally, the State argues it was not improper for the court to appoint a psychological expert because courts in Montana have discretion over the mental examination of a defendant.<sup>33</sup>

Next, the State argues the district court properly assessed the *Miller* factors when resentencing Keefe because, despite Keefe's youth, he was competent and did not act out of juvenile impulsiveness or reactivity.<sup>34</sup> The State supports this assertion by explaining that Keefe was capable of "extricating" himself from his dysfunctional family life; he was almost the age of majority at the time of the offense, and he was sober and acted independently.<sup>35</sup> The State further claims that Keefe's statements made at his trial as a juvenile, coupled with his psychological assessments, confirm his competency and independence.<sup>36</sup> The State argues Keefe did not exhibit potential for rehabilitation at sentencing due to his criminal history, antisocial personality disorder, and failure in youth treatment facilities.<sup>37</sup> Finally, the State contends that a jury was not obliged to conclude whether Keefe was irreparably corrupt, and the judge was correct to do so because the sentencing court is afforded exclusive authority for imposing criminal sentences.<sup>38</sup>

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<sup>31</sup> Brief of Appellee, *supra* note 2, at 24–26.

<sup>32</sup> Brief of Appellee, *supra* note 2, at 24–26.

<sup>33</sup> Brief of Appellee, *supra* note 2, at 27–29 (distinguishing *United States v. Pete*, 819 F.3d 1121 (9th Cir. 2016) and citing MONT. CODE ANN. § 46–18–112(4)).

<sup>34</sup> Brief of Appellee, *supra* note 2, at 32.

<sup>35</sup> Brief of Appellee, *supra* note 2, at 32–35.

<sup>36</sup> Brief of Appellee, *supra* note 2, at 32–37 (distinguishing *Miller v. Alabama*, 567 U.S. 460 (2012)).

<sup>37</sup> Brief of Appellee, *supra* note 2, at 38, 42–43.

<sup>38</sup> Brief of Appellee, *supra* note 2, at 45 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); MONT. CODE ANN. § 46–1–401).

#### IV. ANALYSIS

##### A. Expert Assistance

To determine whether Keefe was unconstitutionally deprived expert assistance, the Court will primarily rely on *Ake v. Oklahoma*, which entitles an indigent defendant access to a competent psychiatrist for the purpose of conducting an “appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense” if the defendant demonstrates that their sanity at the time of the offense will be a “significant factor” at trial.<sup>39</sup> Despite the appellee’s argument that *Ake* is inapplicable to Keefe’s case because it is not a capital case, the Court will likely proceed with an *Ake* analysis because the holding in *Ake* has not been limited to capital cases.<sup>40</sup> Rather, this idea was expressed solely in Justice Burger’s concurrence, which is not binding law.<sup>41</sup> As the parties do not dispute that Keefe is indigent, the Court’s dispositive determination will be whether Keefe met the threshold requirement to entitle him to an expert pursuant to *Ake* by demonstrating to the district court that his sanity at the time of the offense would be a significant factor at trial.<sup>42</sup>

The Court will likely find that Keefe is entitled to an expert, but not for the same reasons that Keefe argues (that the district court made his sanity an issue when it appointed a psychiatrist to examine him). This is because precedent dictates that the defendant must make the “preliminary showing” that their sanity will be a substantial factor in order to procure an expert under *Ake*.<sup>43</sup> As in *Ake*, where the defendant utilized an insanity defense at trial, Keefe’s desire to prove absence of insanity or mental disease or defect to support a finding of “transient immaturity” would correspondingly make his sanity a substantial factor at the resentencing hearing.<sup>44</sup> Because *Ake* is applicable at the sentencing phase, Keefe demonstrated his sanity would be a substantial factor.<sup>45</sup> Alternatively, if the Court determines that Keefe is entitled to a jury

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<sup>39</sup> 470 U.S. 68, 83 (1985).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 87 (Burger, J., concurring, stating that “[n]othing in the Court’s opinion reaches non-capital cases.”).

<sup>42</sup> Brief of Appellee, *supra* note 2, at 21–22.

<sup>43</sup> *See Ake*, 470 U.S. at 83 (explaining that defendant must make a “preliminary showing” that his sanity will be a substantial factor).

<sup>44</sup> Appellant’s Reply Brief, *supra* note 21, at 1–2; Brief of Appellee, *supra* note 2, at 24.

