IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a DANIEL HEINZELMAN,
a/k/a DANIEL INGALLS,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME ECKRICH
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed December 11, 2015

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PRELIMINARY STATEMENT

Throughout this brief, references to the transcript of the sentencing hearing shall be referred to as "SH." State exhibits are referred to as "State's Ex." and defense exhibits are referred to as "Def. Ex.", followed by the exhibit number. References to the Appendix to this brief are denoted "APP." All other documents within the settled record as outlined in the Clerk's Supplemental Alphabetical Index shall be referred to as "SR."

JURISDICTIONAL STATEMENT

Daniel Charles appeals from the Second Amended Judgment of Conviction, entered by the Honorable Jerome Eckrich, Circuit Court Judge, on November 13, 2015. SR 694-97, APP 1-4. Daniel filed a timely Notice of Appeal on December 11, 2015. SR 721-23. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE TRIAL COURT ERRED BY DISREGARDING THE MITIGATING QUALITIES OF YOUTH SET FORTH IN *MILLER V. ALABAMA* AND OTHER FACTORS?

The trial court said that the mitigating qualities of youth set forth in *Miller* were not "universally applicable" and declined to consider them in Daniel's case. SH 642-46, APP 8-12. The trial court also considered facts that were disproved by uncontroverted evidence at the hearing. SH 642-46, APP 8-12. Further, the trial court denied Daniel's motion for new trial on this ground, SR 699-715, by operation of law, SDCL 15-6-59(b).

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Roper v. Simmons, 543 U.S. 551 (2005)

U.S. Const. amend. VIII

U.S. Const. amend. XIV

S.D. Const. art. VI, § 23

II. WHETHER A SENTENCE OF 92 YEARS IS THE LEGAL EQUIVALENT OF A SENTENCE OF LIFE WITHOUT PAROLE?

The trial court sentenced Daniel to 92 years. SR 694-97, APP 1-4. The trial court also denied Daniel's motion for new trial on this ground, SR 699-715, by operation of law, SDCL 15-6-59(b).

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Graham v. Florida, 560 U.S. 48 (2010)

Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014)

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S.D. Const. art. VI, § 23

III. WHETHER A 92-YEAR SENTENCE IS CATEGORICALLY UNCONSTITUTIONAL FOR A 14-YEAR-OLD CHILD?

The trial court sentenced Daniel to 92 years. SR 694-97, APP 1-4. The trial court also denied Daniel's motion for new trial on this ground, SR 699-715, by operation of law, SDCL 15-6-59(b).

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Graham v. Florida, 560 U.S. 48 (2010)

U.S. Const. amend. VIII

U.S. Const. amend. XIV

S.D. Const. art. VI, § 23

IV. WHETHER A 92-YEAR SENTENCE IS DISPROPORTIONATE IN THIS CASE?

The trial court sentenced Daniel to 92 years. SR 694-97, APP 1-4. The trial court also denied Daniel's motion for new trial on this ground, SR 699-715, by operation of law, SDCL 15-6-59(b).

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Graham v. Florida, 560 U.S. 48 (2010)

U.S. Const. amend. VIII

U.S. Const. amend. XIV

S.D. Const. art. VI, § 23

V. WHETHER THE TRIAL COURT ERRED IN PERMITTING ORAL VICTIM IMPACT STATEMENTS BY INDIVIDUALS NOT WITHIN THE DEFINITION OF THE STATUTE?

The trial court acknowledged one of the individuals who testified did not meet the definition of victim under the statute, but admitted her testimony. SH 12-16.

Payne v. Tennessee, 501 U.S. 808 (1991)

State v. Berget, 2013 S.D. 1, 826 N.W.2d 1

SDCL 23A-27-1.1

U.S. Const. amend. V

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STATEMENT OF THE CASE

On April 17, 2000, Daniel Charles was found guilty of first degree murder, pursuant to SDCL 22-16-4, in the shooting death of his stepfather, Duane Ingalls, on July 23, 1999, when he was only 14 years old. SR 300-01. On April 28, 2000, the Honorable Jerome Eckrich, Circuit Court Judge, Fourth Judicial Circuit, imposed a mandatory sentence of life imprisonment without parole. SR 302-03.

On May 13, 2011, Daniel filed a motion to correct illegal sentence, challenging his sentence as cruel and unusual under the Eighth Amendment. SR 365-404. On June 25, 2012, the United States Supreme Court ruled in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that imposing a mandatory life-without-parole sentence on a juvenile is unconstitutional. *Id.* at 2469. On January 25, 2015, the circuit court determined that *Miller* should be applied retroactively to Daniel's case. SR 569-83.

A resentencing hearing was held on October 21-23, 2015. SH 1-638. On October 30, 2015, Judge Eckrich sentenced Daniel to 92 years. SH 639-46, APP 5-12. A Second Amended Judgment of Conviction was filed on November 13, 2015. SR 694-97, APP 1-4. Daniel filed a motion for new trial on November 20, 2015, SR 699-715, which was denied by operation of law, SDCL 15-6-59(b). Daniel filed a timely Notice of Appeal on December 11, 2015. SR 721-23.

STATEMENT OF FACTS

Evidence presented during the sentencing hearing established that Daniel's mother, Melissa Pickard, became pregnant with him when she was a teenager. Def. Ex. 1 at 25, APP 39. Daniel never knew his biological father and, at just 6 months old, his mother abandoned him with her parents. Def. Ex. 1 at 27, APP 41. Daniel's grandparents raised him as their "own son" and he believed them to be his mother and father. Def. Ex. 1 at 27, APP 41; SH 186-88. They moved to Lafayette, Indiana, where he experienced a loving, protective, and stable home, where screaming or yelling was infrequent and corporal punishment was never applied. Def. Ex. 1 at 28, 55, APP 42, 69. During this time, Daniel had almost no contact with his mother. Def. Ex. 1 at 28, APP 42.

When Daniel was 8, Mrs. Pickard revealed to Daniel that she was his biological mother and took him, against the grandparent's wishes, to live with her and her husband – the victim in this case, Duane Ingalls – in South Dakota. Def. Ex. 1 at 27-29, APP 41-43. It was incredibly traumatizing and destabalizing for Daniel to be taken from the only parents he had known and told that they had lied to him. Def. Ex. 1 at 55, APP 69. As a result, he suffered an "attachment disruption" State's Ex. 4 at 25; SH 117.

Not only was Daniel dealing with this trauma, but, in his new home, "Daniel experienced a dysfunctional family system that included frequent arguments and domestic violence between his parents, his stepfather's short temper and abuse, and his mother's histrionics, provoking conflicts and

inciting drama." State's Ex. 4 at 8. His mother and Mr. Ingalls argued on an almost daily basis, with these arguments often escalating to slapping and pushing. Def. Ex. 1 at 29, APP 43; SH 196-201. Daniel witnessed this domestic violence, sometimes becoming involved in an effort to protect his mother, only to be pushed away by Mr. Ingalls. Def. Ex. 1 at 29, APP 43.

Mrs. Pickard would also go into rageful, screaming fits at Daniel on a daily basis that would often get physical. Def. Ex. 1 at 7, 33, APP 21, 47; SH 196-201. Daniel was also subjected to repeated verbal abuse by both Mrs. Pickard and Mr. Ingalls, with Daniel being called "stupid," "idiot," and "worthless." Def. Ex. 1 at 44, APP 58; State's Ex. 4 at 14; SH 198-99. Mrs. Pickard would often call upon Mr. Ingalls to carry out the more extensive corporal punishment. Def. Ex. 1 at 7, 30, APP 21, 44; State's Ex. 4 at 13. This included weekly beatings that added to Daniel's emotional and psychological stress. Def. Ex. 1 at 7, 30, APP 21, 44; State's Ex. 4 at 13. Isolated on a ranch and with the local rural school providing him with little opportunity to interact with kids his own age, Daniel began to struggle socially, and his behavior at school deteriorated. Def. Ex. 1 at 11-12, 30, APP 25-26, 44.

When Daniel was 13, Mrs. Pickard divorced Mr. Ingalls and took a job as a long-haul truck driver, abandoning Daniel again with Mr. Ingalls. Def. Ex. 1 at 26, APP 40; SH 114, 218. Mr. Ingalls was left to manage a traumatized and struggling child alone without the resources needed to do so. While Mr.

Ingalls began with corporal punishment, following the divorce, his physical violence against Daniel escalated. Def. Ex. 1 at 29-33, APP 43-47; State's Ex. 4 at 24; SH 221. In response, Daniel attempted to run away, but he was returned to the ranch. Def. Ex. 1 at 33-34, APP 47-48; SH 151, 225, 311.

Finally, in the winter of 1999, Daniel, desperate to extricate himself from his situation, told his mother about the abuse, asked if he could live with her, and she agreed. Def. Ex. 1 at 30, APP 44; State's Ex. 4 at 9. However, Mrs. Pickard continued to drive truck – leaving Daniel for days at a time with no adult supervision. Def. Ex. 1 at 30, APP 44; *see also* SH 115. Unsurprisingly, Daniel got into trouble at school for getting into a fight with an older boy. Def. Ex. 1 at 31, APP 45. Mrs. Pickard then abandoned Daniel again – this time with his godparents in Rapid City. Def. Ex. 1 at 30-31, APP 44-45. After only a few weeks, Daniel got in trouble with his godparents. Def. Ex. 1 at 31-32, APP 45-46. Feeling overwhelmed, he cut his wrist and was psychiatrically hospitalized. Def. Ex. 1 at 15-16, 32, APP 29-30, 46. Notes from the family meetings at the hospital make clear that Daniel and his mother were concerned about him returning to the ranch because he and Mr. Ingalls weren't getting along. SH 229-30. However, because Mrs. Pickard continued to hold a job inconsistent with caring for her child, she wrote a formal note discharging Daniel to the ranch. Def. Ex. 1 at 17, APP 31.

Daniel's grandfather came and stayed on the ranch for a few weeks following Daniel's hospitalization. Def. Ex. 1 at 7-8, APP 21-22. His

grandfather witnessed Mr. Ingalls's become angry at Daniel because Daniel did not sweep under the couch. Def. Ex. 1 at 7-8, APP 21-22. He saw Mr. Ingalls screaming at Daniel with a look in his eyes like he was going to go after Daniel, but Mr. Ingalls stopped when he saw Daniel's grandfather. Def. Ex. 1 at 7-8, APP 21-22. Based on that exchange, Daniel's grandfather decided to take Daniel to California with him for a few weeks. Def. Ex. 1 at 8, APP 22. Daniel asked his grandfather if he could stay with him, but his grandfather said no because he was sick. Def. Ex. 1 at 7, APP 21. Daniel was then returned to the ranch just weeks before the incident. Def. Ex. 1 at 4, 7, APP 18, 21.

On the day of the incident, Daniel was working early in the field and raked a windrow in the wrong direction. Def. Ex. 1 at 34-35, APP 48-49; State's Ex. 4 at 15-16. Mr. Ingalls confronted him about his mistake, called him "worthless like [his] mother," and then hit him in the head, slamming his head against the tractor window. Def. Ex. 1 at 34-35, APP 48-49; State's Ex. 4 at 15-16. Daniel finished his work in the field and then returned to the house to make lunch, still hurting and upset over the argument in the field. Def. Ex. 1 at 34-35, APP 48-49; State's Ex. 4 at 15-16. When Daniel saw Mr. Ingalls pull up in his truck, still appearing angry, he was afraid, and grabbed a gun and shot Mr. Ingalls. Def. Ex. 1 at 34-35, APP 48-49; State's Ex. 4 at 15-16.

Daniel immediately realized that shooting his step-father was a tragic mistake and called his mother and begged her to come home right away. Def.

Ex. 1 at 35, APP 49; State's Ex. 4 at 16. She was driving and was several hours from the ranch. Def. Ex. 1 at 35, APP 49; State's Ex. 4 at 6. For the next eight hours, Daniel was in acute distress with his step-father's body nearby. Def. Ex. 1 at 35, APP 49. He veered from trying to cover-up the incident by moving the body and trying to clean up evidence of the shooting, to moments where he desperately tried to disassociate from the violence by watching pornography, and ultimately to creating false narratives about what happened and asserting that it was a hunting accident. Def. Ex. 1 at 35, APP 49; State's Ex. 4 at 4, 6, 16. At 14, he clearly could not manage the horror of what he'd done. Def. Ex. 1 at 35, APP 49.

Fourteen-year-olds, like Daniel, Def. Ex. 1 at 1, APP 15; State's Ex. 4 at 1, possess unique characteristics that distinguish them from older teenagers, including their minimal capacity to imagine consequences, regulate their shifting emotions, and control their impulses, *see, e.g.*, SH 116-17 (State's expert testifying that 14 year olds are "impulsive" and "show poor judgment"); *see also* SH 256-63; 487-88, 500-03, 509-10; Def. Ex. 6 at 4-5, APP 83-84; Def. Ex. 8 at 16-21. Fourteen-year-old children also have a heightened capacity for change that is even greater than that of their older teenage counterparts. *See, e.g.*, Def. Ex. 6 at 4-5, APP 83-84; SH 266, 510. The differences between young adolescents and older teens or adults are attributable to both a younger teen's more limited life experience, as well as the fact that, at 14, the parts of the brain that control impulses, evaluate risks and consequences, and allow

long-term thinking and planning are still developing. *See* Def. Ex. 6 at 4-5, APP 83-84; SH 500-03.

While the typical 14-year-old has these vulnerabilities, both the State and defense experts concluded that at the time of the crime Daniel was even more vulnerable and immature. Def. Ex. 1 at 57, APP 71; Def. Ex. 6 at 6, APP 85; State's Ex. 4 at 25. Dr. James, a neuropsychologist, found that Daniel's lived experience of "abuse, social isolation, and familial instability" meant that "Daniel, whose brain was compromised, was operating behaviorally and emotionally as a much younger person than his chronological age at the time of the crime would suggest." Def. Ex. 6 at 6, APP 85. As a result, he was "even more vulnerable to behaving inappropriately, making poor choices, showing poor judgment, behaving impulsively." SH 520-21; *see also* Def. Ex. 1 at 57, APP 71; SH 263-65. The State's expert similarly found that "[i]n Daniel's case, his development was undoubtedly stalled and hampered by a chaotic, neglectful and abusive home environment, the disruption from his grandparent's home, and attachment disruption upon learning that his grandparents were really not his parents," State's Ex. 4 at 25, and that Daniel was "immature for his age," and "showed greater impulsivity than the average 14-year-old," SH 116-17.

The evidence presented at the sentencing hearing also showed Daniel had outgrown these traits as he matured. Def. Ex. 6 at 6-7, APP 85-86; *see also* Def. Ex. 1 at 57, APP 71 ("[I]t is my clinical opinion that over time, Daniel

has matured and become less impulsive."). Dr. James testified that today Daniel shows "remarkably good executive functioning" and "very good" impulse control. SH 525. Dr. James further testified that her neuropsychological testing established that Daniel has "a much more intact and mature brain than he did [as a child]," and that this is "consistent with what we know about the maturing adolescent brain." SH 533-34. The State's expert agreed that "[r]esearch in brain chemistry and neurobiology has consistently shown that the frontal lobe areas in the human brain, (especially in males) responsible for impulse control, abstract thinking, judgment and higher order reasoning are not fully developed until age 25 or 26" and that this development helps "explain some of Daniel's improvement in self-regulation that he has shown in the last few years." State's Ex. 4 at 30.

The evidence regarding Daniel's prison record established that his record has been completely devoid of violence. Def. Ex. 9 at 9, APP 103 ("[T]his is a remarkable record of good behavior in a prison setting."); State's Ex. 1 at 59-60 (list of the disciplinary write-ups Daniel has received in prison showing that he has not engaged in violent or assaultive behavior). This is highly unusual for a juvenile in adult prison, who often are involved in some violence early in their prison time. SH 273-74, 403-06. As Martin Horn, a corrections expert, found "[t]hat [Daniel] has been able to negotiate this world for 15 years beginning at age 15 without resorting to violence is evidence of his determination to not be a violent person." Def. Ex. 9 at 9, APP 103; *see also*

Def. Ex. 1 at 56, APP 70 (psychologist finding "what is surprising is the lack of assaultive or violent misconduct infractions"). During his incarceration, Daniel has no disciplinaries for assaults on inmates or guards, gang-related activity, drugs or alcohol abuse, or sexual misconduct. SH 413-14. Daniel's disciplinaries have also dramatically declined over his 16 years in prison, due to his growing maturity. *See* SH 408; *see also* Def. Ex. 9 at 10, APP 104; Def. Ex. 12 at 1, APP 108.

Despite not being required to take any programming, Daniel has been strongly committed to self-improvement, obtaining his GED when he was only 16 years old, receiving certification from the Library of Congress for braille transcription, and taking the classes made available to him. Def. Ex. 9 at 9, 11, APP 103, 105; Def. Ex. 1 at 22-23, 38, 43, APP 36-37, 52, 57; Def. Ex. 11; *see also* SH 42-43; SH 267-68, 273, 389. As further evidence of his growing maturity, Daniel now "accepts full responsibility" for the shooting of Mr. Ingalls. Def. Ex. 9 at 7, APP 101; Def. Ex. 1 at 35-36, APP 49-50; SH 252-53.

Following the close of evidence, three members of the victim's family gave allocutions, Dale Ingalls, Duane Ingalls's father, Delane Ingalls, his sister, and Kari Jensen Thomas, his cousin, regarding the impact of the crime. SH 566-606. Daniel also gave an allocution, where he expressed that his "actions were horrendous and wrong." SH 635. Daniel continued by saying "I truly and deeply regret murdering my father, Duane" and "I am deeply and sincerely remorseful." SH 637. In its closing argument, the State

acknowledged that "mitigating factors of youth . . . are present in this case. Our own expert reported them out." SH 611.

On October 30, 2015, the trial court pronounced sentence. SH 641-46, APP 7-12. The trial judge stated that "*Miller* does not stand for the proposition that these generally observed characteristics of youth are universally applicable to each and every juvenile, whether that juvenile is a murderer or a prodigy." SH 642-43, APP 8-9. In pronouncing sentence, the trial court also determined that "by no stretch of the imagination can a relationship between the father and son be described as a horrific, crime-producing setting" and that "[Daniel] has demonstrated the capacity for past and continuing violence in and out of prison." SH 645-46, APP 11-12. The trial court then imposed a sentence of 92 years. SH 646, APP 12.

STANDARD OF REVIEW

"Constitutional interpretation is a question of law which is reviewable de novo." *State v. Beck*, 1996 S.D. 30, ¶ 6, 545 N.W.2d 811, 812. "Pursuant to an abuse of discretion standard of review, factual determinations are subject to a clearly erroneous standard." *State v. Guthrie*, 2002 S.D. 138, ¶ 5, 654 N.W.2d 201, 203.

ARGUMENT

I. IN SENTENCING DANIEL TO 92 YEARS, THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF *MILLER*.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court established that "youth matters" in determining an appropriate sentence for a juvenile offender, and a defendant's child status, along with other relevant mitigating factors related to age, must be taken into consideration by the sentencing court. *Id.* at 2465, 2467. Because the trial court failed to do that here, Daniel's sentence violates *Miller*.

In *Miller*, the Court relied on three major differences between children and adults. First, the Court noted that children's "lack of maturity" and "underdeveloped sense of responsibility" can cause them to engage in behavior that is "reckless[], impulsiv[e], and heedless[ly] risk-taking." *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Second, the Court relied on children's "vulnerab[ility] . . . to negative influences and outside pressures," coupled with their "limited 'control over their own environment'" and inability to "extricate themselves from horrific, crime-producing settings." *Id.* Third, the Court observed that "a child's character is not as 'well formed' as an adult's"; consequently, a child's actions are "less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.* (quoting *Roper*, 543 U.S. at 570). These characteristics "diminish the penological justifications" — retribution, deterrence, and incapacitation — "for imposing

the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S. Ct. at 2465.

In addition to youth, *Miller* requires sentencing courts to "tak[e] into account the family and home environment that surrounds [the teenage offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;" "the circumstances of the homicide offense," including "the way familial . . . pressures may have affected him;" the fact that a juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth" that hinder his ability to assist his attorney and to deal with police and prosecutors; and "the possibility of rehabilitation." 132 S. Ct. at 2468.

The holding of *Miller* required the trial court to consider the mitigating qualities of youth before imposing punishment, but the court failed to do so. In sentencing Daniel to 92 years, the trial court briefly listed the *Miller* factors and stated that "[t]his Court accepts these principles in general to youth." SH 642, APP 8. However, the trial court found that "*Miller* does not stand for the proposition that these generally observed characteristics of youth are universally applicable to each and every juvenile, whether that juvenile is a murderer or a prodigy." SH 642-43, APP 8-9. The trial court further determined that the crime "was not inexorably determined by youthful brain or undeveloped character. To find otherwise, denies the existence of will." SH 643, APP 9. In finding that the mitigating qualities of youth are not

specifically applicable to Daniel, the trial court ignored the holding of *Miller*, despite uncontested evidence of Daniel's immaturity.

Miller established that "youth matters" in every case where a judge is attempting to determine an appropriate sentence for a juvenile offender, and that a defendant's youth, along with all mitigating factors related to age, must be considered by the sentencing court. 132 S. Ct. at 2465, 2467. The Court did not speak in general terms, leaving open the possibility that youth might not matter in some cases, but held instead that all "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. The Court has since reaffirmed that "*Miller requires* a sentencer to consider a juvenile offender's youth and attendant characteristics" before determining sentence. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (emphasis added). This established precedent makes clear that the mitigating qualities of youth *are* in fact "universally applicable to each and every juvenile" and the trial court's determination otherwise violated *Miller*.

Moreover, during the sentencing hearing, both parties presented evidence establishing that the mitigating qualities of youth *were* present in Daniel's case. First, as is discussed in more detail in Issue III, *infra*, within the broad developmental category of juveniles, 14-year-old adolescents like Daniel are especially immature, with minimal capacity to imagine consequences, regulate their shifting emotions, and control their impulses, and they have a heightened capacity for change that is even greater than that of

their older teenage counterparts. *See, e.g.*, SH 116-17 (State's expert acknowledging that 14-year-olds are "impulsive" and "show poor judgment"); *see also* SH 256-63, 266, 487-88, 500-03, 509-10; Def. Ex. 6 at 4-5, APP 83-84; Def. Ex. 8 at 16-21.