<sup>45</sup> *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (stating that “[t]his right applies not only at trial, but also in ‘the sentencing phase.’”) (citing *Ake*, 470 U.S. at 83–84).

determination regarding irreparable corruption and permanent incorrigibility, then Keefe's sanity at the time of the offense is likely a substantial factor at trial because such a finding necessarily involves considerations of his mental capacity, as a defendant cannot consistently exhibit capacity for rehabilitation and be irreparably corrupt.<sup>46</sup>

Assuming the Court determines Keefe properly demonstrated his sanity was a substantial factor or is entitled to jury resolution regarding irreparable corruption, it will next need to ascertain whether the appointed expert fulfilled the requirements mandated by *Ake*. To do so, the Court will look to precedent set forth in *McWilliams v. Dunn*<sup>47</sup> and *Smith v. McCormick*.<sup>48</sup> In *McWilliams*, the Supreme Court of the United States emphasized that an examination by a psychiatrist, without more, will not suffice and concluded the defendant was unconstitutionally deprived his right to an expert due to the lack of availability of an expert to help evaluate medical records and examinations or formulate a legal strategy.<sup>49</sup> Similarly, the United States Court of Appeals for the Ninth Circuit in *McWilliams* concluded that the appointed psychiatrist did not meet *Ake's* requirements because the defendant had no opportunity to meet with the psychiatrist for evaluation or discussion of possible defenses, the psychiatrist did not help prepare the defense, and the lack of an additional psychiatrist left the defense without an opportunity to rebut the damaging report presented by the court-appointed psychiatrist.<sup>50</sup> Although *Ake* entitles an indigent defendant access to an expert, *Ake* and its successive cases declined to resolve whether that entitles the defense their own, independent expert.<sup>51</sup>

Pursuant to *Ake*, the Court will likely determine the appointed expert did not suffice because the expert did not provide more than a psychiatric examination of Keefe for trial and subsequent sentencing hearings.<sup>52</sup> Similar to *McWilliams* and *McCormick*, Keefe and his counsel lacked access to the expert to evaluate reports regarding Keefe's mental condition or help prepare

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<sup>46</sup> *Miller v. Alabama*, 567 U.S. 460, 473 (2012).

<sup>47</sup> 137 S. Ct. 1790 (2017).

<sup>48</sup> 914 F.2d 1153 (9th Cir. 1990).

<sup>49</sup> *McWilliams*, 137 S. Ct. at 1800.

<sup>50</sup> *McCormick*, 914 F.2d at 1158–59.

<sup>51</sup> *See Ake*, 470 U.S. at 83; *McWilliams*, 137 S. Ct. at 1800; *McCormick*, 914 F.2d at 1159 (concluding that given the specific circumstances, the defendant was entitled to their own expert, not that the defense is always entitled to their own expert).

<sup>52</sup> Appellant's Opening Brief, *supra* note 2, at 5; Brief of Appellee, *supra* note 2, at 14.



his defense. Thus, in accordance with both *McWilliams* and *McCormick*, Keefe was not provided the assistance prescribed by *Ake*. In summary, if the Court finds Keefe adequately demonstrated his sanity at the time of the offense would be a significant factor at trial or that he is entitled to a jury determination regarding irreparable corruption, then the Court will also likely conclude Keefe is constitutionally entitled to an expert and further that the appointed expert did not meet *Ake*'s requirements because he did not provide more than an examination of Keefe.

### B. Resentencing Hearing

To determine whether Keefe was afforded a proper *Miller* resentencing hearing, the Court will need to analyze whether the district court appropriately considered the mitigating factors of Keefe's youth. *Miller v. Alabama* entitles a juvenile defendant to considerations of the mitigating factors of their youth prior to imposition of a life sentence without the possibility of parole.<sup>53</sup> These factors include immaturity, failure to appreciate risks and consequences, family environment, and potential for rehabilitation.<sup>54</sup> Since *Miller* applies retroactively in cases on "collateral review," such as here, where Keefe is seeking post-conviction relief,<sup>55</sup> if there has been a significant time lapse between the defendant's initial crime and the *Miller* hearing, the analysis will involve evidence of post-incarceration rehabilitation because the defendant's capacity for rehabilitation may preclude imposition of a life sentence without parole.<sup>56</sup> For purposes of resentencing, whether a defendant has "change[d] in some fundamental way" since the commission of the offense is "key evidence" when conducting a *Miller* analysis to ascertain whether the defendant exhibits the capacity for change, thereby negating a finding of irreparable corruption and permanent incorrigibility.<sup>57</sup> Thus, to determine whether Keefe was provided a sufficient *Miller* hearing, the Court's analysis will hinge on whether Keefe was capable of

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<sup>53</sup> 567 U.S. 460, 477–78 (2012) (concluding that mandatory sentences of life without parole for juveniles violates the Eighth Amendment, and such a sentence is reserved for rare cases where the juvenile exhibits irreparable corruption and permanent incorrigibility).

<sup>54</sup> *Id.*

<sup>55</sup> Justice Alito defined "collateral review" in *Wall v. Kholi* as "a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." 562 U.S. 545, 547 (2011).

<sup>56</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (stating that "*Miller* announced a substantive rule that is retroactive in cases on collateral review."); *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019).

<sup>57</sup> *United States v. Pete*, 819 F.3d 1121, 1133 (9th Cir. 2016).

change, and whether he was granted the opportunity to provide evidence of such change.<sup>58</sup>

Integrated with the issue of whether Keefe was provided an adequate *Miller* hearing is the issue of whether Keefe was entitled to a jury determination that he was irreparably corrupt and permanently incorrigible. To resolve this issue, this Court will look to *Apprendi v. New Jersey*<sup>59</sup> and two subsequent cases, *Blakely v. Washington*<sup>60</sup> and *State v. Garrymore*,<sup>61</sup> for guidance. *Apprendi* entitles a defendant to jury resolution of any fact that increases the defendant's penalty beyond the statutory maximum supported by the jury verdict or admissions by the defendant.<sup>62</sup> Applying the law from *Apprendi*, the Supreme Court in *Blakely* concluded that enhancing the defendant's sentence based on a judicial finding of "deliberate cruelty" was improper and the defendant was entitled to submission to a jury because the enhancement was not supported by the jury verdict or defendant's admissions.<sup>63</sup> Also applying the law from *Apprendi*, the Court in *Garrymore* emphasized that a sentencing judge maintains broad discretion when determining sentence parameters and a defendant is not entitled to jury resolution of all facts, only those that enhance the sentence to one unsupported by the jury verdict or defendant's admissions.<sup>64</sup> After *Garrymore* was sentenced to life imprisonment and the judge concluded he was ineligible for parole due to his prior convictions and lack of remorse, this Court held that his Sixth Amendment rights were not violated because those particular facts were not relevant to whether the defendant had a "legal right to a lesser sentence."<sup>65</sup>

The Court will likely conclude Keefe is entitled to jury resolution regarding irreparable corruption and permanent incorrigibility because such a finding is required to constitutionally make him parole ineligible, and the jury did not consider this factor because *Miller* had not yet been decided nor did Keefe admit such a

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<sup>58</sup> *Briones*, 929 F.3d at 1067 (citing *Pete*, 819 F.3d at 1133).

<sup>59</sup> 530 U.S. 466 (2000).

<sup>60</sup> 542 U.S. 296 (2004).

<sup>61</sup> 145 P.3d 946 (Mont. 2006).

<sup>62</sup> 530 U.S. at 490 (concluding that although the purpose to intimidate "sentence enhancer" was not an explicit element of the crime, it was entitled to submission to a jury because it increased the defendant's sentence beyond what was authorized by the jury's guilty verdict); *Blakely*, 542 U.S. at 303 (citing *Ring v. Arizona*, 536 U.S. 584 (2002)).

<sup>63</sup> *Blakely*, 542 U.S. at 303 (explaining that any specific fact, including an aggravating fact, that enhances a defendant's sentence beyond the statutory maximum must be supported by the jury verdict or admitted by the defendant, otherwise it is entitled to submission to the jury).

<sup>64</sup> *Garrymore*, 145 P.3d at 952.

<sup>65</sup> *Id.* at 953 (citing *Blakely*, 542 U.S. at 309) (internal quotation marks omitted).

finding. The jury was incapable of considering irreparable corruption and permanent incorrigibility when Keefe was initially convicted because *Miller* was not decided until more than twenty years later. Additionally, Keefe rebutted a finding that he was irreparably corrupt and permanently incorrigible by asserting he had rehabilitated during his years incarcerated. Similar to *Blakely*, the sentencing judge independently determined whether Keefe was irreparably corrupt and permanently incorrigible; therefore, unless the facts from the jury verdict can support this finding, Keefe will likely be entitled to submission to a jury. Consistent with appellee's assertions, it seems at first glance that Keefe is not entitled to jury resolution, due to the broad discretion a sentencing judge is afforded at sentencing.<sup>66</sup>