Further, while the typical 14-year-old has the vulnerabilities described above, both the State and defense experts concluded that, at the time of the crime, Daniel was even *more* vulnerable and immature than the average 14-year-old. Def. Ex. 1 at 57, APP 71 (noting Daniel's immaturity for his age at time of offense); Def. Ex. 6 at 6, APP 85 (Daniel's lived experience of "abuse, social isolation, and familial instability" meant that "Daniel, whose brain was compromised, was operating behaviorally and emotionally as a much younger person than his chronological age at the time of the crime would suggest"); State's Ex. 4 at 25 ("In Daniel's case, his development was undoubtedly stalled and hampered by a chaotic, neglectful and abusive home environment, the disruption from his grandparent's home, and attachment disruption upon learning that his grandparents were really not his parents."); *see also* SH 116-17, 263-65, 520-21.

In its closing argument, the State specifically conceded that the mitigating qualities of youth discussed in *Miller* apply to Daniel. SH 611 ("There are going to be mitigating factors of youth. They are present in this case. Our own expert reported them out."). Despite this concession, the uncontested evidence presented by both parties, and the established precedent

of *Miller*, the trial court determined "that generally observed circumstances of youth did not cause Daniel Charles to pull the trigger" and failed to take into consideration the undisputed mitigating qualities of youth when sentencing Daniel. SH 643, APP 9. This is in direct violation of *Miller*. *See, e.g.*, *Miller*, 132 S. Ct. at 2468 ("In imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."); *id.* at 2469 ("[W]e require [sentencers] to take into account how children are different.").

Instead of considering the mitigating qualities of youth as required by *Miller*, the trial court focused its decision to sentence Daniel to a term of 92 years on "[t]he goals of sentencing," including retribution, deterrence, incapacitation, and rehabilitation. SH 645-46, APP 11-12. However, the trial court failed to acknowledge that *Miller* found youth undermines these justifications for punishment. 132 S. Ct. at 2465. As *Montgomery* reaffirmed:

> Because retribution relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. The deterrence rationale likewise does not suffice, since the same characteristics that render juveniles less culpable than adults — their immaturity, recklessness, and impetuosity — make them less likely to consider potential punishment. The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender

forever will be a danger to society.

136 S. Ct. at 733 (internal citations and quotation marks omitted).

The trial court relied heavily on incapacitation in determining a 92-year sentence was appropriate for Daniel, finding that "[b]y his own admission, [Daniel] has demonstrated the capacity for past and continuing violence in and out of prison." SH 646, APP 12. However, the uncontroverted evidence at trial established that Daniel had undergone precisely the "ordinary adolescent development [that] diminishes the likelihood that a juvenile offender forever will be a danger to society," *Montgomery*, 136 S. Ct. at 733. *See* Def. Ex. 6 at 6-7, APP 85-86; State's Ex. 4 at 30; *see also* Def. Ex. 1 at 57, APP 71; SH 525, 533-34.

Further, the trial court's suggestion that Daniel had demonstrated "continuing violence in and out of prison" is contradicted by the record. While the murder of Mr. Ingalls was tragic, Daniel's prison record establishes that this act of violence is the exception in his life. Daniel has now spent more than half of his life in prison and his record has been completely devoid of violence. Def. Ex. 9 at 9, APP 103 ("[T]his is a remarkable record of good behavior in a prison setting."); Def. Ex. 1 at 56, APP 70; State's Ex. 1 at 59-60 (list of disciplinary write-ups showing Daniel has not engaged in violent or assaultive behavior). During his 16 years in prison, Daniel has no disciplinaries for assaults on inmates or guards, gang-related activity, drugs or alcohol abuse, or sexual misconduct. SH 413-14; *see also* SH 138-39 (State's

expert testifying that Daniel does not have any disciplinaries for assaults during his incarceration); SH 42-43 (warden acknowledging vast majority of Daniel's write-ups are minor). This is particularly remarkable because most teenagers engage in some violence during their early years in an adult prison. SH 273-74, 403-06. "That [Daniel] has been able to negotiate this world for 15 years beginning at age 15 without resorting to violence is evidence of his determination to not be a violent person." Def. Ex. 9 at 9, APP 103. The trial court's finding that a prolonged sentence was justified because Daniel's record establishes he is "continuing" to be violent in prison lacks any basis in the record.

The trial court also failed to properly consider the other factors constitutionally required by *Miller*. *Miller* requires the sentencing court to "tak[e] into account the family and home environment that surrounds [the teenage offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." 132 S. Ct. at 2468. The trial court based its decision to sentence Daniel to 92 years in part on its own conclusion that "by no stretch of the imagination can a relationship between the father and son be described as a horrific, crime-producing setting." SH 645, APP 11. However, as acknowledged by both State and defense witnesses, Daniel's home environment in South Dakota was de-stabilizing, chaotic, and physically, emotionally, and psychologically abusive. Def. Ex. 1 at 29, APP 43; State's Ex. 4 at 8 ("Daniel experienced a dysfunctional family system that included

frequent arguments and domestic violence between his parents, his stepfather's short temper and abuse, and his mother's histrionics, provoking conflicts and inciting drama."); *see also* SH 86-87, 112-13, 198-205, 209-11, 223-24. An abusive home environment, like the one that both parties agree Daniel experienced, is precisely the type of "horrific, crime-producing setting[]" that *Miller* was concerned about because of a child's inability to "extricate themselves from" that environment. 132 S. Ct. at 2464.

The trial court also failed to consider "the circumstances of the homicide offense," as well as the fact that he "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth." *Miller*, 132 S. Ct. at 2468. The trial court relied on a finding that the crime "was a premeditated, deliberate, intentional, sniper killing." SH 646, APP 12. To the extent that the evidence at trial supported this conclusion, it was based on numerous contradictory statements made by a frightened young adolescent in a misguided effort to help himself. The consistent evidence at the sentencing hearing showed that, following a conflict in the field with Mr. Ingalls, Daniel felt trapped and abandoned and when Mr. Ingalls arrived at the house, still appearing angry, Daniel was afraid, grabbed a gun, and shot Mr. Ingalls. Def. Ex. 1 at 34-35, APP 48-49; Def. Ex. 9 at 6-7, APP 100-01; State's Ex. 4 at 15-16. Moreover, even in cases of "vicious murder," the Supreme Court made clear that "a sentencer need[s] to examine all these circumstances," before imposing sentence. 132 S. Ct. at 2469.

The trial court was further required to consider "the possibility of rehabilitation." *Miller*, 132 S. Ct. at 2468. As detailed above, not only is rehabilitation possible in Daniel's case, it is actively ongoing. Daniel has matured significantly and engaged in programming to further himself while in prison. Def. Ex. 9 at 9, 11, APP 103, 105; Def. Ex. 1 at 22-23, 38, 43, APP 36-37, 52, 57; *see also* SH 42-43, 276-81, 418-19; Def. Ex. 11.

In reaching the determination that Daniel deserved a sentence of 92 years, the trial court refused to apply the established law in *Miller* and ignored the uncontroverted evidence of youth that was presented by both parties in this case. For these reasons, the trial court violated Daniel's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

II. A 92-YEAR SENTENCE IS THE FUNCTIONAL EQUIVALENT TO A SENTENCE OF LIFE WITHOUT PAROLE AND THEREFORE UNCONSTITUTIONAL.

The 92-year sentence imposed in this case is legally equivalent to a sentence of life without parole. Imposing such a sentence on Daniel, a 14-year-old, constitutes cruel and unusual punishment. The United States Supreme Court has addressed life-without-parole sentences for children in three decisions: *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In each of these decisions, the Court has distinguished between sentences which "condemn[] [a juvenile offender] to die in prison," *Montgomery*, 136 S. Ct. at 726, and those which the child has a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75; *see also State v. Springer*, 2014 S.D. 80, ¶ 23, 856 N.W.2d 460, 469 ("*Graham* requires that juvenile offenders have a '*meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation.'"). In cases where life without parole is not a proportionate sentence, "hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S. Ct. at 737.

The 92-year sentence imposed in this case condemns Daniel to die in prison. Daniel would be 106 years old before he completed this sentence. A 92-year sentence creates no expectation of release and therefore fails to restore any meaningful hope for life outside prison walls. Numerous courts

around the country have found that similar lengthy term-of-years sentences violate the Eighth Amendment when imposed on a juvenile. *See Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015) (aggregate sentence of 90 years does not afford meaningful opportunity to obtain release); *see also McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (100-year sentence is "a de facto life sentence"); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (110-year-to-life sentence violates Eighth Amendment).

Furthermore, the sentence in this case fails to provide the meaningful opportunity for release necessary to distinguish it from a life-without-parole sentence for the purposes of the Eighth Amendment. Under South Dakota law, a 92-year sentence requires that Daniel not be eligible for parole for 46 years,[1] when he is 60 years old. SDCL 24-15A-32. A sentence that requires Daniel to serve 46 years before even becoming eligible for the possibility of parole denies him a meaningful opportunity for release and is therefore equivalent to a life sentence. Even assuming that South Dakota's parole remedies do not change and Daniel lives until he is 60 years old,[2] he would be

[1]Because Daniel was convicted of a Class A violent felony as a juvenile and this was his first offense, he must serve one-half of his term-of-years sentence before he is eligible for parole. SDCL 24-15A-32.

[2]*See Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, 2, http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (one study has found that average life expectancy of prisoner serving life sentence is 58.1 years; average life expectancy of someone who received life sentence as youth is 50.6 years).

released when so close to death that he would have no opportunity to meaningfully contribute to society.

For this reason, several other state supreme courts have found that similar sentences are equivalent to life without parole. In *Casiano v. Comm'r of Correction*, 115 A.3d 1031 (2015), *cert. denied sub nom. Semple v. Casiano*, No. 15-238, 2016 WL 854311 (U.S. Mar. 7, 2016), the Connecticut Supreme Court held that "a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope,'" and therefore is equivalent to a sentence of life without parole. *Id.* at 1047 (quoting *Graham*, 560 U.S. at 79).

The court reasoned that:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left.

Casiano, 115 A.3d at 1046. The court concluded that, for purposes of the Eighth Amendment, "an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison," even if there was some possibility that he might be released within his lifespan. *Id.* at 1047.

Similarly, in *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014), the Wyoming Supreme Court held that a sentence where the earliest possibility of release was after "just over 45 years, or when [the defendant] is 61" is "the functional equivalent of life without parole." *Id.* at 136, 142. The court found that, "[a]s a practical matter, a juvenile offender sentenced to a lengthy term-of-years sentence will not have a 'meaningful opportunity for release.'" *Id.* at 142. The court noted that "[t]he United States Sentencing Commission recognizes this reality when it equates a sentence of 470 months (39.17 years) to a life sentence." *Id.*

Additionally, in *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that "while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections." *Id.* at 71. The court found that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release." *Id.* (quoting *Graham*, 560 U.S. at 75). The court also noted that many of the new statutes passed in response to *Graham* and *Miller* "have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration." *Id.* at 72.

Other state appellate courts have also found that similar sentences are equivalent to life without parole. *See State v. Ronquillo*, 361 P.3d 779, 784

(Wash. App. 2015) (finding 51.3 years to be "de facto life sentence"); *People v. Guzman*, No. B243895, 2014 WL 5392509, at *26 (Cal. Ct. App. Oct. 23, 2014) (sentence of 50 years to life is de facto LWOP because "[t]he bleak prospect of release at such a late time in life does not afford Guzman a meaningful opportunity to obtain release"). In addition, at least one federal court has found that the state courts violated clearly established federal law where the earliest possibility of release for a juvenile was geriatric parole at age 60. *LeBlanc v. Mathena*, No. 2:12CV340, 2015 WL 4042175, at *16-18 (E.D. Va. July 1, 2015).

In *Springer*, this Court found that the defendant "did not receive life without parole or a de facto life sentence because he has the opportunity for release at age 49" — more than a decade before Daniel's earliest possible release. 2014 S.D. 80, ¶ 25, 856 N.W.2d at 470. However, this Court was careful to clarify, that "[w]e are not implying that a lengthy term-of-years sentence . . . can never be a de facto life sentence." *Id.* at ¶ 25, 470 n.8.

The sentence in this case is such a de facto life sentence. For the reasons discussed below, the imposition of that sentence in this case is unconstitutional in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

III. A 92-YEAR SENTENCE IS CATEGORICALLY UNCONSTITUTIONAL FOR A 14-YEAR-OLD.

The constitution categorically prohibits sentencing a 14-year-old child to die in prison. The United States Supreme Court has repeatedly recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). In a series of cases, the Court has found that the significant differences between children and adults, mean that "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *see also Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller*, 132 S. Ct. at 2464. "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569-70).

As a result, the Supreme Court has categorically banned certain harsh adult sentences from being imposed on children who lack sufficient culpability. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (recognizing that *Miller* categorically "bar[red] life without parole . . . for all but the rarest of juvenile offenders"); *Graham*, 560 U.S. at 78-79 (categorically prohibiting life without parole for non-homicide offenses for juveniles); *Roper*, 543 U.S. at 572-75 (banning the death penalty for all juveniles).

The Supreme Court has also recognized that life-without-parole sentences can only constitutionally be imposed on children under the rarest of

circumstances. *Miller* specifically stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." 132 S. Ct. at 2469 (emphasis added). And in *Montgomery*, the Supreme Court reaffirmed that "sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." 136 S. Ct. at 734 (internal quotation marks omitted). This is because *Miller* "established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* Given that all of the characteristics of youth that the Supreme Court has recognized apply with even greater force to children as young as 14, these principles lead inexorably to the conclusion that death-in-prison sentences, like that imposed in this case, can never be constitutionally imposed on these youngest teen offenders.

Even within the broad developmental category of juveniles, 14-year-old adolescents are especially immature. As the evidence presented at the sentencing hearing showed, a14-year-old functions "much worse. Even compared to . . . another adolescent" and that because of an older teen's increased ability to function "a 14-year-old and a 16, 17-year-old are actually different beings." SH 510. Compared to older teens, 14-year-olds have less capacity to imagine consequences, regulate their shifting emotions, and control their impulses. *See, e.g.*, SH 116-17 (State's expert testifying that 14 year olds are "impulsive" and "show poor judgment"); *see also* SH 256-63; 487-88, 500-03, 509-10; Def. Ex. 6 at 4-5, APP 83-84; Def. Ex. 8 at 16-21.

Furthermore, young adolescents have a heightened capacity for change that is even greater than that of their older teenage counterparts. *See, e.g.*, Def. Ex. 6 at 5, APP 84; SH 266, 510.

These differences between young teens and older teens or adults are attributable to both a younger teen's more limited life experience, as well as the fact that, at 14, the parts of their brain that control impulses and allow long-term thinking, planning, and resistance to peer-pressure are still developing. Def. Ex. 6 at 4-5, APP 83-84; SH 500-03; *see also* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008).

At 14, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely under-way. SH 509; *see also* B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior* 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009). The development of the prefrontal cortex – the area of the brain "that control[s] and monitor[s] and regulate[s] behavior" – is "at the very beginning stages" of development, while, by contrast, the limbic system – the "emotional engine" of the brain – is "really active." SH 501, 509; *see also* SH 256-58. As a result, young teens are even more likely than their older peers to engage in reckless behavior as "adolescents show an increased preference for novelty, immediate reward and

sensation seeking while being less able to control impulses, anticipate future consequences, and engage in strategic planning." Def. Ex. 6 at 5, APP 84.

In addition, young adolescents also have less ability than older adolescents and adults to free themselves from morally toxic or dangerous environments. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped sense of responsibility – including restrictions on driving, working, entering into contracts, and leaving school – also operate conversely to disable a fourteen-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood. *See* SH 154-55 (State's expert acknowledging that at 14, Daniel couldn't legally drive, enter into contracts, rent an apartment, or work a full-time job).

Young adolescents also have an even greater capacity for rehabilitation than older teens. SH 256-63, 509-10; *see also* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 428 (2000). Their undeveloped sense of self means that they are still a long way from the person they will become, as it is not until the late teens or early twenties that they begin to form a coherent identity. SH 505-06; *see* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence*, 20 L. & Human Behav. 249, 255 (1996). As young adolescents mature, "they are better able to delay immediate gratification and think about the impact of current acts on their future." Def. Ex. 6 at 5, APP 84; SH 510.

And as "psychosocial maturity increases, then engaging in delinquent activity decreases" and "th[e] majority of the people, the adolescents, who engage in delinquent behavior, [] stop engaging in that delinquent behavior as adults . . . includ[ing] [y]outh [w]ho [c]ommit [m]urder." SH 266.

South Dakota has long recognized 14-year-olds, more than older teens, are in need of additional protections and unprepared for adult responsibilities. Unlike older teens, 14-year-olds are considered incapable of consenting to sexual activity, SDCL 22-22-1(5), 22-22-7, and prohibited from marrying, even with parental consent, SDCL 25-1-9. They are not permitted to work more than limited hours and cannot be employed in dangerous occupations. SDCL 60-12-1, 60-12-3. Fourteen-year-olds must be accompanied by a parent or guardian when hunting. SDCL 41-6-13. In addition, because of their greater vulnerability, 14-year-old crime victims are given extra protections under a number of criminal statutes that do not apply to older teens. SDCL 22-22-7, 22-24A-4, 22-24A-5, 22-19-7.1, 23A-12-9. That these restrictions and protections are not applied to late adolescents demonstrates that South Dakota has recognized that early adolescents are developmentally distinct from adults and older teens.

Like the legislature, this Court has also recognized that young adolescents are especially vulnerable and in need of protection. In upholding the application of sex offender registration requirements for a defendant convicted of statutory rape of a 14-year-old, this Court emphasized that "young

adolescents need additional protections" and "can be vulnerable, impressionable, and sometimes subject to making ill-advised choices." *Meinders v. Weber*, 2000 S.D. 2, ¶ 29, 33, 604 N.W.2d 248, 260-61.

There are only 61 children 14 or younger serving life-without-parole sentences in only 16 states.[3] The fact that such long sentences are so unusual for 14-year-olds further proves that Daniel's virtual life sentence violates the Eighth Amendment. Moreover, of those 61 sentences only 10 were discretionary. In the other 51 cases, the judge was unable to consider mitigating factors such as youth and upbringing.

[3]This data is based on the Equal Justice Initiative's extensive review of court documents and news sources to update a previously published report. Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007) (identifying 73 children serving life-without-parole sentences for offenses at age 13 or 14 in 2007). The vast majority of these individuals have not yet received resentencing hearings and this number is likely to decline much further once they do.

While *Graham*, *Miller*, and *Montgomery* make clear that juveniles as a broad class are different and can rarely be constitutionally subjected to the most severe punishments, 14-year-old children are more different still. They are defined by immaturity; yet their immaturity is necessarily transient. These characteristics establish that 14-year-olds universally fall into the category of "juvenile offenders whose crimes reflect the transient immaturity of youth," and for whom a death-in-prison sentence would be unconstitutional. *Montgomery*, 136 S. Ct. at 734. As a result, sentencing Daniel to 92 years for a crime he committed as a 14-year-old violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

IV. A SENTENCE OF 92 YEARS IN THIS CASE IS DISPROPORTIONATE.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); *see also Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment prohibits "sentences that are disproportionate to the crime committed"). This precept "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Applying these principles, the United States Supreme Court stated in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that "the characteristics of youth, and the way they weaken the rationales for punishment, can render a life-without-parole sentence disproportionate." *Id.* at 2465-66. Indeed, the Court held that these harshest sentences are presumptively disproportionate because when the mitigating qualities of youth are considered "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." *Id.* at 2469 (emphasis added). The Court further emphasized this point in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), holding that "*Miller* . . . bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. The Court found that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Id.* (internal quotation marks omitted).

Therefore, under *Montgomery* and *Miller*, the harshest adult sentences must be reserved for a narrow category of juvenile offenders who are the worst of the worst. At the sentencing hearing, the State had the burden of establishing that Daniel is the "uncommon" youthful offender "whose crime[] reflect[s] permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, and thus, is deserving of a death-in-prison sentence. However, the State failed to satisfy that burden. Because the evidence presented at the sentencing hearing

established that Daniel's "crime reflects transient immaturity," *Montgomery*, 136 S. Ct. at 735, a de facto life sentence of 92 years is disproportionate under the Eighth Amendment.

As detailed in Issues I and III, *supra*, all the incompetencies associated with youth are of even greater import when a 14-year-old is being sentenced, because young teens have the least capacity to imagine consequences, regulate their shifting emotions, and control their impulses, and the most capacity for change. While the typical 14-year-old brain has the vulnerabilities described above, both the State and defense experts concluded that, at the time of the crime, Daniel was even more vulnerable and immature, making this harsh sentence even less appropriate. Def. Ex. 1 at 57, APP 71; Def. Ex. 6 at 6, APP 85; State's Ex. 4 at 25; *see also* SH 116-17, 263-65, 520-21.

Further, as detailed in the Statement of Facts, *supra*, there were significant additional mitigating circumstances in this case. From when Daniel was 6 months old until he was 8 years old, he lived in a loving and stable home with his grandparents, who he believed to be his actual parents. Def. Ex. 1 at 25-28, 55, APP 39-42, 69. When Daniel was 8, this stability and attachment was disrupted, as Daniel's mother, who had hardly interacted with him previously, revealed herself to be his biological mother and took him to live with her and Mr. Ingalls in South Dakota. Def. Ex. 1 at 27-29, APP 41-43; State's Ex. 4 at 25; SH 117. In addition to the trauma suffered from this revelation, Daniel's new home environment was chaotic, unpredictable, and

violent. Def. Ex. 1 at 29, 54, APP 43, 68; SH 196-201, 209. Daniel witnessed domestic violence between his mother and Mr. Ingalls on a daily basis, and he was subjected to physical, verbal, and psychological abuse by both his mother and Mr. Ingalls. Def. Ex. 1 at 7, 29, 33, APP 21, 43, 47; State's Ex. 4 at 8, 14; SH 196-201.

When Daniel was 13, his mother divorced Mr. Ingalls, but abandoned Daniel with his stepfather. Def. Ex. 1 at 26, APP 40; SH 114, 218. Following the divorce, the violence against Daniel intensified and Daniel's many attempts to extricate himself from that situation – from running away, to asking his mother and grandparents if he could live with them – failed. Def. Ex. 1 at 7, 17, 29-33, 57, APP 21, 31, 43-47, 71; State's Ex. 4 at 23-24; SH 115, 151.

On the day of the crime, the evidence showed that, following a conflict in the field with Mr. Ingalls, Daniel felt trapped and abandoned. When Mr. Ingalls arrived at the house, still appearing angry, Daniel was afraid, and grabbed a gun and shot Mr. Ingalls. Def. Ex. 1 at 34-35, APP 48-49; Def. Ex. 9 at 6, APP 100; State's Ex. 4, at 15-16. Daniel's traumatic attachment disruption and abandonment, his home environment, his inability to extricate himself, and the circumstances of the offense all illustrate why this harsh sentence is disproportionate for Daniel. *See Miller*, 132 S. Ct. at 2468.

Further, Daniel's prison record establishes that Daniel is not "the rare juvenile offender who exhibits such irretreivable depravity that rehabilitation

is impossible." *Montgomery*, 136 S. Ct. at 733. As set forth in detail in the Statement of Facts, *supra*, Daniel's record has been completely devoid of violence. Def. Ex. 9 at 9, APP 103; Def. Ex. 1 at 56, APP 70; State's Ex. 1 at 59-60. Daniel has also been strongly committed to self-improvement in prison. Def. Ex. 9 at 9, 11, APP 103, 105; Def. Ex. 1 at 22-23, 38, 43, APP 36-37, 52, 57; SH 42-43; *see also* Def. Ex. 11.

In addition, Daniel's current neuropsychological profile establishes that this is not a case where "rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. Dr. James, after subjecting Daniel to 13 tests and a comprehensive neuropsychological evaluation, SH 481, determined that today Daniel shows "remarkably good executive functioning" and "very good" impulse control, SH 525. Dr. James testified that the testing established that Daniel has "a much more intact and mature brain than he did [as a child]," and that this is "consistent with what we know about the maturing adolescent brain." SH 533-34. This evidence establishes that Daniel has undergone the precise change that *Miller* and *Montgomery* foresaw for all but the rare juvenile offender.

Even if this Court does not agree that this 92-year sentence is the functional equivalent of a life-without-parole sentence, this incredibly harsh sentence is still disproportionate given the facts in this case and the teachings of *Miller*. In *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), the Iowa Supreme Court found that "[t]hough Miller involved sentences of life without parole for

juvenile homicide offenders, its reasoning applies equally to Pearson's sentence of thirty-five years without the possibility of parole." *Id.* at 96. Not only did the Iowa Supreme Court determine that the principles of *Miller* applied to sentencing children in this context, the court also held that "in light of the principles articulated in *Miller* . . . it should be relatively rare or uncommon that a juvenile be sentenced to a lengthy prison term without the possibility of parole." *Id.* at 96.

Moreover, despite all of the mitigating evidence presented at the sentencing hearing in this case – much of which was completely uncontested by the State – the sentence of 92 years handed down by the trial court is much harsher than sentences given to other children in South Dakota since *Miller*, further illustrating that the sentence is disproportionate. Jessi Owens – who was both older than Daniel (17 years old at the time of the crime) and participated in an aggravated crime (beating a stranger to death with a hammer after breaking into his home), *Owens v. Russell*, 2007 S.D. 3, ¶ 2, 726 N.W.2d 610, 613-14 – has been re-sentenced to 40 years.[4]

[4] *Woman Given Life in Prison for Murder Resentenced*, Keloland Television, http://www.keloland.com/newsdetail.cfm/woman-given-life-in- prison-for-murder-resentenced/?id=168955.

Maricela Diaz, who was 15 at the time, participated in what could be called a thrill killing, luring another teenager into a car, driving her to the country, stabbing her repeatedly, and then burning her alive in the trunk of a car.[5] Despite participating in this highly aggravated crime, Ms. Diaz also received a lesser sentence than Daniel of 80 years.[6] SH 634. Braiden McCahren, who was 16 at the time of the offense, got in an argument with two of his friends about a paintball incident, retrieved a shotgun, pointed it at his friends, and pulled the trigger, which resulted in the death of Dalton Williams.[7] Despite the availability of life without parole as a punishment – indeed, had Mr. McCahren been an adult, such a sentence would have been mandatory – the trial judge in that case sentenced Mr. McCahren to only 25 years with 15 years of that time suspended, making Mr. McCahren parole eligible after only 5 years served.[8]

Particularly in light of these cases, given Daniel's young age, and the

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[5] *Diaz Found Guilty of Teen's Murder, Kidnapping*, Argus Leader, http://www.argusleader.com/story/news/crime/2015/01/15/live-tweets-final- day-teen-murder-trial/21799901/.

[6] *Maricela Diaz Sentenced to 80 Years in Prison for Murder of Mitchell Teen*, KDLT, http://www.kdlt.com/news/local-news/maricela-diaz-sentenced- to-80-years-in-prison-for-murder-of-mitchell-teen/32056490.

[7] *Pierre Teen Convicted in Classmate Murder Trial*, Argus Leader, http://www.argusleader.com/story/news/crime/2014/09/23/jury-deliberating- classmate-murder-trial/16110695/.

[8] *State v. McCahren*, 2016 S.D. 34, ¶ 4, 36.

strong mitigating evidence presented here, the sentence in this case is disproportionate and violates Daniel's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

V. THE TRIAL COURT ERRED IN PERMITTING IMPROPER VICTIM IMPACT TESTIMONY.

During the sentencing hearing, Kari Jensen Thomas presented an oral victim-impact statement to the court. Because Ms. Thomas is not a victim within the definition of SDCL 23A-27-1.1, her testimony was admitted in error.

While South Dakota law provides victims the right to provide an oral victim impact statement, under the statute, this right is limited:

> the term, victim, means the actual victim or the parent, spouse, next of kin, legal or physical custodian, guardian, foster parent, case worker, victim advocate, or mental health counselor of any actual victim who is incompetent by reason of age or physical condition, who is deceased, or whom the court finds otherwise unable to comment.

SDCL 23A-27-1.1, APP 111. As a cousin of the actual victim, Duane Ingalls, SH 569, Ms. Thomas is not included in SDCL 23A-27-1.1 and was not entitled to give a statement.

Following an objection by defense counsel, the trial court stated that Ms. Thomas does not fit within the statutory definition of "victim." SH 14. The

court acknowledged, "I'm basically granting [the State] one that the statute doesn't define." SH 14. Moreover, after reading the statute out loud, SH 15-16, the trial court said "[n]one of those people that you're proposing as alternatives meet that definition. . . . In spite of that, . . . I'm going to allow the State to add a spokesperson for that third generation." SH 16. The State selected Ms. Thomas.

This Court has recognized the importance of keeping victim-impact testimony within statutory bounds, making clear that "[v]ictim-impact evidence has its limits" and that, if those limits are exceeded, "victim-impact evidence has the possibility to rise to the level of a constitutional deprivation." *State v. Berget*, 2013 S.D. 1, ¶ 83, 826 N.W.2d 1, 26 (citing *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (stating that unduly prejudicial victim-impact evidence may implicate Due Process Clause)). In this case, there is no need to speculate as to where the limit is; the South Dakota legislature has provided a bright-line rule. SDCL 23A-27-1.1. By ignoring that rule, the trial court deprived Daniel of his constitutional right to a fair sentencing hearing.

Ms. Thomas's oral statement was highly inflammatory and prejudicial. She stated that she spoke on behalf of "close to 100 Ingalls and Jensen family members." SH 577. The sentencing wishes of so many community members could have had a significant role in how the trial court decided the case.[9] Ms.

[9]Kate Berry, *How Judicial Elections Impact Criminal Cases*, The Brennan Center for Justice (2015) (finding that reelection pressure can affect sentencing).

Thomas's statement also emphasized the supposed threat that Daniel would pose to her, her family, and the community at large if released: "Collectively, we're all fearful. We have anxiety about the thought of him being released." SH 571. Ms. Thomas also expressed concern that Daniel may harm her eventual grandchildren if released, and speculated that those grandchildren would "live with this constant fear." SH 571. After this statement, the trial court relied on the fact that "[s]ociety's not yet safe for Mr. Charles," as a reason for Daniel's unconstitutionally long sentence. SH 646, APP 12.

The erroneous admission of Ms. Thomas's testimony violated Daniel's rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, SDCL 23A-27-1.1, and Article 6, Section 23 of the Constitution of South Dakota.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Daniel Charles respectfully requests that this Court remand this case to the trial court with an order directing the trial court to reverse the Second Amended Judgment of Conviction, and impose a reduced sentence.

REQUEST FOR ORAL ARGUMENT

The attorney for the appellant, Daniel Charles, respectfully requests oral argument.

Respectfully submitted this 5th day of May, 2016,

/s/Robert W. Van Norman
ROBERT W. VAN NORMAN

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BRYAN A. STEVENSON

ALICIA A. D'ADDARIO

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ATTORNEYS FOR DEFENDANT/APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b)(2) using Century Schoolbook typeface in 12 point type. Appellant's Brief contains 9,953 words.

2. I certify that the word processing software used to prepare this brief is Word Perfect X5.

Dated this 5th day of May, 2016,

/s/Robert W. Van Norman
ROBERT W. VAN NORMAN
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of May, 2016, a true and correct copy of Appellant's Brief in the matter of State of *South Dakota v. Daniel Charles* was served via electronic mail upon Marty J. Jackley, Robert Mayer, and Ann C. Meyer, Attorneys for Appellee, at atgservice@state.sd.us.

Dated this 5th day of May, 2016,

/s/Robert W. Van Norman
ROBERT W. VAN NORMAN
Attorney for Appellant/Defendant

STATE V. CHARLES – NO. 27691

APPENDIX TO APPELLANT'S BRIEF

Table of Contents

TAB 1

Second Amended Judgment of Conviction

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) ss.		FOURTH JUDICIAL CIRCUIT
COUNTY OF MEADE)		COURT NO. 46C99000884AO
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	SECOND AMENDED
vs.	)	JUDGMENT OF CONVICTION
	)	
DANIEL NEIL CHARLES AKA	)	
DANIEL HEINZELMAN AKA	)	
DANIEL INGALLS,		
Defendant.		
DOB: 11/06/1984		

An Indictment was filed with this Court on the 3rd day of December, 1999, charging the Defendant with the crime of FIRST DEGREE MURDER (SDCL 22-16-4).

The Defendant was arraigned and advised of the contents of said Indictment and received copies thereof in open court at Sturgis, Meade County, South Dakota, on the 3rd day of December, 1999. The Defendant, Defendant's attorney, Timothy Rensch, and Jennifer B. Utter, prosecuting attorney, appeared at the Defendant's arraignment. The Defendant had been advised of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty to the charge in the Indictment. The Defendant requested a Jury Trial on the charges contained in the Indictment.

A trial commenced on the 10th day of April, 2000, in Sturgis, South Dakota before the Honorable Jerome Eckrich on the charges. The Defendant appeared personally and through counsel, Timothy Rensch and Patrick Duffy. Jennifer Utter and Robert Mayer appeared on behalf of the State. On the 17th day of April, 2000, the jury returned a verdict of: Guilty of First degree Murder (SDCL 22-16-4). The court ordered entry of a judgment of guilt to the charge of FIRST DEGREE MURDER (SDCL 22-16-4).

On the 28th day of April, 2000, a sentencing hearing was scheduled before the Honorable Jerome A. Eckrich. The Defendant appeared personally and through counsel, Timothy Rensch and Patrick Duffy, and Jennifer B. Utter appeared on behalf of the State. The Court asked the Defendant whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

ORDERED that the Defendant, Daniel Neil Charles a/k/a Daniel Heinzelman a/k/a Daniel Ingalls, is sentenced to Life in Prison in the South Dakota State Penitentiary, there to be fed, clothed, maintained, and provided the necessities of life; and it is further

ORDERED that the Defendant make restitution, to the best of his ability, to the South Dakota Victim's Compensation Fund for the victim's burial expenses and other expenses, not to exceed the amount of $10,000.00; and it is further

ORDERED that pursuant to SDCL 23A-27-27 judgment for the following costs is hereby ordered docketed as judgment against the Defendant:

Attorney fees:	$10,136.88
Investigation costs:	$1,418.20
Prosecutor's costs:	$28.25

The court advised the Defendant of his right to appeal the aforementioned Judgment.

On the 3rd day of May, 2000, the court entered an AMENDED JUDGMENT OF CONVICTION, which contained the following sentence:

ORDERED that the Defendant, Daniel Neil Charles a/k/a Daniel Heinzelman a/k/a Daniel Ingalls, is sentenced to Life in Prison in the South Dakota State Penitentiary, there to be fed, clothed, maintained and provided with all the necessities of life, and it is further

ORDERED that the court costs of $50.00 are waived, and it is further

ORDERED that the Defendant make restitution, to the best of his ability, to the South Dakota Victim's Compensation Fund for the victim's burial expenses and other expenses, not to exceed the amount of $10,000.00, and it is further

ORDERED that a civil judgment is to be entered in the amount of $10,136.88 attorney fees, $1,418.20 investigation costs, $28.25 Prosecutor's costs, to be paid to the Meade County Auditor.

On the 17th of February, 2015, the court entered an ORDER VACATING SENTENCE AND SCHEDULING RE-SENTENCING HEARING. The court found that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life-without-parole sentences imposed on children are unconstitutional, should be applied retroactively to Mr. Charles. The court further found that Mr. Charles' sentence was unconstitutional because he received a mandatory life-without-parole sentence for a crime committed when he was fourteen years old. The court granted the Defendant's Motion to Correct Illegal Sentence. The court subsequently scheduled re-sentencing for October 21 and 22, 2015.

On the 21st, 22nd, 23rd, and 30th days of October, 2015, the court held the re-sentencing hearing. The Defendant appeared personally and through counsel, Alicia D'Addario, John Dalton, and Robert Van Norman. Robert Mayer, Gregory Sperlich, and Kevin Krull appeared on behalf of the State. The parties presented evidence and testimony in mitigation and in aggravation of punishment. The prosecuting attorney addressed the court, counsel for the

Defendant spoke on behalf of the Defendant, and the Defendant made a statement in his own behalf.

SENTENCE

On the 30th day of October, 2015, the court pronounced its sentence. The Defendant appeared personally and through counsel, Alicia D'Addario and John Dalton. Robert Mayer, Gregory Sperlich, and Kevin Krull appeared on behalf of the State. The Court had asked the Defendant whether any legal cause existed to show why Judgment should not be pronounced. No cause was offered. The Court pronounced the following sentence:

ORDERED that the Defendant, Daniel Neil Charles a/k/a Daniel Heinzelman a/k/a Daniel Ingalls, is sentenced to a term of ninety-two (92) years in the South Dakota State Penitentiary, there to be fed, clothed, maintained, and provided the necessities of life; and it is further

ORDERED that the Defendant shall receive credit for sixteen (16) years and three (3) months already served; and it is further

ORDERED that the court costs of $50.00 are waived, and it is further

ORDERED that the Defendant make restitution, to the best of his ability, to the South Dakota Victim's Compensation Fund for the victim's burial expenses and other expenses, not to exceed the amount of $10,000.00, and it is further

ORDERED that a civil judgment is to be entered in the amount of $10,136.88 attorney fees, $1,418.20 investigation costs, $28.25 Prosecutor's costs, to be paid to the Meade County Auditor.

NOTICE OF APPEAL

You, DANIEL NEIL CHARLES A/K/A DANIEL HEINZELMAN A/K/A DANIEL INGALLS, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15 and 23A-32-16 which you must exercise by filing a notice of appeal with the Meade County Clerk of Courts, and serving a copy of the same upon the Attorney General of the State of South

Dakota and the Meade County State's Attorney and filing proof of such service, within thirty (30) days from the date that this Judgment is signed, attested and filed with said Clerk.

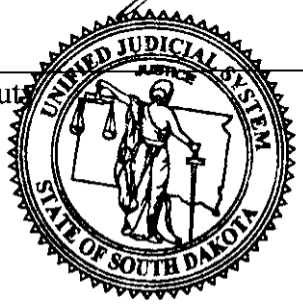
DATED this 13 day of November, 2015, at Sturgis, South Dakota, nunc pro tunc to the 30th day of October, 2015.

BY THE COURT:

Honorable Jerome A. Eckrich
4th Circuit Court Judge

ATTEST:
Clerk of Courts

By: _____
Deputy



FILED
NOV 13 2015
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

TAB 2

Transcript of Sentencing Hearing, Oct. 30, 2015

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	Resentencing Hearing
	)	
vs.	)	Criminal File No. 99-884
	)	
DANIEL CHARLES,	)	Volume IV of IV
	)	
Defendant.	)	

BEFORE: THE HONORABLE JEROME A. ECKRICH
Circuit Court Judge
Sturgis, South Dakota
October 30, 2015, at 1:30 p.m.

APPEARANCES:

For the State:
MR. KEVIN J. KRULL
Attorney at Law
1425 Sherman St.
Sturgis, SD 57785

MR. GREGORY SPERLICH
Attorney at Law
P.O. Box 1820
Rapid City, SD 57709

MR. ROBERT MAYER
Attorney at Law
1302 E. Hwy. 14 #1
Pierre, SD 57501

For the Defendant:
MS. ALICIA D'ADDARIO
Attorney at Law
122 Commerce St.
Montgomery, AL 36104

MR. JOHN DALTON
Attorney at Law
122 Commerce St.
Montgomery, AL 36104

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Good afternoon. We're on the record in the matter of State vs. Charles. Criminal File No. 99-884. It's the time and place for the Court to pronounce sentence.

The Defendant is present with his counsel, Mr. Dalton and Ms. D'Addario. The State is present with Mr. Krull, Mr. Sperlich, and Mr. Mayer appears by telephone.

Ms. D'Addario, is there any legal reason that sentencing could not be pronounced today?

MS. D'ADDARIO: No, Your Honor.

THE COURT: The sentencing Court has a responsibility to become thoroughly acquainted with the character and history of the Defendant in order to impose an appropriate sentence.

This inquiry includes an examination of the Defendant's character, mentality, habits, tendencies, age, inclination to commit crime, life, family, occupation, past criminal record, and social environment.

Miller vs. Alabama refines the Court's responsibility when determining an appropriate sentence for a juvenile killer. As Defendant's

prehearing sentencing memorandum notes, relevant, mitigating factors of youth include: Lack of maturity, an underdeveloped sense of responsibility, which implies the tendency to engage in a behavior that is reckless, impulsive, or risky.

The Miller Court identified vulnerability to negative influences, outside pressures coupled with limited control over environment, and an inability to extricate oneself from horrific, crime-producing circumstances.

Miller observed that a child's character is not as well-formed as an adult's. Consequently, a juvenile's actions are less-likely to evidence irretrievable depravity. These characteristics diminish the penological justifications of a sentence: Retribution, deterrence, and incapacitation.

Finally, Miller says, "Life without parole foreswears the rehabilitative ideal and requires that an offender" -- "requires a finding that an offender is incorrigible which is at odds with the child's capacity for change."

This Court accepts these principles in general to youth. But Miller does not stand for the proposition that these generally observed characteristics of youth are universally applicable to each and every juvenile,

whether that juvenile is a murderer or a prodigy.

This Court recognizes that generally observed circumstances of youth did not cause Daniel Charles to pull the trigger. Daniel Charles' murder of his father was not inexorably determined by youthful brain or undeveloped character. To find otherwise, denies the existence of will.

Furthermore, today the Court doesn't sentence a youthful offender. It sentences a 30-year-old man. A man who acknowledges he continues to manipulate. Who acknowledges he only recently stopped lying. Who acknowledges that he explodes in anger if his buttons are pushed. Who's prison behavior is, which to some may seem relatively insignificant, can hardly be described today as parole worthy.

Daniel Heinzelman -- or Daniel Charles, rather, was no child of tender years when he murdered his father, an objective observer, giving Daniel Charles all the characteristics of youth, and even giving Daniel Charles -- giving credence to Daniel Charles' latest version of the events can yet conclude this was a cold-blooded murder, driven less by impulsivity than by a specific, long-formed intent to murder either Duane or his mother or others.

Dr. Manlove himself, a forensic psychologist,

opined that Daniel Charles' murder of Duane Ingalls was not an impulsive event.

At page 326 of the juvenile transfer hearing, Dr. Manlove noted the chronicity of Daniel's problems: Manipulation, explosive anger, conduct disorder, antisocial traits.

The Court today, after hearing all of the psychological experts, cannot ignore the chronicity of those problems identified over 16 years ago. It would appear that in Daniel Charles' case that those traits observed in his childhood continue into adulthood. These characteristics, regardless of the etiology that exists today and continue to caution the Court that rehabilitation is, if anything, only in its nascence.

Daniel Charles' lifelong history of lying is of no small concern to the Court. Dr. Manlove was suckered in 16 years ago. Chronic lying is a character issue. It's impossible to engage the sincerity of Daniel Charles' remorse or expressions of changed behavior. It seriously calls into question his rendition of the relationship between he and Duane.

The Court frankly does not accept wholesale Daniel Charles' description of the pervasive, knock down, drag-out, physical combat he describes between

father and son. Clearly Daniel Charles was physically and verbally abused mostly by his mother. But by no stretch of the imagination can a relationship between the father and son be described as a horrific, crime-producing setting. And even if Duane cuffed and verbally abused Daniel Charles, this picture cannot be viewed in isolation from the welcoming and extended family Daniel Charles had the opportunity to be part of for several years.

The goals of sentencing are retribution, deterrence, both individual and general, and rehabilitation. Incapacitation is a common and valid sentencing goal. One purpose of sentencing is not preeminent over any of the others. There's nothing in the constitution that says rehabilitation is the sole permissible goal of incarceration.

Even assuming, which this Court does not -- but even assuming Miller stands for the proposition that the rehabilitation ideal for a juvenile offender is preeminent over all the other goals of sentencing, this Court, of course, must consider all the pertinent goals of sentencing.

The gravity of this offense is great, notwithstanding any lessened moral culpability associated with mitigating qualities of youth. This

was a premeditated, deliberate, intentional, sniper killing. And today, despite the passage of time and the chronological maturity, the Defendant still presents a condition of moral atrophy.

Society's not yet safe for Mr. Charles. By his own admission, he has demonstrated the capacity for past and continuing violence in and out of prison. Incapacitation is therefore a continuing factor of import.

Society requires that a crime of this gravity under the circumstances presented, notwithstanding Daniel Charles' chronological age at the time, demands substantial retribution.