However, the Court will likely conclude otherwise because Keefe's case exhibits several important distinguishing factors from *Garrymore*. First, unlike *Garrymore*, Keefe was a juvenile and accordingly, life imprisonment without the possibility of parole was not within his maximum possible sentence permitted by statute.<sup>67</sup> Therefore, the judge in *Garrymore* was afforded broader discretion to make *Garrymore* parole ineligible because *Garrymore* was not entitled to the additional protections that juveniles are provided in the criminal justice system.<sup>68</sup> Second, considerations of prior criminal history and lack of remorse are distinct from a finding of irreparable corruption and permanent incorrigibility, which has been reserved for "rare" juveniles and based on specific considerations of youth and capacity of rehabilitation.<sup>69</sup> Therefore, consistent with *Apprendi*, *Blakely* and their progeny, Keefe is likely entitled to jury resolution because such a conclusion enhances his sentence beyond the statutory maximum authorized by *Miller* and supported by Keefe's admissions, unless a review of the facts accepted by the jury is capable of supporting such a finding.

Consistent with the conclusion that Keefe is likely entitled to a jury finding regarding irreparable corruption and permanent incorrigibility, the Court will likely find Keefe was not afforded a sufficient *Miller* hearing because the mitigating attributes of his youth and evidence of rehabilitation were not given proper consideration. Specifically, the Court will likely conclude that Keefe is entitled to present evidence of post-incarceration rehabilitation

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<sup>66</sup> Appellee's Response Brief, *supra* note 2, at 45; *Garrymore*, 145 P.3d at 953–55.

<sup>67</sup> MONT. CODE ANN. § 46–18–222(1).

<sup>68</sup> See *Garrymore*, 145 P.3d at 953–55; *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

<sup>69</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016); *Miller*, 567 U.S. at 479–80.

because a significant amount of time has lapsed since the crime and it refutes the conclusion that he is irreparably corrupt and permanently incorrigible, thus it is determinative of whether he can constitutionally be sentenced to life without parole.<sup>70</sup> Additionally, evidence of post-incarceration rehabilitation is specifically relevant to whether Keefe has a “legal right to a lesser sentence,” pursuant to *Miller*.<sup>71</sup> This is consistent with the agreed upon view that prospects of rehabilitation and impact of incarceration are relevant evidence at a *Miller* resentencing hearing.<sup>72</sup> Further, the Court will likely conclude it was improper to not consider evidence of Keefe’s childhood abuse and neglect because *Miller* and the following cases affirm that those factors are relevant to whether the defendant’s actions reflect transient immaturity rather than irreparable corruption and permanent incorrigibility.<sup>73</sup> In conclusion, because Keefe is entitled to consideration of the unique characteristics of his youth at the time of the offenses, the Court will likely find Keefe is entitled to jury resolution regarding irreparable corruption and entitled to present evidence of rehabilitation and childhood abuse and neglect.<sup>74</sup>

## V. CONCLUSION

The Court will likely conclude that (1) Keefe is entitled to expert assistance and the appointed psychiatrist did not suffice, and (2) Keefe was not afforded a proper *Miller* hearing and should be allowed to present evidence of post-incarceration rehabilitation. Further, *Keefe v. Kirkegard* offers the Montana Supreme Court an opportunity to address several unresolved constitutional issues pertaining to juveniles in the criminal justice system. Is a juvenile defendant entitled to jury resolution that they are irreparably corrupt? Does a judicial finding of irreparable corruption violate their constitutional rights under the Sixth or Eighth Amendments? Resolving these questions provides the Court a chance to contribute to the ongoing discussion regarding the constitutional ramifications

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<sup>70</sup> See *Miller*, 567 U.S. at 478; *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019).

<sup>71</sup> *Miller*, 567 U.S. at 479; *Briones*, 929 F.3d at 1067; *Pete*, 819 F.3d at 1133.

<sup>72</sup> See *Miller*, 567 U.S. at 479 (“A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” (citing *Graham v. Florida*, 560 U.S. 48, 74 (2011)) (internal quotation marks omitted); *Briones*, 929 F.3d at 1067; *Pete*, 819 F.3d at 1133.

<sup>73</sup> *Miller*, 567 U.S. at 476 (explaining that the Court had previously found “evidence [of abuse and neglect] ‘particularly relevant’ – more so than it would have been in the case of an adult offender.”) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

<sup>74</sup> *Id.* at 472–75.

of sentencing a juvenile to life imprisonment, and further imposing parole ineligibility.