In this case the Court has therefore determined that the Defendant be sentenced to a term of 92 years in the State Penitentiary with credit for 16 years, three months served. This Court reaffirms the costs and fees imposed in its original sentence.

Mr. Krull, do you have any questions?

MR. KRULL: Are you asking the State to prepare a proposed judgment as usual?

THE COURT: Yes.

MR. KRULL: Nothing further, Your Honor.

THE COURT: Ms. D'Addario, is there anything that you have at this point?

MS. D'ADDARIO: No, your Honor.

THE COURT: Thank you very much. We're in recess.

(Hearing recessed at 1:40 p.m., October 30, 2015.)

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF MEADE)

I, DENNON BURTON, an Official Court Reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Pages 639 through 647, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE JEROME A. ECKRICH, Circuit Court Judge.

Dated at Sturgis, South Dakota, this 11th day of February, 2016.

/s/ Dennon Burton
DENNON BURTON
Official Court Reporter
My Commission Expires: 10/29/21

TAB 3

Defendant's Exhibit 1

SEALED BY THE COURT

TAB 4

Defendant's Exhibit 6

SEALED BY THE COURT

TAB 5

Defendant's Exhibit 9

State v. Daniel Charles
Meade County, SD

Expert Report of Findings and Conclusions
Prepared by: Martin F. Horn

I. Introduction

I have been retained by the Equal Justice Initiative to provide an expert opinion as to the resentencing of Daniel Charles and to evaluate and assess his behaviors in juvenile and adult confinement. My opinions are based upon my review of documents produced in the above-captioned case and provided to me by counsel[1], my forty-five years of experience in the corrections industry (including my positions as parole officer, Prison Warden, Secretary of Corrections for the Commonwealth of Pennsylvania, Commissioner of the New York City Department of Correction, Commissioner or the New York City Department of Probation, Executive Director of the New York State Division of Parole and Executive Director Sentencing Commission of the New York State Unified Court System).

A. Disclosure of Financial Terms

I am receiving $350/hour for the research, drafting and submission of this expert report. My compensation is not contingent on the content of my opinion, the conclusions I reach, or the outcome of this case. My opinion has not been affected by the compensation that I have received.

B. Summary of Findings

Daniel Charles stands convicted by jury trial of the murder by gunshot of his former stepfather Duane Ingalls on July 23, 1999. The jury found Mr. Charles guilty of murder in the first degree. Mr. Charles admits his guilt in the crime and admits that at the time of the offense he did try to conceal it and lied about his intent in pointing the gun and pulling the trigger. He now admits his intent was to harm, if not to kill Duane Ingalls.

At the time of the murder, Mr. Charles was not yet 15 years old, having been born November 6, 1984. He had lived with the deceased for several years prior to the offense and during that time witnessed the abuse of his mother by the deceased and himself experienced brutal physical abuse at the hands of the deceased. He had been living alone on the victim's ranch in Mud Butte, SD with the victim. The victim had a tempestuous relationship with Mr. Daniel's mother and she has a history of inappropriate behavior. His upbringing was chaotic and his role models propagated a tendency toward inappropriate acting out behavior.

[1] A list of documents is included hereto in Section X of this report.

The ranch is remote and although he attended a rural school until 8th grade, he was isolated and alone with no appropriate social relationships until the time of the murder. Because of this social isolation he was very immature, even by the standards of a normal 14-year-old boy. He saw no way out of his situation and was ignorant of options to obtain help. He had no access to a counselor or other responsible adult to turn to.

This experience of learned inappropriate behaviors, immaturity, and the lack of appropriate social relationships contributed to his commission of the offense. In addition, once he was arrested and confined in juvenile detention and later at age 15 in the Penitentiary with adults, normal internal controls were absent and he found himself in a far more intense social environment than he had ever experienced.

His behaviors, the murder, the lying immediately thereafter, his self harming behaviors, his infractions during confinement all must be evaluated in light of these early, precursor influences. During his prison confinement he has not engaged in activity that can be described as violent nor has he sought the protection afforded by joining a gang. He has taken every available opportunity to advance and improve himself and he demonstrates growth and insight into his previous behaviors and who he is today.

In my professional opinion, Daniel Charles is not at this time a risk to the community and his behaviors while confined should be evaluated in light of who he was when incarcerated in 1999 and the man he has become.

II. Summary of Qualifications

I received my Bachelor of Arts in Government from Franklin & Marshall College in 1969, followed by a Master of Arts in Criminal Justice from John Jay College in 1974.

From 1969 to 1975, I served as a Parole Officer in the New York State Division of Parole. After earning my Master's Degree I became an assistant professor of criminal justice at what is now the State University of New York Polytechnic Institute in Utica, New York.

In 1977, I became employed with the New York State Department of Correctional Services and held a variety of positions, including Superintendent of the Hudson Correctional Facility. As Superintendent, I was responsible for all aspects of prison administration, including the safe housing of the prisoners, their welfare including their physical and mental health, security, the maintenance of the physical plant, labor relations, programs intended to rehabilitate the prisoners and the personnel and fiscal affairs of the institution and the promulgation and implementation of policies and procedures necessary to operate the prison.

In 1985, I returned to the New York State Division of Parole and served as Director of

Parole Operations and Executive Director. In these positions I was effectively the Chief Parole Officer of the State. I was responsible for the work of over nine hundred parole officers throughout the State and the ancillary staff. I promulgated and implemented policies and procedures necessary for the proper operation of a parole release process and the post release supervision of prisoners released from State prisons. I was responsible for fiscal and personnel matters, training, staff supervision, and the law enforcement relationships between the Division of Parole and sister agencies.

From 1995 until 2001, I worked for the Commonwealth of Pennsylvania, as Secretary of Corrections and Secretary of Administration. In this position I was responsible for implementing correctional policies and programs. During my tenure, staff and inmate safety and health care improved, suicides were reduced, three long-standing consent decrees were dissolved, and classification and information systems were modernized. I created an addiction treatment program that, for the first time, provided funding for post-release treatment of released offenders. Under my leadership, improvements to the provision of mental health services were made; including an enlargement of facility based acute care and step-down programs, "rule out" protocols to keep mentally ill inmates out of punitive segregation and release programs for inmates with mental illness were initiated. I was responsible for all aspects of prison administration for over 20 prisons housing over 30,000 prisoners and the work of over 15,000 staff. This included ensuring the safe and constitutional housing of prisoners by overseeing prisoner welfare including their physical and mental health, security, the maintenance of the physical plant, labor relations, programs intended to rehabilitate the prisoners and the personnel and fiscal affairs of the institutions. As part of my responsibilities I negotiated settlements with plaintiffs in matters relating to the conditions of confinement of the prisoners in the State's prisons. I was responsible for maintaining constitutional conditions of confinement in the prisons. When I was appointed in 1995, Pennsylvania had recently adopted an "adult time for adult crime" statute and I was responsible for planning for the admission of children into the state's prisons. I successfully obtained funding for a dedicated facility for that purpose, SCI Pine Grove, a maximum-security prison but with an internal program modeled on the highly successful Glen Mills School (http://www.glenmillsschool.org/about/).[2]

Beginning in 2002, I served as Commissioner of the New York City Department of Probation, to which Mayor Michael Bloomberg appointed me effective January 1, 2002. In that position, I reengineered the juvenile probation process in New York City reducing the number of juveniles committed to placement for juvenile delinquency by 70% while there was no increase in crime by these juveniles. I also began a redesign of the City's pre-adjudication detention process for juveniles leading to changes that have become the standard throughout the nation and have reduced the use of pre-adjudication confinement while improving outcomes such as appearance at hearings and lowered flight risk.

[2] http://old.post-gazette.com/regionstate/20001212pinegrovereg5.asp

In 2003, Mayor Bloomberg appointed me to simultaneously serve as Commissioner of the New York City Department of Correction, the City's jail system, and I held both positions simultaneously until July 31, 2009. As New York City Correction Commissioner, I was responsible for all aspects of jail administration for over 10 jails housing over 15,000 prisoners and the work of over 9,000 staff. In this position I was also responsible for conditions of confinement, including the safe and constitutional housing of the prisoners, their welfare including their physical and mental health, security, the maintenance of the physical plant, labor relations, programs intended to rehabilitate the prisoners, personnel and fiscal affairs of the institutions and the promulgation and implementation of policies and procedures necessary to operate the prisons. As part of my responsibilities, I negotiated settlements with plaintiffs in matters relating to the conditions of confinement of the prisoners in the City's jails. I was responsible for maintaining constitutional conditions of confinement in the jails.

I introduced programs and training that reduced suicides[3] and cut jail violence in half.[4] I authored and approved the use of force and other policies of the New York City Department of Corrections. I initiated New York's first drug interdiction program which included the first wide scale drug testing in the City's jails. I created the first jail reentry program in the nation. As part of this program, I reengineered the intake process to insure all inmates were properly screened for vulnerability, possessed the documents needed to work upon release, created transitional job opportunities for persons released from jail, and created systems to identify high frequency jail and shelter users. I worked with the City's housing and homeless services to address the needs for housing of discharged persons.

I am now a Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice, and I serve as Executive Director of the New York State Sentencing Commission by appointment of the Chief Judge of the State of New York. As Executive Director, my primary responsibilities include supporting the work of the Commission in a ministerial role.

In 2004, I was appointed by Hon. Charles Hynes to serve as co-chair of the American Bar Association Corrections Committee. From 2003-2009 I served as chair of the policy and resolutions committees of both the American Correctional Association and the Association of State Corrections Administrators. I served as a Commissioner of the Commission on Accreditation for Corrections.

---

[3] *Performance Statistics* FY02 FY03 FY04 FY05 FY06 FY07 FY08 FY09
Suicides 2 *6* 1 5 3 2 2 0
(New York City Mayor's Management Report, City of New York, 2002-2010 http://www.nyc.gov/html/ops/html/data/mmr_archives.shtml#2009)

[4] New York City Mayor's Management Report, City of New York 2002-2010 (http://www.nyc.gov/html/ops/html/data/mmr_archives.shtml#2009)

I have authored numerous publications on topics related to corrections, and I have delivered addresses to professional meetings throughout my career. I have testified on behalf of government agencies in both state and federal courts and have been an expert in both state and federal litigations. Additional information related to my qualifications, publications, and litigation experience is set forth in the curriculum vitae attached as Exhibit A to this report. Based on my education, experience, and qualifications, I have substantial expertise in assessing individual defendants and making sentencing recommendations to the courts and release recommendations to parole boards.

III. Daniel Charles family and development

Daniel Charles, aka Daniel Neil Heinzelman, aka Daniel Neil Ingalls was born November 6, 1984, in Tucson, AZ. His mother, Melissa Jan Pickard separated from his natural father and he is not named on his birth certificate. He lived apart from his mother with his maternal grandparents in Indiana for most of his childhood. At the age of 8 his mother married Duane Ingalls, the deceased victim and she and Daniel went to live on the Ingalls ranch in rural Mud Butte, SD. His relationship with Ingalls was "rocky from the start," according to Daniel. His mother and Ingalls had frequent "heated" arguments that led to violence by Ingalls against Daniel's mother and included striking tossing and shoving her around. As a result, she sustained bruises. He says he witnessed this violence several times a week between the ages of 8 and 13 years. Daniel claims this behavior scared him and made him feel protective toward his mother, but he was unable to protect her or himself. Ingalls was abusive toward Daniel as well. Although he describes Ingalls as "my friend and father figure," he harbored anger and fear as a result of the violence he experienced. He says that after his mother left the abuse and beating occurred more frequently, almost on a daily basis.

While his mother was clearly a victim of Ingalls violent behavior she had anger management and explosive personality issues of her own. Daniel describes her as needing "drama" in life and "liking to cause a scene." In sum, during this 5-year period of his early to mid adolescence Daniel was isolated and constantly exposed to violence and inappropriate behaviors.

Five years later, when Daniel was 13 his mother divorced Ingalls and left Daniel on the ranch alone with Ingalls for several months. Later in the year, Daniel moved with her to Belle Fourche, SD. After a month, he moved in with John and Kathy Hansen, his godparents, in Rapid City, SD.

While there he engaged in attention seeking, self harming behavior, cutting himself on the wrist with a pocket knife (some reports describe it as a staple, he says it was a pocket knife). The Rapid City PD responded and he was admitted to the Rapid City Behavioral Health Center. While there he was diagnosed with depression and was

prescribed Prozac. He returned to live with Ingalls on the ranch and complete the 8th grade, although his mother was no longer there. His grades were good, many A and B grades. After completing 8th grade he moved to Sacramento, CA. to live with his grandfather but returned shortly after to live on the ranch alone with Ingalls. After only 2 weeks there he shot and killed Ingalls.

Although he has no criminal arrests or juvenile delinquencies prior to the instant offense, Daniel describes himself during those years as "a little brat," and as one needing attention. Much of his early adolescent behavior was the result of the tumultuous life he was living and his need for attention in this isolated and isolating world he lived in, surrounded by self absorbed and inappropriately behaving adults. Because the ranch was so isolated, Daniel had no friends his own age, no opportunity to observe appropriate adult behavior and no appropriate opportunity to develop normal affections and adolescent relationships. Isolated on the ranch he had no outlet or access to responsible adults to rescue him from the tumultuous world he was living in. He never learned how to relate to people his own age or to observe appropriate boundaries until he was imprisoned. Daniel today admits to many of the things alleged by the victims' family at sentencing; that he stole Ingalls credit card and used it to watch pornography, and that he did get into a fight with another youth. These however must be considered in light of the behavior of a very lonely, confused, often-abandoned 14-year-old boy.

Following his arrest on July 27, 1999 Daniel was confined at the Western South Dakota Juvenile Service Center in Rapid City. He was not yet 15 years old. When he turned 15 and upon his conviction he was committed to the South Dakota State Penitentiary.

IV. The Crime

On July 23, 1999 Daniel was working with Duane Ingalls in the ranch hay fields. After about an hour and half of work, Ingalls stopped and berated Daniel for raking a windrow in the wrong direction. At some point it became an argument and ultimately Ingalls hit Daniel in the head, slamming his head into the window of the tractor. Daniel reports feeling pain and also feeling helpless, trapped, and abandoned. He returned to the house to fix dinner and when Ingalls returned home, feeling angry and threatened Daniel took a rifle, that he knew was loaded as they always kept the rifles loaded, and aiming at Ingalls pulled the trigger, killing Ingalls.

Daniel expected a visit to the ranch from Ingalls's father and panicked. He cleaned up the scene and hid Ingalls's body in the garage. The elder Mr. Ingalls came and went without realizing what had happened. Daniel called his mother who took many hours to arrive. While waiting for his mother to arrive, Daniel admits he used Ingalls' credit card to access telephone pornography. He says he needed to pass the time, was lonely, confused, and there was nothing else to do while he waited. Upon her arrival and

assessment of the situation, his mother immediately called 911 and they awaited the arrival of the police.

He accepts full responsibility for what he did. He now admits he knew the gun was loaded and despite his earlier representations to the contrary now says that in his fear and panic he lied to the police when first questioned.

V. Juvenile Confinement

Following his arrest Daniel was placed in the Western South Dakota Juvenile Service Center (JSC)on July 30, 1999. Almost immediately he had an adverse reaction. Bear in mind this is a youngster who has no history of living or even being with others his own age. He lived alone on the ranch with Ingalls from age 8-14 with little interruption. At the ranch, he was miles from neighbors or town. Once he completed his 8th grade education in the rural school, he had little or no contact with his peer group.

JSC reports indicate non-violent and verbal conflict with other detainees. By August 10, he is reported banging his head on the window and is non-communicative. His verbalizations evidence a sense of hopelessness and carelessness. He continues to engage in verbal and non-violent behavior and conflict with peer. He is described as argumentative, with a negative attitude and engages in making sexually inappropriate comments toward other detainees and staff. On September 20 1999, he is observed "punching cell walls." On August 21, 1999, he says to staff he is going to death row and that he doesn't give a "fuck"—cause nothing matters anymore.

On September 23, 1999, he states with respect to another detainee, "Since (name) has been off Ad/Seg, whenever he walks by me he will kick my knees, hit my back, or throw his over shirt in my face. One day he even pulled my pants down…"On September 28, 1999, he asks to be placed in voluntary protective custody as the result of an incident with another detainee. The next day, September 29, he floods his room. On October 2, 1999, he writes a grievance stating another detainee is "harassing me sexually, physically and mentally. This is the 3rd report I have done on him and nothing has been done so I went on PC (protective custody) and that made it worse. Please do something this time."

On November 7, 1999, he is found lying on the floor of his room with a blue piece of cloth wrapped around his neck in what is construed as a suicide attempt. On November 17, 1999, in another apparent suicidal gesture, he is found in his room with a "rope" made from several layers of toilet paper tightly wrapped around his neck and both hands tightly clasping the toilet paper, he appeared to be a purplish color. On February 11, 2000, he was observed in the shower stall using his eyeglasses to cut at his left wrist. He manages to get out of restraint in a further effort to do harm to him and is oppositional to direction. On February 17, 2000, he was observed banging his head against the wall to the point where he broke his skin and was bleeding. He would not

stop until placed in a restraint chair. On February 22, 2000, he would not respond to counselor questions relative to his Administrative Segregation Review and flooded his cell. On February 23, 2000, during a routine search staff found a quarter size hole, dug in the wall of his cell and he admitted doing it, "because I can." On October 4, 2000, he is kicking and pounding during the night to, "drown the voices from his head." The next day, on October 5, he again floods his room.

All of this bespeaks the confusion, hopelessness and frustration he felt and reflects his lack of previous experience with group living situations and peer group interactions. He likely felt scared and threatened and did not want to give any cause for other detainees to believe they could take advantage of him. Few of his misbehaviors are violent or seriously assaultive. All of these behaviors are consistent with a scared and confused youngster in a frightening situation and a frightening environment, on his own among others for the first time in his life and subject to rules and structure he had never experienced. His various self-harming episodes are means of obtaining attention and reflect the helplessness he was experiencing insofar as such extreme gestures were the only means he had to effect his environment. In this setting we also begin to see his behavior of visiting other detainees, reflecting his newfound acquaintanceship with peers. For the first time he has contemporaries to visit and he has never developed internal controls to manage these relationships and opportunities. He impresses as an immature, inexperienced youngster trying very hard to cope in a difficult and frightening environment without resort to violence.

For example, according to mental health records on August 6, 1999, "Daniel reports that other detainees in the housing pod are trying to get him to fight by saying things to him and bumping into him. Daniel reports he then says something back to them and then gets in trouble." And later, on August 9, "Daniel states that the conflict in the pod starts with the other detainees. He states the he 'flips off' others in the pod after they do it to him, or after they bang on his door or stand at the window of his door and call him names…He reports that other detainees made racist comments about him, and he then made racist comments about them in return." He is placed in protective custody but then on August 11, "states he is tired of being in his room…Daniel states he is claustrophobic…he was hitting his head against the wall last night because the room is too small for him." On August 25, "Daniel reports recent problems with another detainee in his housing pod. Daniel states that everyone in his pod was pressuring him to 'kick his ass'…Daniel states he is aware of this (that he will be held accountable for his behavior) and that is why he kept it to a verbal confrontation and avoided getting into a physical fight." This evidences to me the strain this youngster was experiencing and the efforts he was making not to respond violently to provocation.

Notwithstanding all this, according to educational records he successfully completes most of his academic assignments and tasks. On most days he receives a behavior score of 3, "no rule violations, positive attitude. Responds positively to staff and volunteers to facilitate JSC schedules and programs."

On October 15, 1999, he tells medical staff he is having difficulty sleeping. This is of note because he had been prescribed Prozac earlier and it is now known that Prozac may lead to sleep difficulty and also that being under 24 years of age is considered a risk factor in prescribing Prozac and may increase the risk of suicidal thoughts or behavior in persons under 24. In fact, Prozac is not approved currently for use in children younger than age 18. (www.iodine.com/drug/prozac/side-effects) His behavior should be considered in light of that information.

VI. South Dakota State Penitentiary

Charles was committed for life to the South Dakota State Penitentiary in April 2000. He was not yet 16 years old. Upon arriving he immediately had to fend off predatory older prisoners attempting to take advantage of him and attack him sexually. On three occasions he had to fend off rape attempts by other prisoners. He did not report them because he did not want to violate the unwritten "prison code," and begin his life of imprisonment as a "snitch."

According to a May 2015 Progress Report from the Department of Correction he was not assigned to complete any required programming due to his life sentence. Nonetheless, he pursued successful completion of his GED, attended anger management and computer programming classes on his own initiative. In addition he has become highly proficient in transcribing material into Braille for the blind, and is certified to do that and graphic design. He has worked in the license plate, bookbindery, and custom furniture shops.

In the more than 15 years he has been at the Penitentiary he has received only one (1) high level disciplinary report. And the story behind that report is worth evaluating separately. Nonetheless, this is a remarkable record of good behavior in a prison setting. In a speech I delivered in October 2014 at the University of Notre Dame, I made the following observation, "Even at their best, prisons are menacing environments. Bullying behavior is no stranger to our high schools; we should not be surprised when it takes brutal shape in our prisons and jails. We call them gangs. A young man locked up in the U.S. today is confronted by one set of bullies or another." That Charles has been able to negotiate this world for 15 years beginning at age 15 without resorting to violence is evidence of his determination to not be a violent person.

According to the May 2015 DOC Progress Report he has received 55 low level disciplinary reports for insolence, damaging or altering state property, conduct which disrupts, transferring property, refusing to obey verbal orders, threatening another inmate, non emergency use of a cell light, possession of contraband, stealing, being in an unauthorized area, misuse of medication, refusing to work, refusing to accept living assignments, counterfeiting, reproducing or forging any document, possession of tattoo material, attempting suicide or self harm, and transferring property. In addition he has

four (4) moderate level disciplines for conduct that disrupts or threatening staff. The record reflects an additional 393 "minor" reports less serious than these, of the nature of failing to stand for the count, failing to make his bed, and the like. An analysis of his behavior demonstrates that, overall, Mr. Charles' minor disciplinary violations consist almost entirely of incidents involving Mr. Charles being somewhere he should not have been, having something he should not have had, or failing to do something.

His most common violation of rules is for being on the wrong tier. Guards would report observing Mr. Charles on a tier other than his own. Daniel often maintains that he had a legitimate reason to be there, such as work. Often, he admits he just wanted to talk with a friend on another tier. The second most common violation is for failure to stand for the count. The majority of these violations occur at the 7am count. The correction officers would report Daniel still asleep in his bed when he was supposed to be standing at the cell front. Some of these occurred during the evening count when he was observed to be napping in bed. The next category of frequent minor discipline involves horseplay, purposely setting off a metal detector and talking back to the correction officers. Other, less frequent disciplinary violations involve tattooing that other prisoners sought him out for because he has a natural artistic talent.

His one High-level discipline involves the attempted escape of another prisoner. In this matter, there is no allegation he was attempting to escape. Rather, following the discovery of an attempt to escape by another prisoner, he came forward with information about conversations he had with that inmate previously that he says he did not realize until after the fact were about that prisoner's escape planning. He was nevertheless penalized for participating in those conversations and for accepting money from the other prisoner. Admittedly, he should not have done that but, there is no allegation in the disciplinary record that he was himself trying to escape or that he actively aided or abetted the other prisoner's attempt. On the contrary, one prison report states directly he was not a suspect in the escape attempt, and that he provided "a lot" of "useful" information to the corrections staff.

It is important to take note that most of his disciplinary write-ups occurred early in his imprisonment. Prison records show a dramatic decline in the overall number of disciplinary write ups in the last 8 years when compared to the first 7 years of his confinement. It is my opinion that much of his behavior is attributable to his youth during the early years of his imprisonment and to the very same attention seeking and lack of social experience that we observed during his time in the JSC. This is a 15-year-old youngster, with little or no social experience with his own age group, placed into the overwhelming world of adult prison, with many opportunities for friendship and socialization. He needed time to learn how to balance the rules of the prison with his youthful and undeveloped social experiences. While locked up, at various times he has been diagnosed with Explosive Personality Disorder, Severe Global Insomnia, Demophobia (an exaggerated or irrational fear of crowds), Bi Polar and ADHD. Also, one

again sees much of the same attention seeking and suicidal ideation observed in JSC as well as the insomnia that may be causative of the failing to stand for count write ups.

In my opinion, based on over 40 years working with prisons and prisoners, I do not believe that Daniel's experience is inconsistent with normal adjustment experienced by prisoners. Children in adult prisons frequently have adjustment problems and Daniel was no different. It is striking, on the contrary, how well he negotiated them without resort to violence or by joining a gang, typical responses I have observed. The record indicates that he came forward with information about the attempted escape of another prisoner on his own volition and at some risk to himself. His behaviors are consistent with what I have observed among long termers and especially among juveniles. There is no evidence in the prison record of abuse of drugs or alcohol.

His record does not give rise to alarm about his danger to society or the prospect he can succeed if released.

VII. Efforts Toward Self Improvement

By his own admission, when he first went to prison he was, as he describes himself an, "impetuous little brat." He was lost and confused, frightened – looking at a life term – and still the child needing attention he was before his imprisonment. His development was interrupted by the murder and it delayed his emergence as a responsible adult. The record demonstrates growth and maturity as well as improved judgment and decision making on his part. He has learned what "sets him off," he dislikes being yelled at and when so confronted tries to get away from people who "set him off," and not to respond with physical violence. He has taken every opportunity, in a prison that doesn't offer many opportunities, to improve. He has learned anger management, braille transcription, to play piano and guitar and to read music. He has learned to speak Russian and German and has been active in the prison Chapel for many years. He tried to engage the Ingalls family in Victim Offender Reconciliation, but they declined to participate. Daniel tried to take other classes, for example Moral Reconation Therapy, but is not eligible because of his sentence.

In our interview, he demonstrates understanding of his problems and a willingness to work toward overcoming them. He speaks and analyzes his situation as a grown adult. He seems to face the challenges confronting him "wholeheartedly," and with a determination to overcome the hurdles he faces. He has sought support in the past and avers he will do so if released. He says he tries to, "learn everything I can." The questions he asks the interviewer and himself are good ones that indicate a mature and appropriate understanding of his situation and prospects.

VIII. Release Plans and Prospects

Daniel recognizes that if released he faces a difficult and uphill struggle, but as noted he speaks sincerely about a determination to take it on "wholeheartedly." His planning is realistic and sound. He has a good and continuing relationship with his mother and her new husband. He recognizes his mother's issues and the complications she can bring to his life. He says, "I love her to death, but I am definitely the adult in the relationship." He knows she likes drama in life and likes to "cause a scene." As a result he knows that long term, living with his mother in Sioux Falls is not a good plan. He anticipates offers of employment from H and W Contracting where his mother's new husband is employed and from American Printing House working on Braille transcription. However, he is most sincerely interested in the prospect of going to Delancey Street Foundation in San Juan Pueblo, New Mexico (http://www.delanceystreetfoundation.org/hww.php)where he can receive support, counseling and vocational training in a setting where he can pursue his skills and interest in ranching. I believe this plan is a sound one.

IX. Conclusion and Recommendation

Based upon my review of the records of Daniel Charles, my interview of him, and knowledge and experience I have accumulated during more than 40 years working in probation, parole and prison, and years of study, I do not believe that Daniel Charles is today a threat to the community. In my estimation, his in prison behaviors are well within normal limits and consistent with normal prison adjustment by a 15 year old boy in a maximum-security adult prison over a period of more than 15 years. Moreover, given the deficiencies I observe in Charles's early life experience and the trauma he experienced both during his childhood, including the murder itself, and during his early imprisonment, I do not believe that his disciplinary record is indicative of any future threat to the safety of the community. Daniel reacted to the apparent hopelessness of his situation with understandable and age appropriate acting out behaviors. It has been my observation that when people, especially prisoners feel that everything has been taken away and they haven nothing to lose, their behavior deteriorates. I believe this explains much of Daniels behaviors during his confinement. I see a record of growing maturity, improved judgment and decision-making, introspection, and the assumption of personal responsibility. Knowing what we know today about the development of adolescents, his behaviors from 1999 to now do not appear abnormal and is consistent with behavior I have observed among his contemporaries in similar situations.

In my opinion, Daniel Charles can safely be released to live in the community, especially if provided with a transition plan such as can be afforded by an organization such as Delancey Street Foundation. I believe he demonstrates the ability to live and remain at liberty without violating the law and his release would be compatible with the best interests of society

X. Documents Relied Upon

Juvenile Records
Prison Records
    Including Incident Reports and Disciplinary Reports
    Disciplinary History Report
DOC Mental Health Records
Sentencing Transcript
Statistical Analysis of Disciplinary History provided by counsel

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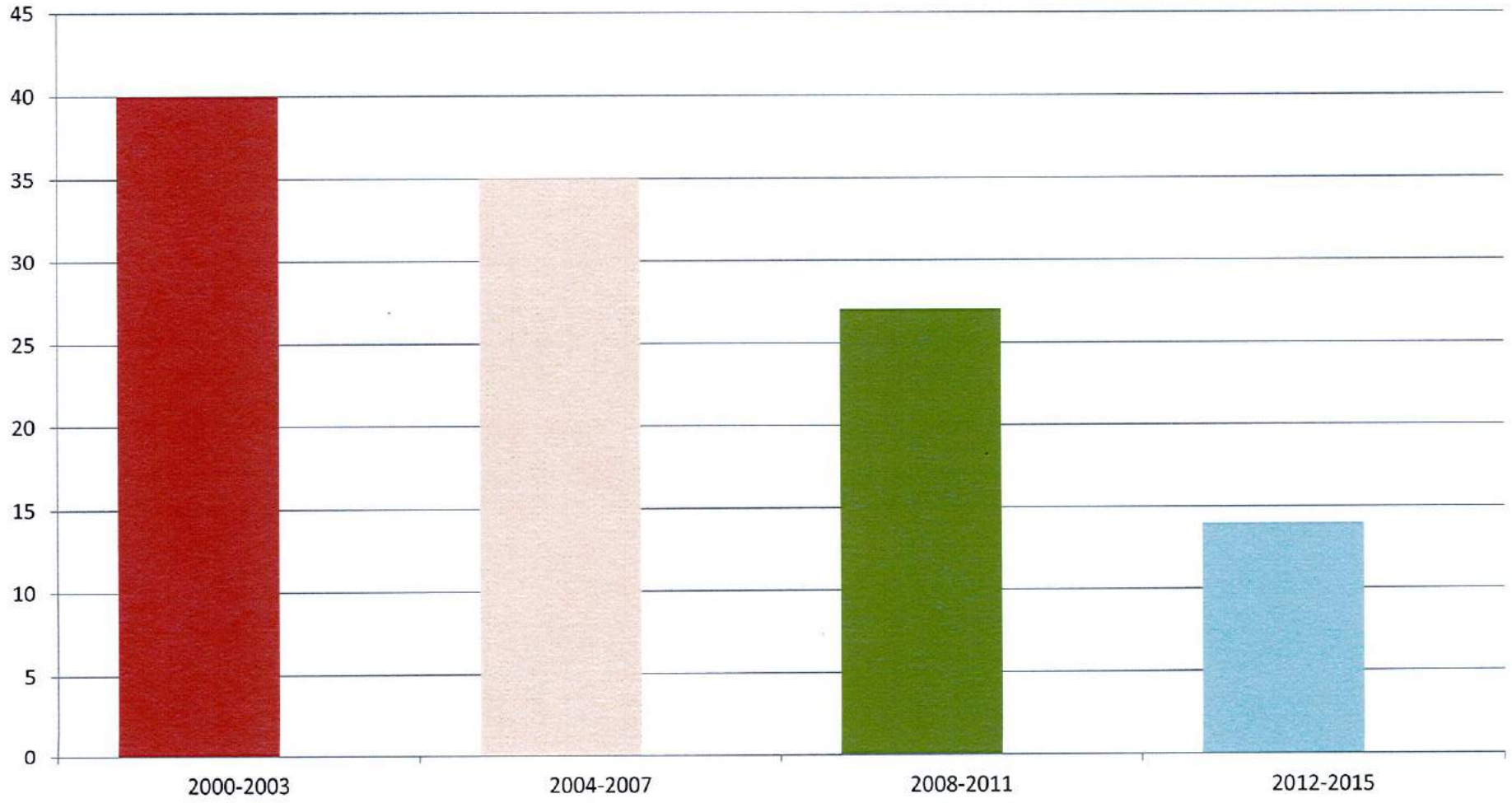
TAB 6

Defendant's Exhibit 12

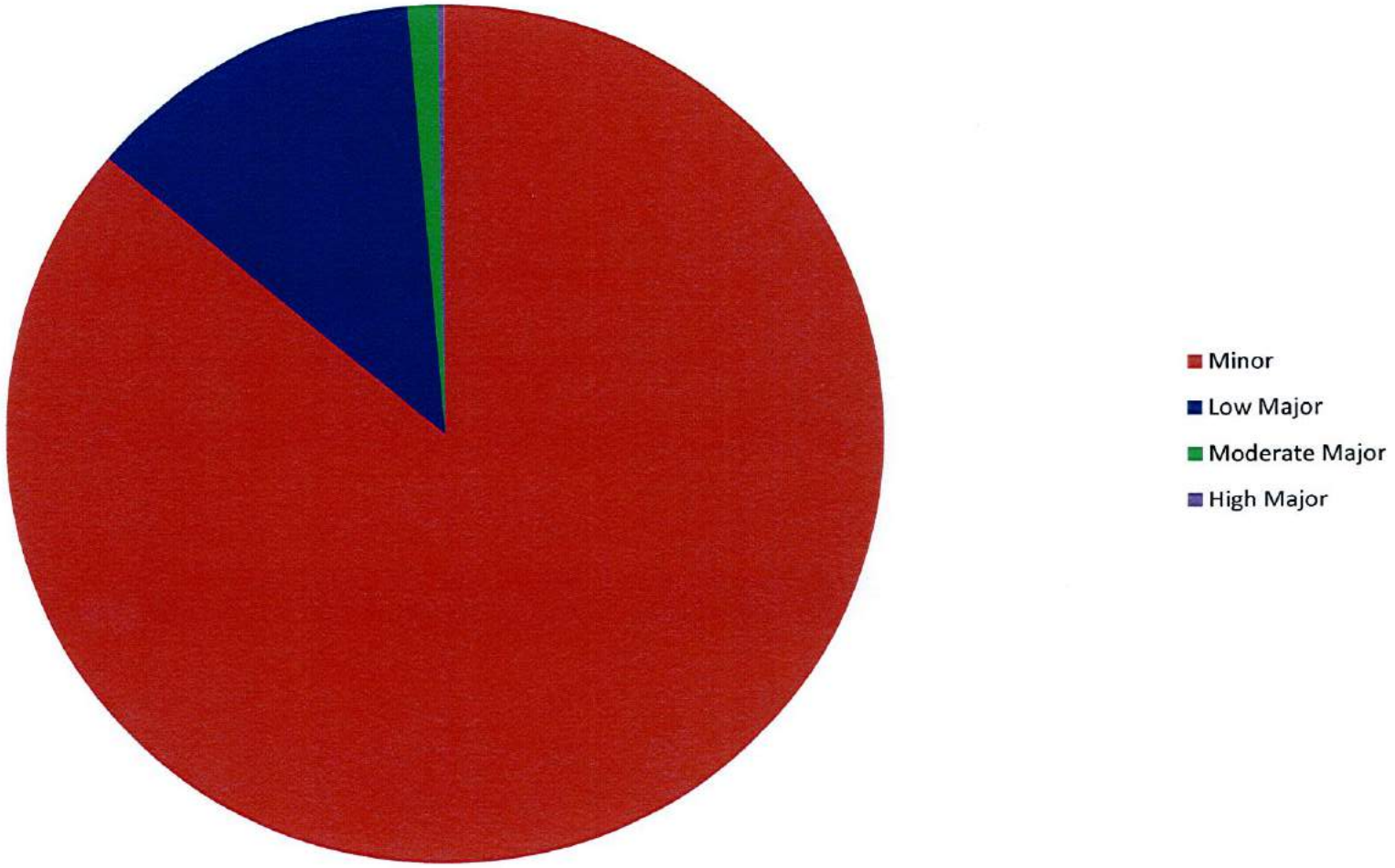
DEFENDANT'S EXHIBIT 12

Blumberg No. 5114

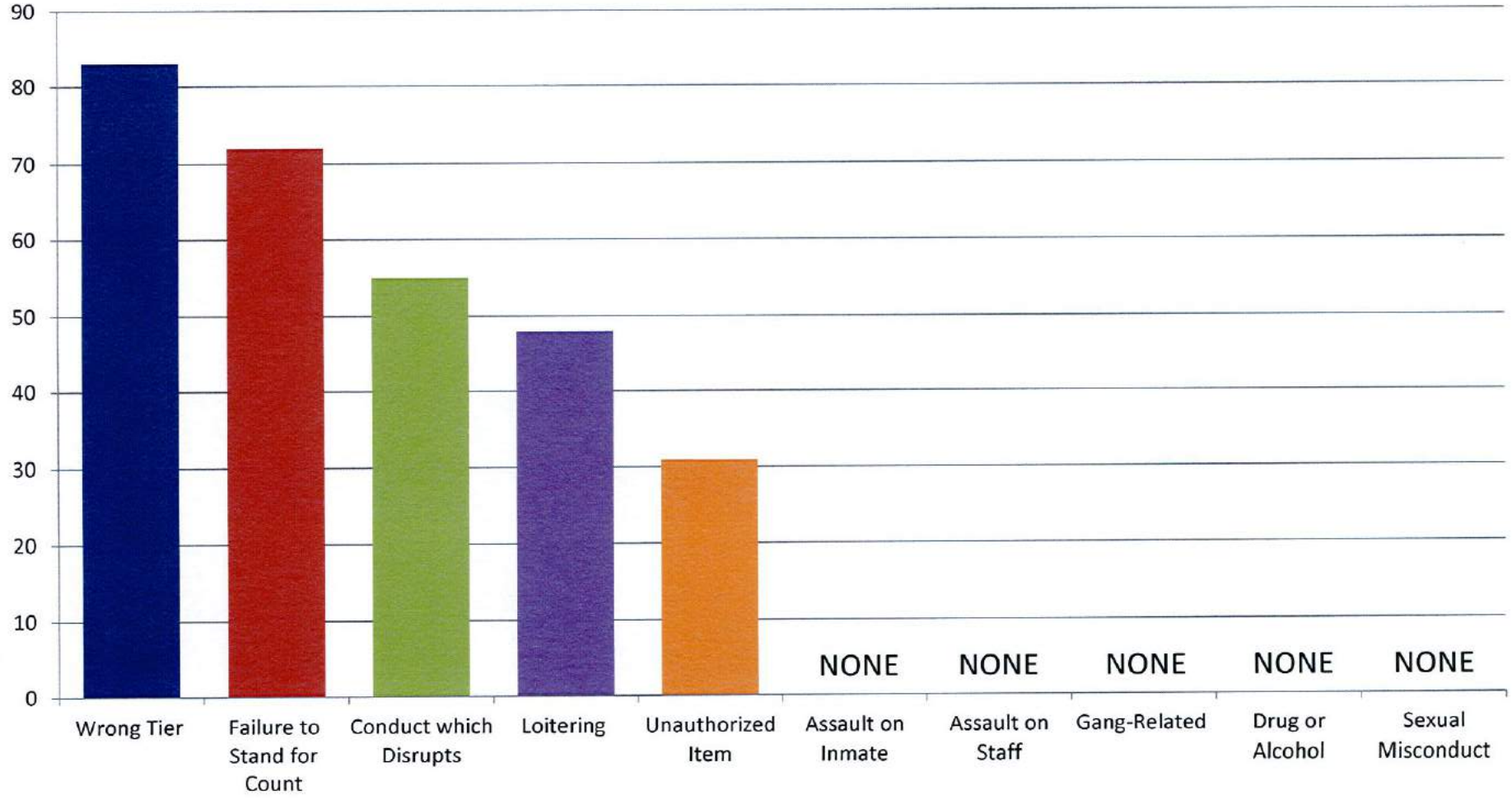
Average Annual Violations by Four-Year Period



Total Violations by Level



Selected Violations by Type



TAB 7

SDCL 23A-27-1.1

South Dakota Codified Laws
Title 23a. Criminal Procedure
Chapter 23A-27. Sentence and Judgment (Refs & Annos)

SDCL § 23A-27-1.1

23A-27-1.1. Victim's oral impact statement to court before sentence imposed--Response of defendant--Victim defined

Currentness

If a defendant has been convicted of an A, B, or C felony, upon request to the court by a victim and before imposing sentence on a defendant, the victim has the right to orally address the court concerning the emotional, physical, and monetary impact of the defendant's crime upon the victim and the victim's family, and may comment upon the sentence which may be imposed upon the defendant.

If a defendant has been convicted of any other felony or misdemeanor, upon request to the court by a victim and before imposing sentence on a defendant, the victim, in the discretion of the court, may orally address the court concerning the emotional, physical, and monetary impact of the defendant's crime upon the victim and the victim's family, and may comment upon the sentence which may be imposed upon the defendant.

The defendant shall be permitted to respond to such statements orally or by presentation of evidence and shall be granted a reasonable continuance to refute any inaccurate or false charges or statements.

For the purpose of this section, the term, victim, means the actual victim or the parent, spouse, next of kin, legal or physical custodian, guardian, foster parent, case worker, victim advocate, or mental health counselor of any actual victim who is incompetent by reason of age or physical condition, who is deceased, or whom the court finds otherwise unable to comment.

Credits
Source: Supreme Court Rule 86-21; SL 2004, ch 162, § 1; SL 2005, ch 129, § 1; SL 2012, ch 133, § 1; SL 2013, ch 105, § 4.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a Daniel Heinzelman,
a/k/a Daniel Ingalls,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME ECKRICH
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed December 11, 2015

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,

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DANIEL NEIL CHARLES,
a/k/a Daniel Heinzelman,
a/k/a Daniel Ingalls,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." Daniel Neil Charles, a/k/a Daniel Heinzelman, a/k/a Daniel Ingalls, Defendant and Appellant, will be identified as "Defendant," or "Charles." All other individuals will be designated by name.

References to the transcripts of Defendant's April 10 through 17, 2000 jury trial; April 28, 2000 sentencing hearing and October 21 through 23 and 30, 2015 resentencing hearing will be designated as "JT," "ST," "RST," respectively. Citations to the settled record, the Defendant's brief, the October 2, 2015 presentence report, the State's exhibits and the Defendant's exhibits will be identified as "SR," "DB," "PSR," "St. EX," Def. EX," respectively. The State also has combined

Defendant's second, third and fourth issues into one issue with different subsections for ease of reference. All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This case stems from a Second Amended Judgment of Conviction, which was filed on November 13, 2015, by the Honorable Jerome A. Eckrich, Circuit Court Judge, Fourth Judicial Circuit, Meade County. SR 694-97. On December 11, 2015, Defendant filed a Notice of Appeal. SR 721-23. This Court has jurisdiction as provided in to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE DEFENDANT'S AGE AND MITIGATING CHARACTERISTICS OF YOUTH, DURING THE RESENTENCING HEARING, AS RECOGNIZED BY *MILLER v. ALABAMA*, 567 U.S. _____, 132 S.CT. 2455, 183 L.Ed.2d 407 (2012)?

Judge Eckrich's analysis was correct.

Montgomery v. Louisiana, 577 U.S. _____, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)

United States v. Jefferson, 816 F.3d 1016 (8th Cir. 2016)

State v. Cardeilhac, 876 N.W.2d 876 (Neb. 2016)

State v. Springer, 2014 S.D. 80, 856 N.W.2d 460

II

WHETHER DEFENDANT'S PENALTY OF 92 YEARS, WITH CREDIT FOR TIME SERVED, IS: (1) THE LEGAL EQUIVALENT OF A LIFE SENTENCE WITHOUT PAROLE; (2) CATEGORICALLY UNCONSTITUTIONAL FOR A FOURTEEN-YEAR OLD HOMICIDE OFFENDER; OR (3) DISPROPORTIONATE TO THE CRIME OF FIRST DEGREE MURDER IN THIS CASE?

The trial court's individualized sentencing decision was appropriate.

State v Ainsworth, 2016 S.D. 40, 879 N.W.2d 762

State v. Cardeilhac, 876 N.W.2d 876 (Neb. 2016)

State v. Springer, 2014 S.D. 80, 856 N.W.2d 460

III

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED DUANE INGALLS' COUSIN TO PROVIDE AN ORAL VICTIM IMPACT STATEMENT, PURSUANT TO SDCL 22A-27-1.1, DURING THE RESENTENCING HEARING?

Judge Eckrich reached the right result.

State v. Berget, 2015 S.D. 1, 826 N.W.2d 1

State v. Guerra, 2009 S.D. 74, 772 N.W.2d 907

State v. Moeller, 511 N.W.2d 803 (S.D. 1994)

STATEMENT OF THE CASE

This matter arises from Defendant's execution-style murder of his stepfather, Duane Ingalls, with a rifle.[1] *State v. Charles,* 2001 S.D. 67, ¶¶ 2-17, 628 N.W.2d 734-38. On December 2, 1999, the Meade County

[1] Duane Ingalls will be referred to as Defendant's "stepfather," however, no official court adoption was ever pursued in this case. RST 340.

State's Attorney filed a Complaint, which charged Charles, who was fourteen years old (DOB 11/06/84) with: Count I--First Degree Murder, in violation of SDCL 22-16-4; or in the alternative, Count IA--Second Degree Murder, in violation of SDCL 22-16-7; or in the alternative, Count IB--First Degree Manslaughter, in violation of SDCL 22-16-15. SR 3-4; JT 690. Defendant was initially charged pursuant to a petition filed in juvenile court, Meade County File 46 JUV 99-49 (before the Honorable Timothy R. Johns), but his criminal prosecution was transferred to adult court.

The Honorable Jerome A. Eckrich conducted a jury trial on April 10 through 17, 2000. JT 14-844. Charles, who was represented by two defense attorneys, took the stand and testified on his own behalf at trial, and told several stories about his stepfather's death. JT 690-787. The jury convicted Defendant of First Degree Murder. SR 300-01; JT 840-43.

On April 28, 2000, Judge Eckrich required that Defendant serve a mandatory life sentence for this crime. SR 305-06; ST 20. This judge filed a Judgment of Conviction on April 28, 2000. SR 302-03. On May 3, 2000, the court filed an Amended Judgment of Conviction, *nunc pro tunc* April 28, 2000. SR 305-06, 323-24.

On May 13, 2011, Charles filed a Motion to Correct Illegal Sentence and Supporting Memorandum of Law and Facts. SR 365-404. State filed several Motions to Dismiss Defendant's Request to Correct

Illegal Sentence on July 29, 2011. SR 438-46. On June 25, 2012, the United States Supreme Court ruled, in *Miller v. Alabama,* 567 U.S. ____, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), that a juvenile homicide offender could not be sentenced to life in prison without parole absent consideration of the mitigating factors of youth, except in rare cases when incorrigibility exists.[2] Judge Eckrich filed a Memorandum Decision on January 29, 2015, which granted Defendant's Motion to Correct Illegal Sentence, and found that *Miller,* 132 S.Ct. at 2455 applied retroactively. SR 565-83. On February 19, 2015, this judge filed an Order Vacating Sentence and Scheduling a Resentencing Hearing. SR 585-86. The court held a resentencing hearing on October 21 through 23 and 30, 2015 and imposed a 92-year penitentiary sentence, with credit for time served, which gave Charles the chance for parole eligibility by age 60 (new parole system), or within his natural lifetime. SR 694-97; RST 1-647; PSR 1-16. *State v. Springer,* 2014 S.D. 80, ¶ 24 n.6, 856 N.W.2d 460, 469 n.6.

On November 13, 2015, Judge Eckrich filed a Second Amended Judgment of Conviction. SR 694-97. Defendant filed a Motion for New Trial on November 20, 2015. DB 5; SR 699-715. On November 24, 2015, State filed a Motion to Dismiss Charles' Request for New Trial, New Sentencing Hearing, or Sentence Reduction. SR 716-20.

[2] SDCL §§ 22-6-1 and 22-6-1.3, which became effective on July 1, 2016, prohibit the imposition of life imprisonment upon any defendant for any offense committed when he or she is less than eighteen years of age.

Defendant filed a Notice of Appeal on December 11, 2015. SR 721-23. On January 25, 2016, the United States Supreme Court decided *Montgomery v. Louisiana,* 577 U.S. _____, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016), and held that *Miller,* 132 S.Ct. at 2455 constituted a substantive rule of constitutional law, which applies retroactively in juvenile murder cases. Additional procedural details will be presented where necessary.

STATEMENT OF FACTS

A. Facts Pertaining to Defendant's 2000 Trial.

The facts, which relate to the murder of Duane Ingalls, are detailed, in *Charles,* 2001 S.D. 67, ¶¶ 2-17, 628 N.W.2d at 734-38. To briefly recapitulate, Defendant, who was fourteen years old and living on a ranch near Opal, South Dakota, used a Remington 25.06 rifle on July 23, 1999 to kill his stepfather with one shot aimed directly at Duane's head, after a disagreement about raking hay. JT 690-787. At trial, Defendant reshuffled the events surrounding the unarmed victim's death and testified that he had merely pulled the trigger of the Remington 25.06 rifle without cocking this weapon and that the safety just happened to be off. JT 722-25, 748, 770-71. In addition, Charles insisted that he thought that the rifle was unloaded, despite his earlier story to the contrary, and that he had made up a saga about a fox hunting accident to conceal how the victim had died. JT 708-11, 724-25, 731-33, 736-37, 740-43, 748-53, 772-86. The jury, however,

rejected Defendant's claims and convicted him of first degree murder. SR 300-01; JT 840-43.

B. Facts Relating to Defendant's 2015 Resentencing Hearing.

As previously mentioned, Judge Eckrich conducted a resentencing hearing on October 21 through 23 and 30, 2015. RST 1-647; St. EX 1-2, 4; Def. EX 1, 6, 9. Dr. David Kauffman, PhD, a psychologist, testified that he had met with the Defendant four times, which included a testing session on August 8, 2015; two clinical interviews on September 4 and 10, 2015; another testing encounter on September 14, 2015; and that he had talked with Defendant's mother. RST 52-55, 69, 97, 108-09, 125, 127-28, 134, 139-40, 160; St. EX 4 at 1-3, 12-14. Dr. Kauffman indicated that Defendant had been diagnosed by "the mental health staff and institution" with Intermittent Explosive Disorder; that Charles had said that he thought that the symptoms of this disorder accurately characterized his psychological difficulties; that Defendant had acknowledged that he had problems with intense anger, authority figures, chronic lying, and emotional regulation; and that Charles had an IQ of 119, was articulate and had obtained his GED in prison. RST 55-58, 74-77, 82-84, 90, 94, 96, 138-39; St. EX 4 at 2-4. In addition, this expert related that Defendant had admitted, during their second interview, that he had never dry fired an unloaded rifle at his stepfather (as he testified at trial); that Charles had deliberately decided that "I ought to shoot his ass," when he heard Duane's pickup

truck pulling into the yard at lunch on July 23, 1999; and that Defendant had shot his stepfather in the head with a 25.06 rifle from about 30 yards, as he was walking up the sidewalk. RST 55-60, 62, 74-77, 106-09, 148-49; St. EX 4 at 4-6, 15-16, 24, 29-30. Dr. Kauffman also stated that Defendant had not been afraid of losing his life, or in any fear of imminent risk of serious bodily harm; that Charles had expressed feelings of rage and revenge; that Defendant had mentioned thoughts about killing his stepfather in the past; and that Charles had not shown any remorse for Duane's death, although he regretted the pain caused to the victim's family. RST 59-60, 62, 74-77, 106-09, 148-49; St. EX 4 at 4-6, 15-16, 24, 29-30.

Similarily, this expert stressed that Defendant had told inconsistent stories, during his two interviews, about how he had spent the time after he cleaned up the crime scene and hid his stepfathers body in the garage, which included the fact that Charles was either watching pornography, or some kind of R-rated movies, and masturbating. RST 55-60, 76-77, 148-49; St. EX 4 at 5-6, 29-30. In addition, Dr. Kauffman testified that he interpreted Defendant's behavior as "some type of spree activity" and as a lack of regret for his criminal actions. RST 68-69, 110, 139; St. EX 4 at 5-6, 29-30. This expert also noted that Defendant was fascinated with weapons; that Charles was very skilled with guns and knives; and that he had been

shooting firearms and guns since "age eight on the rnach." RST 68-69, 110, 139; St. EX 4 at 17, 30.

Adding to this picture, Dr. Kauffman emphasized that Defendant's prison disciplinary record reflected that he had "61 major and 396 minor write-ups," and that many of these incidents had taken place during Charles' first years of incarceration; that Defendant had had 14 major write-ups in the last five years, although he had claimed that he only had "three or four" major infractions; that Charles had admitted that he had been in disciplinary trouble for offering to pay another inmate to beat up someone in 2000, who had allegedly threatened him in prison; and that he had been involved in several undetected fights with other inmates, mainly during his initial incarceration. RST 79-80, 118-19, 138-39, 147-48; St. EX 4 at 17. This expert indicated that Defendant had described his involvement in a September 12, 2013 escape plan, in which he had provided information in exchange for money, but that Charles had insisted that he had no idea that another inmate's questions were related to a future escape attempt. RST 37-40, 79-80, 118; St. EX 4 at 17. In addition, Dr. Kauffman detailed that Defendant had been unable to maintain a job while in prison and had lost his employment at the license plate shop for using technology for his own purposes; that Charles had lost his job at the wheelchair shop for an angry outburst at a supervisor, which included throwing a piece of wheelchair across the room; and that he

had lost his library job, as recently as April of 2015, for downloading pornography on a flash drive and renting it out to other inmates for a profit. RST 80-81, 99, 101, 109-10; St. EX 4 at 17, 30. This expert also stated that Defendant's inability to successfully maintain a job showed that Charles was "willing to manipulate the rules and take advantage of situations." RST 81-82, 101, 109-10; St. EX 4 at 17, 30.

As far as Defendant's mental status and the mitigating factors of youth, Dr. Kauffman explained that Charles had been only 14 years old when he killed his stepfather; that a typical juvenile of this age is impulsive and that research on brain development has shown that the frontal lobe of juveniles is not fully developed until age 25 or 26, especially in males; that Defendant had reported that his family was dysfunctional and that his mother and Duane were verbally, emotionally and physically abusive (although little corroboration to this effect existed in terms of his stepfather); that Charles was less mature than other juveniles his age because of his environment and removal from his grandparents' home before moving to the ranch with his mother and Duane; and that Defendant still had problems with authority figures, angry outbursts, compulsive lying and that certain buttons, or triggers, set him off, such as being given an ultimatum, or being addressed in a demeaning way, which posed risk factors if he returned to the community. RST 82, 85-88, 100-01, 104, 109-10, 112-18, 120, 125-28, 150-51, 156-58, 332-34; St. EX 4 at 17-18, 25-30. In

addition, this expert pointed out that the results of Defendant's psychological tests had shown that he had some narcissistic and antisocial personality traits and characteristics; that Charles' history of antisocial behavior was consistent with a Conduct Disorder and treatment would be difficult in this context; and that Defendant had manifested some Cluster B personality traits, which meant that he was willing to take advantage of situations, be deceitful, manipulate, have a sense of entitlement and lack empathy. RST 67-68, 82-83, 89-94, 96, 99, 100-01, 109-10, 128-29; St. EX 4 at 18-19, 30. Dr. Kauffman also related that he had evaluated the Defendant based upon three types of parricide offenders, or children who kill their parents (as categorized in a study by Dr. Kathleen Heide); that this expert had found that Charles demonstrated some characteristics of a severely abused parricide offender, who typically had suffered some kind of life-threatening abuse; but that Defendant had shown more traits of an antisocial parricide offender, who was filled with intense rage and revenge because of his dispute with his stepfather on July 23, 1999. RST 59-60, 62, 104-10, 150-53, 162; St. EX 4 at 28-30. This expert further opined that Defendant's extreme responses when he is angry or upset and continued interest in weaponry raised concerns; that Charles' personality traits and characteristics were chronic and enduring and made for a guarded prognosis; and that he had a moderate risk to

reoffend violently. RST 68-69, 92-94, 101-03, 110, 122-23, 139, 143-46, 156, 159, 162; St. EX 4 at 20, 30.

Moreover, three experts took the stand and testified for the defense, during the resentencing hearing. RST 164-561; Def. EX 1, 6, 9. Dr. Antoinette Kavanaugh, PhD, a forensic psychologist, agreed with Dr. Kauffman about the recent developments in juvenile brain science; the impact of domestic violence upon adolescents; that Defendant was psychologically less mature than the average fourteen-year-old juvenile because of his turbulent home environment; and that Charles manifested significant aspects of the classical antisocial personality constellation. RST 175-77, 199-204, 209-12, 255-71, 298-300; Def. EX 1 at 1-2, 47-57. This expert, however, professed that a diagnosis of Antisocial Personality and Disorder was not appropriate in Defendant's case, and that he had just learned to cope differently because of his chaotic family; that Charles had not demonstrated a high rate of violence and that he was no more likely than other penitentiary inmates to be aggressive; that Defendant had tried to rehabilitate himself in prison with education, jobs, and community projects; and that Charles had felt remorse and regret for killing his stepfather. RST 197-212, 251-65, 295-301, 306-07, 348-49, 357-58, 366-68, 375; Def. EX 1 at 22-23, 33-36, 43-47, 53-57. In addition, Dr. Kavanaugh believed that Defendant did not meet the criteria for Intermittent Explosive Disorder; that Charles fell within the severely abused parricide offender type, due

to the fact that he had suffered long-term mistreatment from both his mother and stepfather; and that Defendant was just trying to get the fighting to stop and that he would not have had to be facing life-threatening circumstances to qualify under this category of adolescents, who killed their parents. RST 244-45, 248-52, 308-12, 319-22, 328-29, 354-58, 373; Def. EX 1 at 53-54. This expert also insisted that Defendant had impulsively killed his stepfather; that Charles had previously dry-fired a rifle at his parents, during an argument, to stop the domestic abuse in his home; that Defendant's use of pornography and compulsive masturbation after the victims death did not constitute the type of spree behavior exhibited by an antisocial type of parricide offender; and that Charles' obsession with weapons resulted from his ranch background. RST 203-04, 248-51, 311, 316, 319-22, 327-29, 361-65, 369-71, 375-77; Def. EX 1 at 34-36, 53-57. Dr. Kavenaugh further noted that Defendant's ability to regulate his anger was not as developed as most inmates and that this area should be addressed to reduce his risk for recidivism. RST 316-17, 345-46; Def. EX 1 at 46-47, 57.

The testimony provided by Dr. Josette James, PhD, a pediatric neuropsychologist, paralleled that of Dr. Kavanaugh. RST 473-561; Def. EX 6 at 2-11. Dr. James explained that the prefrontal cortex of an adolescent's brain does not "mature until the early 20-s"; that Defendant had experienced difficulties with Attention Deficit

Hyperactivity Disorder in the past; and that Charles had witnessed domestic violence between his mother and stepfather, which had impacted upon the fragile frontal lobe networks of his brain. RST 508-21, 527, 533, 552-58; Def. EX 6 at 2-6. In addition, this expert indicated that her evaluation of the Defendant had demonstrated that he had a "good overall IQ"; that Charles' neurobiological functioning was "much more intact and mature" than compared to his youth; that Defendant's executive functioning skills had improved over time; but that Charles had still self-reported that he had a short fuse, was often annoyed, impulsive and had angry outbursts. RST 521-38, 544-49, 551-53, 559; Def. EX 6 at 2-11. Dr. James also stated that Defendant's prison record of infractions had improved over time and that she would have expected much more physical violence; that Charles' maladaptive behavior had gotten better, although he had recently been fired from his library job for downloading and selling pornography to other inmates; and that Defendant was "at risk for emotional and behavioral deterioration," without a highly structured environment. RST 535-38, 547-52, 555-56, 561; Def. EX 6 at 11.

Martin F. Horn stressed that his testimony was based upon his experience in the correctional industry, rather than upon the mental health field. RST 378-89, 430-33, 455-59, 464-65, 467-68; Def. EX 9 at 2-5, 12. In addition, this expert emphasized that he had interviewed Defendant by telephone, taken into account Charles' pre-prison

behavior; and reviewed his efforts at self-improvement while in prison. RST 390-93, 455-59; Def. EX 9 at 1-2, 5-12. Horn also opined that Defendant's home life had been troubled; that Charles was remorseful for the murder of his stepfather; that Defendants had only one major disciplinary violation for participating in an escape plan and a lot of "minor beefs"; that Charles had tried to improve himself with a braille project and community service work; that Defendant's scheme, in which he sold pornography to other inmates for profit, was not a serious offense; and that he could be safely released into the community. RST 393-96, 406-20, 428-29, 445-46, 445-46, 459-65; Def. EX 9 at 1-2, 5-12. This expert, however, admitted (during cross-examination) that Defendant had had problems with other inmates and undocumented fights while in prison; that one of the hurdles which Charles faced was keeping his emotional issues under control; and that Defendant had a difficult and uphill battle, in terms of any release into society. RST 420, 440-41, 459-61, 463-67, 469-71; Def. EX 9 at12.

Lastly, Judge Eckrich took into consideration (oral) victims' impact statements from Duane's father, sister and cousin; the Defendant's remarks about the murder of his stepfather; and extensive arguments from both sides about the important sentencing factors in Charles' case. RST 9-16, 566-647; PSR 1-16. This judge found that the gravity of Defendant's crime was great, despite "any lessened moral culpability associated with [the] mitigating qualities of youth," and that

it was "a premeditated, deliberate, intentional, sniper-killing." SR 694-97; RST 645-46; PSR 1-16. The court required that Defendant serve a 92-year penitentiary sentence, with credit for 16 years and 3 months of time served (parole eligibility date of 08/05/2045, new parole system). SR 694-97; RST 641-46; PSR 1-16. Additional facts will be presented where appropriate.

ARGUMENTS

I

THE TRIAL COURT PROPERLY CONSIDERED DEFENDANT'S AGE AND MITIGATING CHARACTERISTICS OF YOUTH, DURING THE RESENTENCING HEARING, AS RECOGNIZED BY *MILLER V. ALABAMA,* 567 U.S. _____, 132 S.CT. 2455, 183 L.Ed.2d 407 (2012).

A. Background.

Defendant protests, in his first issue, that Judge Eckrich violated his state and federal constitutional rights, when the court "briefly listed the *Miller* factors [and] accepted these principles in general [as] to youth," but went on to say that "*Miller* does not stand for the proposition that these generally observed characteristics of youth are universally applicable to each and every juvenile, whether [he] is a murderer or a prodigy." DB 15-16; RST 641-43. *Miller,* 132 S.Ct. at 2464. In addition, Defendant argues that this judge's analysis was wrong, when he stated that Charles' murder of his stepfather "was not inexorably determined by youthful brain or undeveloped character [because] to find otherwise denies the existence of will." DB 15-16;

RST 643. Defendant also contends that Judge Eckrich improperly focused upon the goals of sentencing, such as "retribution, deterrence, incapacitation" because *Miller* noted that "youth undermines these justifications for punishment." DB 18; RST 645-46. Defendant further insists that the court ignored that Charles' prison record was "completely devoid of any violence" and failed to consider other important factors, which included his dysfunctional family, the circumstances of the homicide and the possibility of rehabilitation in this case. DB 19-22; RST 641-47.

B. Standard of Review.

A motion for new trial is reviewed under an abuse of discretion standard. *State v. Rolfe,* 2014 S.D. 47, ¶ 9, 851 N.W.2d 897, 901. This Court determined, in *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 465-66, that sentencing judges, in juvenile murder cases, must consider the mitigating qualities of youth, as articulated by *Miller,* 132 S.Ct. at 2467-69. In addition, the *Springer* Court pointed out that these factors include: (1) the chronological age of the juvenile; (2) the juvenile's immaturity, impetuosity, irresponsibility, and recklessness; (3) family and home environment; (4) incompetency in dealing with law enforcement and the adult criminal justice system; (5) the circumstances of the crime; and, most importantly, (6) the possibility for rehabilitation. *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 465-66 (citing *Miller,* 132 S.Ct. at 2467-69). It also found that a juvenile's

"traits are 'less fixed' and his actions are less likely to be 'evidence of irretrievabl[e] deprav[ity],' " so sentencing courts should carefully weigh and consider the mitigating qualities of youth. *Id.* at 466 (citing *Miller,* 132 S.Ct. at 2464); *State v. McCahren,* 2016 S.D. 34, ¶¶ 36-37, 878 N.W.2d 586, 601-02 (possibility for parole counts).

C. Legal Analysis.

State asserts that Judge Eckrich carefully calibrated an appropriate sentence for the Defendant in this case. DB 14-22; SR 694-97; RST 641-47; PSR 1-16. *United States v. Jefferson,* 816 F.3d 1016-21 (8th Cir. 2016) (citing *Montgomery,* 136 S.Ct. at 736) (*Miller* announced a substantive rule of constitutional law and applies retroactively); *State v. Cardeilac,* 876 N.W.2d 876, 886-90 (Neb. 2016); *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 465-66. *Rolfe,* 2014 S.D. 47, ¶ 9, 851 N.W.2d at 901. This judge emphasized that "*Miller v. Alabama* refines [a sentencing court's] responsibility when determining a [proper] sentence for a juvenile killer"; specifically listed the mitigating factors of youth, which include "lack of maturity, an undeveloped sense of responsibility, [and] the tendency to engage in behavior that is reckless, impulsive, or risky"; and found that "*Miller* observed that a child's character is not as well-formed as an adult's," so his actions are less-likely to evince "irretrievable depravity," which diminish the penological justifications of retribution, deterrence and incapacitation. DB 15-16, 18-19; RST 641-42, 645-46. *Cardeilac,* 876 N.W.2d at 886-

90 (citing *Miller,* 132 S.Ct. at 2469). In addition, Judge Eckrich (who had presided over Defendant's trial in 2000) was well aware of Charles' age at the time of his crime and referred to the terms "age," "youth," or "youthful offender" at least eight times, during his resentencing analysis. DB 15-16; RST 641-46. *Jefferson,* 816 F.3d at 1019-21; *People v. Walker*, 2016 Ill. App. 2d 140723, ¶¶ 21-30, 53 N.E.3d 995, 999-1000 (Apr. 27, 2016) (no reasonable possibility existed that the sentencing court was unaware or failed to consider juvenile murder defendant's age); *McCahren,* 2016 S.D. 34, ¶¶ 36-37, 878 N.W.2d at 601-02; *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 455-56. This judge also took into consideration the individualized sentencing factors in Defendant's situation, which included that Charles had recanted his trial testimony (during his second interview with Dr. Kauffman) and admitted that he had deliberately shot his stepfather with a deer rifle, due to feelings of rage and revenge, rather than fear for his life or any imminent risk of serious bodily harm. DB 21; RST 59-60, 62, 75-77, 105-10, 148-49, 247-79, 316, 321, 375-76, 646-47; St. EX 4 at 5-6, 15-16, 24, 29-30. *State v. Ainsworth,* 2016 S.D. 40, ¶ 10, 879 N.W.2d 762, 765; *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 465-66; *State v. Owen,* 2007 S.D. 21, ¶ 37, 729 N.W.2d 356, 367-68 (intent to kill still exists if the perpetrator is in the state of anger); *State v. Berhanu,* 2006 S.D. 94, ¶ 16, 724 N.W.2d 181, 185-86 (the decision to effect death need only exist for an instant). The court further ruled that Defendant

had committed "a cold blooded murder, driven less by impulsivity than by a specific, long-formed intent to murder either Duane, his mother or others," even giving Charles credit for "all the characteristics of youth." DB 21; RST 59-60, 62, 75-77, 105-09, 141, 148-49, 170-71, 203-04, 247-51, 309-10, 370-71, 373, 375-76, 646-47; St. EX 4 at 5-6, 15-16, 24, 29-30.

Moreover, Defendant misconstrues Judge Eckrich's remark that "*Miller* does not stand for the proposition that these generally observed of youth are universally applicable to each and every juvenile whether [he] is a murderer or a prodigy," because the court was obviously factoring age into the equation but also pointing out that youth alone did not cause Charles "to pull the trigger" here, and that his criminal behavior went far beyond impulsiveness or lack of maturity. DB 15-18; RST 642-43, 646. *Jefferson,* 816 F.3d at 1019-21 (sentencing courts have wide latitude in weighing a juvenile defendant's youth, prison record, and any testimony from mental health experts); *People v. Holman,* 2016 WL 868413, at *8-11 (Ill. Mar. 3, 2016) (unpublished) (youth matters but no consensus exists about whether a specific list of *Miller* factors must always be considered); *People v. Gonzales,* 2014 WL 4176179, at *12-13 (Alaska 2014) (unpublished); *Springer,* 2014 S.D. 80, ¶¶ 5 n.2, 14, 19, 856 N.W.2d at 462 n.2, 465-67 (sentencing judge was familiar with the record and perfect eloquence was not required). In addition, this judge indicated that he had listened to "all of the

psychological experts," during the resentencing hearing, and could not ignore the chronicity of Defendant's psychological problems, which included "manipulation, explosive anger, conduct disorder [and] antisocial traits." RST 57-377, 473-561, 644. *Jefferson,* 816 F.3d at 1019-21; *Cardeilhac,* 876 N.W.2d at 899-90; *Ramos v. Weber,* 2000 S.D. 111, ¶ 14, 616 N.W.2d 88, 93 (South Dakota is not a sentenceing-by-expert state). Judge Eckrich also detailed that Defendant's murder of his stepfather was "not inexorably determined by youthful brain or undeveloped character [because to] find otherwise, denies the existence of will"; that Charles' criminal actions constituted "a premeditated, deliberate, intentional sniper killing"; and that Defendant's lifelong history of lying made it impossible to evaluate the sincerity of his expressions of remorse, or changed behavior. RST 57-60, 62-63, 74-78, 82-83, 85-88, 100, 103-09, 251-54, 273-73, 301, 316-17, 334-35, 375-76, 396, 428-29, 468, 536-38, 554-56, 643-45; St. EX 4 at 4-5, 24-30. *Ainsworth,* 2016 S.D. 40, ¶ 10, 879 N.W.2d at 765; *Mackaben v. Mackaben,* 2015 S.D. 86, ¶ 20, 871 N.W.2d 617, 624 (credibility determinations are not relitigated on appeal). The court further stated that Defendant had experienced a difficult home life because of the physical and verbal abuse perpetrated "mostly by his mother"; that Defendant's description of the pervasive "physical combat" with his stepfather was suspect and could not be viewed in isolation from the welcoming and extended family, which Charles had the opportunity to

join, while living at the ranch; that Defendant, by his own admission, had demonstrated the capacity for violence, in and out of prison, and that he still posed a danger to society, despite the passing of time and chronological maturity; but imposed a sentence which gave Charles a chance of parole by the age of 60, or within his expected lifetime. RST 58-62, 70-73, 82, 86-94, 98-101, 107, 109-10, 119-20, 125-30, 138-39, 153-58, 162, 210-12, 231-33, 420, 440-41, 459-61, 463-67, 469-71, 645-46; St. EX 4 at 5-6, 15-18, 24, 29-30. *McCahren,* 2016 S.D. 34, ¶¶ 36-37, 878 N.W.2d at 601-02 (possibility for parole counts); *State v. Rice,* 2016 S.D. 18, ¶ 28, 877 N.W.2d 75, 85; *Springer,* 2014 S.D. 80, ¶¶ 19-20, 856 N.W.2d at 467-68.

Furthermore, Judge Eickrich did not give superficial, or token, consideration to Defendant's prison record, which showed that Charles had "61 major and 396 minor write-ups," although many of these infractions had taken place during his first years of incarceration; that Defendant had 14 major write-ups in the last 5 years; that Charles had served 60 days in disciplinary segregation for contributing information to another inmate's escape plan and accepting money for this exchange; that Defendant had paid another inmate in 2000 to beat up someone for him, while he watched; that Charles had been involved in undocumented fights in prison; and that he had lost several jobs for an angry outburst in the wheelchair shop and for downloading pornography, as part of his library job and selling it to other inmates.

DB 19-20; RST 38-44, 79-81, 109-10, 118, 138-39, 147-48, 272-76, 405-17; 428-29, 441-46, 459-62, 643-46; St. EX 4 at 17. *Jefferson,* 816 F.3d at 1020-21 (prison record was a consideration). In addition, this judge took into account the testimony of three mental health experts, who discussed Defendant's angry temperament and the fact that certain buttons, or triggers, set him off; that Charles had initiated the confrontation with Duane in the tractor on July 23, 1999 by kicking him; that Defendant had threatened to kill his stepfather in the past; and that he had even dry-fired a gun at his parents, during a fight. DB 19-20; RST 70-72, 74-78, 81-82, 85-88, 90-94, 103, 108-10, 141, 156, 159, 162, 203-04, 369-71, 376-77, 440-41, 644-46; St. EX 4 at 5-7, 11, 15, 29-30. The court also noted that Defendant still presented "a condition of moral atrophy," despite the passage of time and chronological maturity (or age); that Charles had guarded rehabilitation prospects and that society was "not yet safe" for him; and required that Defendant serve a 92-year prison sentence, with credit for time served and the chance for parole at age sixty, or within his natural lifetime. DB 20-21; SR 694-97; RST 103, 107, 110, 156, 162, 440-41, 465-66, 536-38, 553-56, 645-46. *Gonzales,* 2014 WL 4176179, at *12-13; *Cardeilhac,* 876 N.W.2d at 889 (quoting *Montgomery,* 136 S.Ct. at 737) (release on parole is evaluated in terms of "some years of life outside prison walls"); *Springer,* 2014 S.D. 80, ¶¶ 19-20, 856 N.W.2d at 467-68. Thus, no mistakes of constitutional magnitude exist here.

II

DEFENDANT'S PENALTY OF 92 YEARS WITH CREDIT FOR TIME SERVED IS NOT: (1) THE LEGAL EQUIVALENT OF A LIFE SENTENCE WITHOUT PAROLE; (2) CATEGORICALLY UNCONSTITUTIONAL FOR A FOURTEEN-YEAR-OLD HOMICIDE OFFENDER; OR (3) DISPROPORTIONATE TO THE CRIME OF FIRST DEGREE MURDER IN THIS CASE.

A. Overview.

As previously mentioned, State has combined Defendant's second, third and fourth issues into one argument because they are interrelated. DB 27-39. Defendant complains, in his second issue, that his 92-year sentence condemns him to die in prison; that he will be 106 years old before he completes this penalty; and that it constitutes a de facto life sentence. DB 22-26. In addition, Charles posits, in this third issue, that a 92-year sentence is categorically unconstitutional for a fourteen-year-old homicide offender, because it amounts to a "death-in-prison" sanction. DB 26-32. Defendant also maintains, in his fourth issue, that his 92-year prison sentence is disproportionate to his crime of first degree murder, constitutes cruel and unusual punishment, and is the functional equivalent of a life sentence without parole. DB 32-39.

B. Standard of Review.

In determining whether a sentence is grossly disproportionate, this Court examines "the gravity of the offense and the harshness of the penalty." *Ainsworth,* 2016 S.D. 40, ¶ 8, 879 N.W.2d at 763. "This comparison rarely 'leads to an inference of gross disproportionality' and typically marks the end" of any appellate review. *State v. Traversie,*

2016 S.D. 19, ¶ 16, 877 N.W.2d 327, 332. Some factors, which are considered when judging the gravity of an offense include its violent versus non-violent nature, the revel of intent required, and other conduct relevant to the crime. *Id.* As for the harshness of a penalty, this Court evaluates its "relative position on the spectrum of all permitted punishments"; and if the sanction appears to be grossly disproportionate, it is compared to those, which have been imposed on criminals in the same or other jurisdictions. *McCahren,* 2016 S.D. 34, ¶¶ 34-37, 878 N.W.2d at 601-02.

C. Legal Synopsys.

1. Defendant's penalty of 92 years in the penitentiary, with credit for time served, is not the legal equivalent of a life sentence without parole.

State counters that Defendant is trying to expand the scope of *Miller* to categorically ban his term of years sentence, which gives Charles the possibility of parole within his expected lifetime. DB 22-26. *Cardeilhac,* 876 N.W.2d at 888-90 (citing *Miller,* 132 S.Ct. at 2455); *Holman,* 2016 WL 868413, at *13-14; *McCahren,* 2016 S.D. 34, ¶¶ 35-36, 878 N.W.2d at 601-02; *Rice,* 2016 S.D. 18, ¶ 28, 877 N.W.2d at 85; *Springer,* 2014 S.D. 80, ¶¶ 19-25 n.8, 856 N.W.2d 467-70 n.8. Although Defendant argues that his 92-year sentence condemns him to die in prison, Charles disregards the fact that Judge Eckrich carefully crafted a lengthy term of years sentence, which is not the equivalent of a life sentence, because it gives him a meaningful opportunity for release

on parole (new system) at the age of 60 (08/05/2045), or well within his natural lifetime. DB 23-25; SR 697-98; RST 641-46. *Cardeilhac,* 876 N.W.2d at 888-90; *Springer,* 2014 S.D. 80, ¶¶ 19-25 n.8, 856 N.W.2d at 467-70 n.8. Defendant also ignores that both *Montgomery* and *Miller* specifically stated that, in rare instances, a sentence of life in prison, even without the possibility of parole, may be appropriate for juvenile homicide offenders, when their crimes reflect irreparable corruption.[3] DB 23-25. *Cardeilhac,* 876 N.W.2d at 887 (citing *Miller,* 132 S.Ct. at 2469); *Holman,* 2016 WL 868413, at *13-14 (citing *Montgomery,* 136 S.Ct. at 734); *Walker,* 2016 Ill. App. 2d 140723, ¶¶ 21-30, 53 N.E.3d at 999-1000 (life sentence in prison for felony murder was proper). *State v. Graham,* 171 So.3d 272, 274-75, 281-82 (La. App. 2015) (resentencing defendant to life in prison with the benefit of parole for second degree murder complied with *Miller's* juvenile sentencing principles).

Moreover, Defendant overlooks that many courts have found that a lengthy term of years sentence, in juvenile cases, is not the functional equivalent of a life sentence, or geriatric release, despite the fact that a decisional split appears to exist in this area. DB 23-25. *Cardeilhac,* 876 N.W.2d at 888-90 (citing *Montgomery,* 136 S.Ct. at 737) (some years of life outside prison walls count); *People v. Tucker,* 2016 WL 1090013, at *13-14 (Ill. App. Mar. 18, 2016) (unpublished) (citing *People v. Reyes,*

[3] SDCL §§ 22-6-1 and 22-6-1.3, which became effective on July 1, 2016, prevent the imposition of life imprisonment upon juvenile offenders under the age of eighteen but a term of years is permissible.

2015 Ill. App. 2d 120471, ¶¶ 22-25, 49 N.E.3d 19 (May 6, 2015) (rejecting extension of *Miller* when juvenile offender received a 97-year aggregate sentence for first degree and attempted murder with a firearm); *State v. Zuber,* 126 A.3d 335, 342-46 (N.J. Super. 2015); *Holman,* 2016 WL 868413, at *13-14 (citing *Montgomery,* 136 S.Ct. at 736); *Gonzales,* 2014 WL 4176179, at *8-13 (161 years in prison for murder and burglary committed by juvenile offender, with 50 years suspended, complied with *Miller*) (unpublished); *People v. Lehmkahl,* 369 P.3d 635, 637 (Colo. 2013) (sentence of 76 years to life in non-homicide case was proper, when juvenile when became parole eligible at 67); *Thomas v. State,* 78 So.3d 644, 648 (Fla. App. 1st Dist. 2012) (no de facto life sentence when juvenile was released from prison in his sixties). In addition, Judge Eckrich took into consideration that Defendant's "premeditated, deliberate, intentional" sniper-style killing of his stepfather, was a grave crime and based upon rage and revenge; and formulated a lengthy term of years in prison, which gave Charles time to mature, improve his ability to control his angry temperament and to continue his rehabilitation, which was "only in its nascence." RST 59-60, 62, 103, 107, 110, 156, 162, 440-41, 465-66, 536-38, 553-56, 643-46; St. EX 4 at 5, 30. *Ainsworth,* 2016 S.D. 40, ¶ 8, 879 N.W.2d at 765; *Traversie,* 2016 S.D. 19, ¶¶ 16, 18-19, 877 N.W.2d at 322-33. This penalty also gives Charles hope for a future outside of prison, and reflects that states are not required to guarantee any juveniles, who

commit homicide or non-homicide crimes, eventual release, but only have to provide a realistic opportunity to reach this goal. DB 22-26; SR 697-98; RST 641-46. *Cardeilhac,* 876 N.W.2d at 889 (citing *Montgomery,* 136 S.Ct. at 736); *Holman,* 2016 WL 868413, at *13-14 (citing *Montgomery,* 136 S.Ct. at 736) (states can remedy *Miller* violations by allowing juvenile murder offenders to apply for parole without remanding for resentencing hearings); *Springer,* 2014 S.D. 80, ¶¶ 23-25, 856 N.W.2d at 469-70. Charles further ignores that he failed to provide any statistics, studies, court records, or other evidence, during the resentencing hearing, which somehow established that he "would be close to death" at the age of sixty, and would not have a meaningful chance for parole in this case. SR 713; DB 23-26; RST 32-647. *Springer,* 2014 S.D. 80, ¶¶ 20-21, 856 N.W.2d at 468; *People v. Lucero,* 2013 WL 1459477, at *2-4 (Colo. App. April 11, 2013) (unpublished) (defendant failed to present any statistics on his life expectancy below); *State v. Holloway,* 482 N.W.2d 306, 310-11 (S.D. 1992) (waiver exists). Consequently, this grievance should be rejected.

2. Defendant's 92-year prison sentence, with credit for time served, is not unconstitutional for a fourteen-year-old homicide offender.

Defendant recasts his sentencing challenge, in his third issue, and claims that the state and federal constitutions prohibit punishing a fourteen-year-old child, by ordering him to die in prison; that the mental health experts, who testified during the resentencing hearing, agreed

that these youngsters are impulsive, engage in poor judgment, and have a heightened capacity for change; and that they have an inability to free themselves from morally toxic, violent, or dysfunctional households. DB 26-32; RST 116-17, 154-55, 256-58, 266, 487-88, 500-03, 509-10; Def. EX 6 at 4-5; Def. EX 8 at 16-21. State responds that Judge Eckrich listened to all of the psychological experts in this case; was fully informed about the recent developments in juvenile brain science; calculated an appropriate penalty for the Defendant, which factored the distinctive characteristics of youth into the equation; and imposed a 62-year prison sentence upon Charles, with credit for time served, which gave him the opportunity for parole (parole eligibility date 08/05/2045, new system) at age 60, and hope for reconciliation with society. DB 26-32; SR 694-97; RST 46-377, 473-561, 641-46; St. EX 4; Def. EX 1, 6, 9. *Jefferson,* 816 F.3d at 1018-21; *Springer,* 2014 S.D. 80, ¶ 23, 856 N.W.2d at 469. This judge also revised Defendant's grim prospects for any life outside of the penitentiary walls, and gave Charles a term of years sanction, which resulted in a realistic opportunity for a future outside of the prison walls and is not a functional life sentence. SR 694-97; RST 641-46. *Cardeilhac,* 876 N.W.2d at 588-90 (citing *Montgomery,* 136 S.Ct. at 737) (light outside prison walls is all that is required); *Holman,* 2016 WL 868413, at *13-14; *Rice,* 2016 S.D. 18, ¶ 28, 877 N.W.2d at 85; *Zuber,* 126 A.3d at 344-49.

Furthermore, Judge Eckrich gave Defendant the chance to achieve maturity of judgment; improve his angry temperament and antisocial personality traits; and protected the victim's family and community from any risk of danger. SR 694-97; RST 103, 110, 156, 162, 316-17, 440-41, 463-67, 533-38, 555-56, 561, 641-46; St. EX 4 at 30. *Ramos,* 2000 S.D. 101, ¶ 14, 616 N.W.2d at 93 (sentencing judges are not required to accept an expert's opinion on rehabilitation); *State v. Pulfrey,* 1996 S.D. 54, ¶¶ 21-22, 548 N.W.2d 34, 39-40 (danger to society is a concern). In addition, the court was not presented with any life expectancy calculations during the resentencing hearing below, but using such data creates additional problems about differentiating between races, ethnicities, or sexes, and some of the equalizing effects of a prison environment. DB 26-32; SR 713; RST 32-647. *Zuber,* 126 A.3d at 347; *Springer,* 2014 S.D. 80, ¶¶ 22-23, 856 N.W.2d at 469-70. Thus, this protest should be given short shrift.

3. Defendant's 92 years penitentiary sentence, with credit for time served, is not grossly disproportionate to this crime.

Defendant repeats, in his fourth issue, that his 92-year prison sentence is the functional equivalent of life without parole; that Charles' "death-in-prison" sentence is incredibly harsh and should be reserved for the "worst" juvenile homicide offenders; that Defendant experienced attachment disruption when he went to live with his mother, and a violent home life on the ranch; that Charles felt trapped and afraid on

July 23, 1999, so he shot his stepfather with a rifle; and that Defendant has been committed to self-improvement in prison, his neuropsychological profile is positive for rehabilitation, and that other juvenile murder offenders, in South Dakota, have received less time in prison. DB 32-39.

(a) Gross Disproportionality

State replies that Defendant's sentence for first degree murder is not grossly disproportionate because the gravity of this offense, which is a Class A felony, is high on the spectrum of criminality. DB 32-39; SR 694-97; RST 641-46; PSR 1-16. *Ainsworth,* 2016 S.D. 40, ¶¶ 8-9, 879 N.W.2d at 765. In addition, Judge Eckrich determined, during the resentencing hearing, that Defendant had deliberately killed his stepfather despite "any lessened moral culpability associated with the mitigating qualities of youth"; that Charles had admitted that he only recently stopped lying and that he explodes in anger if his buttons are pushed; and that Defendant had persistent problems with manipulation, explosive anger, Conduct Disorder and antisocial traits. SR 694-97; RST 59-60, 62, 66-67, 75-78, 82-94, 103-10, 148-49, 247-49, 316-17, 321, 345-46, 367-68, 402, 643-46; St. EX 4 at 5, 30. *Traversie,* 2016 S.D. 19, ¶¶ 16-17, 877 N.W.2d at 332 (serious crimes warrant serious penalties). This analysis also dovetails with Dr. Kauffman's testimony that Defendant had a fascination with weapons and guns; a guarded prognosis and very narrow window for change; and

a moderate risk to reoffend violently. RST 94, 103, 110, 122-23, 143-48, 156, 159, 162, 364-65; St. EX 4 at 20, 30. It further is consistent with the concerns of several defense experts that Defendant has a difficult and uphill battle and that he is at risk for emotional and behavioral degeneration, without a structured milieu. RST 316-17, 345-50, 441, 463-33, 551-52, 555-56, 561; Def. EX 1 at 46-47; Def EX 6 at 10-11; Def. EX 9 at 12.

Moreover, Judge Eckrich did not impose the most severe penalty of life without parole upon Defendant, or find that he demonstrated "irretrievable depravity." DB 35; SR 694-97; RST 443-46. *Jefferson,* 816 F.3d at 1019 (citing *Montgomery,* 136 S.Ct. at 773). Instead, this judge gave Charles the full benefit of the individualized sentencing procedure prescribed by *Miller* and a realistic opportunity to obtain release on parole by the age of 60, or within his natural life expectancy. SR 694-87; RST 643-46. *Cardeilhac,* 876 N.W.2d at 886-89 (citing *Montgomery,* 135 S.Ct. at 737); *McCahren,* 2016 S.D. 34, ¶¶ 34-37, 878 N.W.2d at 601-02; *Springer,* 2014 S.D. 80, ¶¶ 23-24, 856 N.W.2d at 469-70 (glimmer of hope exists). Defendant's sentence, therefore, fails to suggest gross disproportionality, and there is no need to compare this penalty with those of other juvenile murder offenders in South Dakota, which involve different factual circumstances and levels of intent. DB 37-39; SR 694-97; RST 643-46. *State v. Chipps,* 2016 S.D. 8, ¶ 42,

874 N.W.2d 475, 490; *State v. Bonner,* 1998 S.D. 30, ¶ 11, 577 N.W.2d 575, 578 (South Dakota does not have pervasive sentencing guidelines).

(b) Abuse of Discretion

Finally, Judge Eckrich did not abuse his discretion when he required that Defendant serve a 92-year prison sentence, with credit for time served and the chance of parole by the age of 60, because "trial courts of this state exercise broad discretion when deciding the extent and kind of punishment to be imposed." DB 32-39; SR 494-97; RST 641-46; PSR 1-16. *Ainsworth,* 2016 S.D. 40, ¶ 10, 879 N.W.2d at 765. Again, this judge preserved the possibility of future parole for Charles and struck a balance between retribution, rehabilitation and deterrence. SR 694-97; RST 643-44. *Rice,* 2016 S.D. 18, ¶¶ 23-28, 877 N.W.2d at 83-85 (no abuse of discretion existed); *Springer,* 2014 S.D. 80, ¶¶ 23-24, 856 N.W.2d at 469-70. The court also did not take any shortcuts here and took into account Defendant's youth, upbringing, behavior in prison, mental status and prospect for rehabilitation. SR 694-97; RST 641-46. *Jefferson,* 816 F.3d at 1018-21; *Chipps,* 2016 S.D. 8, ¶ 42, 874 N.W.2d at 490 (no inter- and intra-jurisdictional analysis was necessary); *State v. Schmidt,* 2012 S.D. 77, ¶¶ 39-40, 46, 825 N.W.2d 889, 899-900 (this Court does not micromanage sentences). Accordingly, Defendant is not fated to die in prison.

III

THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED DUANE INGALLS' COUSIN TO PROVIDE AN ORAL VICTIM IMPACT STATEMENT, PURSUANT TO SDCL 23A-27-1.1, DURING THE RESENTENCING HEARING.

A. Background.

Defendant complains, in his fifth issue, that Judge Eckrich improperly allowed Kari Jensen Thomas, who was Duane Ingalls' cousin, to provide an oral victim impact statement on October 23, 2015, which violated SDCL 23A-27-1.1, because she "did not fit the statutory definition of a victim." DB 39-41; RST 9-16, 569-81. In addition, Charles alleges that this judge violated a "bright line rule," when he stated that "I'm basically granting [the State] one that the statute doesn't define" and permitting it to use "a spokesperson for the third generation," because of the extensive number of people who wanted to speak on Duane's behalf, at the resentencing hearing. DB 39-40; RST 12-16. Defendant also urges that Ms. Thomas' remarks were "highly inflammatory and prejudicial" because she spoke on behalf of "close to 100 Ingalls and Jensen family members"; talked about the collective fear and anxiety, which everyone would experience, if Defendant was released into the community; and that there were "eventual grandchildren as well," who would have to live in constant fear, if this happened. DB 39-40; RST 571-81.

B. Standard of Review.

Victim-impact evidence has its limits and the admission of overly prejudicial information has the possibility of rising to the level of a constitutional violation. *State v. Berget,* 2013 S.D. 1, ¶ 83, 826 N.W.2d 1, 26 (citing *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). There is nothing unfair, however, about allowing a judge to bear in mind the harm caused by a criminal defendant's actions, while at the same time considering the mitigating evidence introduced by the defense. *Berget,* 2013 S.D. 1, ¶ 84, 826 N.W.2d at 26-27 (citing *State v. Rhines,* 1996 S.D. 55, ¶ 136, 548 N.W.2d 415, 447).

C. Legal Analysis.

State argues that Judge Eckrich struck a balance in this case, when he permitted the victim's cousin to speak on behalf of the next generation of her family, during the resentencing hearing. RST 9-16, 569-81. This judge explained that he had read many letters from individuals, who were impacted by Defendants murder of his stepfather, and that he was taking into consideration that Charles was not raising any objections to the written victim impact statements, which had been submitted under SDCL 23A-27-1.3. DB 39-41; RST 9-12, 569-81. *Berget,* 2013 S.D. 1, ¶¶ 83-84, 826 N.W.2d at 26-27 (citing *Payne,* 501 U.S. at 826); *State v. Birdshead,* 2015 S.D. 77, ¶¶ 65-66, 871 N.W.2d 62, 65-66. In addition, Judge Eckrich indicated that many of these

folks, who had already provided written victim impact statements, wanted to speak at the resentencing hearing; but that he was going to allow the State to pick a spokesperson for the next generation, in order to avoid "a parade of diatribe," and to manage "a highly emotional, highly charged and tough situation for everybody." RST 9-16. *State v. Young,* 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74; *State v. Paulson,* 2015 S.D. 12, ¶ 14, 861 N.W.2d 504, 508; SDCL 23A-27-1.1. The court also noted that this approach was "not going to affect [its] ability to assess both orally and in writing, how [Defendant's] crime has impacted the [victim's] family." DB 39-40; RST 13, 569-81. *Young,* 2015 S.D. 96, ¶ 6, 873 N.W.2d at 74 (absurd and unreasonable results are avoided); *State v. Zakaria,* 2007 S.D. 27, ¶¶ 19-21, 730 N.W.2d 140, 146; *Rhines,* 1996 S.D. 55, ¶ 136, 548 N.W.2d at 447.

Lastly, the fact that Judge Eckrich decided to "basically stretch" SDCL 23A-27-1.1 and let Duane's cousin speak on behalf of her other family members (along with the victim's elderly father and sister) was a practical solution and reduced the disappointment for those people who wanted to translate the victim's loss into human terms. DB 39-41; RST 14-15, 566-611. *Berget,* 2013 S.D. 1, ¶ 83, 826 N.W.2d at 26-27. In addition, this judge reached a compromise, which limited the negative remarks about Charles and the wound that he slashed in the psche of Duane's relatives and friends. RST 14-15, 566-611. The court also may have violated the letter of SDCL 23A-27-1.1, but not the spirit and

intent of this statute. RST 9-16, 569-81. *State v. Guerra,* 2009 S.D. 74, ¶ 44, 772 N.W.2d 907, 919; *Zakaria,* 2007 S.D. 27, ¶¶ 19-21, 730 N.W.2d at 146; *State v. Moeller,* 511 N.W.2d 803, 812 (S.D. 1994) (technical violation of statute existed but no prejudice). As such no relief is justified on this record.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that the Defendant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 8,337 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 23rd day of September 2016.

_____
Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of September 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Daniel Neil Charles, a/k/a Daniel Heinzelman, a/k/a/ Daniel Ingalls* was served via electronic mail upon the following:

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_____
Ann C. Meyer
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a DANIEL HEINZELMAN,
a/k/a DANIEL INGALLS,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME ECKRICH
Circuit Court Judge

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Notice of Appeal filed December 11, 2015

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IN THE SUPREME COURT
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No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a DANIEL HEINZELMAN,
a/k/a DANIEL INGALLS,

Defendant/Appellant.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT THE STATE'S CHARACTERIZATION OF THE FACTS.

Throughout its brief, the State attempts to portray Daniel Charles as currently dangerous, violent, and deserving of the longest sentence given to any juvenile in the State of South Dakota following *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The record does not support this characterization.

The State repeatedly asserts that Daniel has a "moderate risk to reoffend violently." State's Br. 11-12, 32. This assertion is based entirely on the State expert's use of the Violence Risk Appraisal Guide. State's Ex. 4 at 25, SH 103.

However, when confronted with the unreliability of the Violence Risk Appraisal Guide in predicting individual behavior on cross-examination, Dr. Kauffman admitted that "I wouldn't have used it on Daniel if I'd known [the] evidence that suggests that you shouldn't be using it in sentencing." SH 145. Further, Dr. Kavanaugh testified in detail about the inaccuracies associated with using the Violence Risk Appraisal Guide in sentencing – noting that one of the creators of the test published a paper finding that it should not be used on an individual sentencing level because the "inaccuracy of it is significant when used on an individual level." SH 302-04. While she was testifying regarding the problems with this instrument, the trial court interrupted her, noting that he now had "enough information about the VRAG." SH 304-05. Given that all parties at the sentencing hearing acknowledged that this instrument could not provide evidence that Daniel himself had a "moderate risk to reoffend violently," it is not surprising that the State did not rely on this instrument in its closing argument at sentencing. For the State, now on appeal, to rely on this discredited instrument to characterize Daniel as having "a moderate risk to reoffend violently," is inappropriate.

The State further repeatedly mentions that their expert found Daniel had "antisocial traits." State's Br. 11, 30-31.

The State even attempts to make a point of contrast with its own expert, noting about Dr. Kavanaugh – a defense witness – that "[t]his expert, however, professed that a diagnosis of Antisocial Personality and [sic] Disorder was not appropriate." State's Br. 12. However, the State's own expert also testified that he would not diagnose Daniel with Antisocial Personality Disorder. SH 129; State's Ex. 4 at 22. Further, the State's expert conceded that having some antisocial traits is not "diagnostic" and is not the same as having Antisocial Personality Disorder. SH 83, 128-29.

Moreover, the State asserts that Dr. Kavanaugh found that Daniel "manifested significant aspects of the classical antisocial personality constellation." State's Br. 12 (citing SH 300). A review of the record makes clear that Dr. Kavanaugh never said this – and, indeed, stated precisely the opposite opinion. Dr. Kavanaugh testified that she "agree[d] with [Dr. Kauffman] that there are significant aspects of the classical antisocial personality constellation, and this is what he said, 'Such as egocentricities, lack of impulse control, disregard for others, disloyalty, and recklessness [that] do ***not*** appear particularly prominent characteristics of Daniel's clinical picture by comparison.' And I think that's clear." SH 300 (emphasis added). She further emphasized that "I don't really

think he has characteristics of antisocial traits." SH 300.

Relatedly, the State notes that "Dr. Kauffman indicated that [Daniel] had been diagnosed by 'the mental health staff and institution' with Intermittent Explosive Disorder." State's Br. 7. However, Dr. Kauffman further indicated in direct examination that such a diagnosis was simply "in his history, because he hasn't had any, that I'm aware of, blow-ups within the last several years." SH 99; *see also* SH 138-39 (noting on cross that he did not have evidence of diagnostic criteria for Intermittent Explosive Disorder).

The State also emphasizes Daniel's prison record, noting the raw number of disciplinary reports received, that he had undocumented fights as a 15-year-old in the adult prison almost 16 years ago, that he had lost jobs while in prison, and that he was "involve[d] in a September 12, 2013 escape plan." State's Br. 9-10, 22-23. With regard to the "escape plan," the State's own witness testified that Daniel did not try to escape and voluntarily came forward with information that was useful to security staff. SH 43-44. Moreover, the State didn't present any experts to testify about Daniel's prison behavior or what that behavior indicates about his ability to re-enter society. By contrast, Daniel presented evidence from Martin Horn – an esteemed corrections expert with more than 45 years as a parole

and probation officer, warden, and secretary of corrections. Def. Ex. 9 at 2-5, APP 96-99. Mr. Horn determined that despite these disciplinary reports, Daniel has "a remarkable record of good behavior in a prison setting." Def. Ex. 9 at 9, APP 103. As Mr. Horn emphasized, "[t]hat [Daniel] has been able to negotiate this world for 15 years beginning at age 15 without resorting to violence is evidence of his determination to not be a violent person." Def. Ex. 9 at 9, APP 103. Daniel has no disciplinary reports for assaults on inmates or guards, gang-related activity, drugs or alcohol abuse, or sexual misconduct. SH 413-14; Def. Ex. 12 at 3. Mr. Horn concluded that based on his review of Daniel's record, "I do not believe that his disciplinary record is indicative of any future threat to the safety of the community" and that "Daniel Charles can safely be released to live in the community." Def. Ex. 9 at 12, APP 106.[1]

[1]The State further notes that defense experts found Daniel faced an "uphill battle" if released and needed a "structured environment." State's Br. 14-15. As Martin Horn noted in his testimony, "[e]very individual who's released from prison, whenever they're released, faces hurdles and an uphill struggle and has to work to overcome them," and this is especially true for someone, like Daniel, who has spent his "entire adult life up to this point in prison." SH 463-65. As a result, Daniel sought out significant re-entry support, proposing a re-entry plan where he would be sent to the Delancey Street Foundation, which is a world-renowned re-entry program that could provide him with the necessary support and training to succeed. Def. Ex. 9 at 12, APP 106, Def. Ex. 13, 14.

The State does acknowledge that its expert testified regarding the mitigating qualities of youth, and that due to Daniel's upbringing, Daniel was even more immature than the typical 14-year-old. State's Br. 10. These facts were uncontested at the sentencing hearing and clearly established by experts from both parties, *see, e.g.*, SH 116-17, 256-63; 487-88, 500-03, 509-10; Def. Ex. 1 at 57, APP 71; Def. Ex. 6 at 4-6, APP 83-84; Def. Ex. 8 at 16-21; State's Ex. 4 at 25 – indeed, at the sentencing hearing, the State even acknowledged the presence of this mitigation in closing argument, SH 611. On appeal, however, the State spends little time addressing the dictates of *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), cited in Daniel's opening brief (Appellant's Br. 14-22), choosing instead, as the trial court did at sentencing, to effectively disregard the consensus of all the experts on the mitigating qualities of youth present in this case and the precedent from the Supreme Court that makes clear the necessity of accounting for such evidence prior to reaching a sentencing determination. *See, e.g.* State's Br. 18-23.

II. IN SENTENCING DANIEL TO 92 YEARS, THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF *MILLER*.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court established that "youth matters" in

determining an appropriate sentence for a juvenile offender, and a defendant's child status, along with other relevant mitigating factors related to age, must be taken into consideration by the sentencing court. *Id.* at 2465, 2467. The Court has since reaffirmed that "*Miller requires* a sentencer to consider a juvenile offender's youth and attendant characteristics" before determining sentence. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (emphasis added). Despite this, in sentencing Daniel to 92 years, the trial court found that "*Miller* does not stand for the proposition that these generally observed characteristics of youth are universally applicable to each and every juvenile, whether that juvenile is a murderer or a prodigy," SH 642-43, APP 8-9, and disregarded that precedent, and the undisputed mitigating evidence that was presented by both sides about these characteristics of youth in Daniel's case.

On appeal, the State concedes that following *Miller* "sentencing courts should carefully weigh and consider the mitigating qualities of youth." State's Br. 18. Despite this acknowledgment, the State argues that the judge complied with the mandates of *Miller* because he "referred to the terms 'age,' 'youth,' or 'youthful offender' at least eight times during his resentencing analysis" and "was obviously factoring age into the equation." State's Br. 19-20. However, the trial court used

these terms only in an attempt to minimize or disregard the uncontested mitigating qualities of youth present in this case. *See* SH 642-43, APP 8-9 (acknowledging children are different "in general," but determining that these qualities are not "universally applicable to each and every juvenile, whether that juvenile is a murderer or a prodigy"); SH 643, APP 9 (noting "generally observed circumstances of youth" didn't cause Daniel to commit crime); SH 643, APP 9 (noting that murder was not "determined by youthful brain"); SH 643, APP 9 (noting that "today the Court doesn't sentence a youthful offender"); SH 643, APP 9 (finding Daniel was "no child of tender years" at time of crime); SH 645, APP 11 ("notwithstanding any lessened moral culpability associated with mitigating qualities of youth"); SH 646, APP 12 ("notwithstanding Daniel Charles' chronological age at the time"). Focusing on these references makes clear that the trial court failed to take into account the mitigating qualities of youth, and, instead, deliberately disregarded this undisputed evidence in violation of *Miller*. 132 S. Ct. at 2469 ("[W]e require [sentencers] to take into account how children are different."); *id.* at 2468 ("[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

Moreover, the Supreme Court made clear in *Montgomery* that

"*Miller*. . . did *more* than require a sentencer to consider a juvenile offender's youth" before imposing sentence. 136 S. Ct. at 734 (emphasis added). The Court held that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Id.* (internal quotation marks omitted).

Following the *Montgomery* decision, courts have recognized that even when sentencing judges exercise discretion to impose the harshest possible punishment available, such sentences are unconstitutional if the sentencing courts fail to apply the reasoning of *Miller*. *See, e.g.*, *Landrum v. State*, 192 So. 3d 459, 467 (Fla. 2016) (reversing discretionary life-without-parole sentence and holding that "the exercise of a sentencing court's discretion when sentencing juvenile offenders must be informed by consideration of the juvenile offender's youth and its attendant circumstances as articulated in *Miller*" (internal quotation marks omitted)); *Veal v. State*, 784 S.E.2d 403, 411-12 (Ga. 2016) (applying *Montgomery* and *Miller* to strike down life-without-parole sentence imposed in discretionary sentencing scheme).

As set forth in greater detail in the opening brief, Appellant's Br. 14-22, in reaching the determination that Daniel

deserved a sentence of 92 years, the trial court refused to apply the established law in *Miller* and ignored the uncontroverted evidence of youth that was presented by both parties in this case. For these reasons, the trial court violated Daniel's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

III. A 92-YEAR SENTENCE IS THE FUNCTIONAL EQUIVALENT TO A SENTENCE OF LIFE WITHOUT PAROLE AND THEREFORE UNCONSTITUTIONAL.

The 92-year sentence imposed in this case is legally equivalent to a sentence of life without parole because it denies Daniel a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016) (in cases where life without parole is not a proportionate sentence, "hope for some years of life outside prison walls must be restored"). In its brief, the State declines to directly address the cases cited in Daniel's opening brief, noting instead that a "decisional split appears to exist in this area." State's Br. 26. However, the majority of the cases cited by the State in its brief either involve significantly shorter sentences than the present case, are no longer good law or currently under review by the highest court of that state, or

are cases that do not apply *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

In support of its argument that "many courts have found that a lengthy term of years sentence . . . is not the functional equivalent of a life sentence," the State relies on *State v. Springer*, 2014 S.D. 80, 856 N.W.2d 460 and *State v. Cardeilhac*, 876 N.W.2d 876 (Neb. 2016). State's Br. 26. However, in both of these cases, the defendant is eligible for parole at a significantly younger age than Daniel would be. In *Cardeilhac*, the defendant was eligible for parole at half his 60-year sentence – when we would be 45 years old. 876 N.W.2d at 879, 888.[2] Similarly, Mr. Springer is eligible for parole after he has served 33 years – when he would be 49 years old. 2014 S.D. 80, ¶ 1, 856 N.W.2d at 461. The State also relies on *State v. Graham*, 171 So. 3d 272 (La. App. 2015), but Mr. Graham had received a sentence of life with parole after 35 years, *id.* at 278, 282; *see also* La. Rev. Stat. Ann. § 574.4(E)(1)(a).

The State relies on an unpublished opinion from the Alaska Court of Appeals for the proposition that a 161-year sentence "complied with *Miller*." State's Br. 27 (citing *Gonzales v.*

[2]Mr. Cardeilhac had a separate robbery conviction and sentence that he was already serving time for, which ran consecutively to this sentence. *Cardeilhac*, 876 N.W.2d at 888. At maximum, that sentence would add an additional four years before parole eligibility. *Id.*

State, No. A–11111, 2014 WL 4176179 (Alaska Ct. App. Aug. 20, 2014)). However, this decision does not even cite – much less analyze – *Miller* or whether this sentence complies with *Miller*. Further, under this sentence, Mr. Gonzales would be eligible for parole at 51. *Gonzales*, 2014 WL 4176179, at *11.

The State cites multiple decisions from intermediate appellate courts in Illinois and New Jersey, arguing that such courts have approved lengthy term of year sentences. State's Br. 26-27. However, the Illinois Supreme Court has overruled one of these decisions, determining that a sentence of 97 years *is* a de facto life-without-parole sentence and, therefore, unconstitutional. *People v. Reyes*, No. 119271, 2016 WL 5239589, at *3 (Ill. Sept. 22, 2016) ("[S]entencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment."). Moreover, *People v. Tucker*, 2016 WL 1090013 (Ill. App. Ct. Mar. 18, 2016), which is an unpublished opinion, relies on the now overruled *Reyes* decision in reaching its determination that the defendant's sentence in that case is constitutional. *Tucker*, 2016 WL 1090013, at *13. The Illinois Supreme Court has also granted review in *People v. Holman*, 58 N.E.3d 632 (Ill. App. Ct. 2016), another case relied upon by the State. Similarly, the

State relies on *State v. Zuber*, 126 A.3d 335 (N.J. Super. 2015), but the New Jersey Supreme Court has granted certification in that case as well, *State v. Zuber*, 130 A.3d 1247 (N.J. Feb. 12, 2016) (table).

The State also relies on *Thomas v. State*, 78 So. 3d 644 (Fla. 1st Dist. Ct. App. 2011), for the proposition that a defendant did not receive de facto life without parole if he would be released in his sixties. State's Br. 27. However, *Thomas* has been effectively abrograted, as the Florida Supreme Court has subsequently reversed decisions of that court that had relied on *Thomas* and has made clear that term of year sentences that "will not provide a meaningful opportunity for release" are unconstitutional. *Henry v. State*, 175 So. 3d 675, 676, 679-80 (Fla. 2015) (reversing 90-year sentence); *see also Gridine v. State*, 175 So. 3d 672, 674-75 (Fla. 2015) (reversing decision from First District Court of Appeal that decided *Thomas* and "declar[ing] that [defendant's] seventy-year prison sentence is unconstitutional because it fails to provide him with a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation"). More recently, following the Florida Supreme Court's clarification of the law, a Florida District Court of Appeal found that a 45-year sentence was unconstitutional because it failed to "afford[]

[defendant] a meaningful opportunity for early release based upon demonstrated maturity and rehabilitation." *Tyson v. State*, 2016 WL 4585974, at *1 (Fla. 5th Dist. Ct. App. Sept. 2, 2016).

The State also argues that under *Miller* and *Montgomery*, life without parole remains appropriate in some instances. State's Br. 26. However, as the State acknowledges in its brief, State's Br. 26 n.3, the South Dakota Legislature has now abolished life without parole as an available sentence for children, making clear that it is the policy of the State of South Dakota that children receive parolable sentences. SDCL 22-6-1, 22-6-1.3. As a result, even if life without parole remains an available sentence in other states in rare instances, it is not an available punishment in South Dakota.

Further, the State appears to concede that the question is whether a 92-year sentence provides Daniel with "a meaningful opportunity for release," State's Br. 25, 27-28, but argues that the possibility for parole after serving 46 years is sufficient to satisfy that.[3] However, given this logic, it follows that

[3]The State repeatedly asserts that having a parole opportunity at 60 is "within [Daniel's] expected lifetime" or "well within his natural lifetime," State's Br. 5, 22, 23, 25, 26, 32, but offers no evidence to support this assertion. Moreover, the focus on life expectancy tables as a basis for determining whether a defendant has received a meaningful opportunity for release is inappropriate. *See, e.g.*, Adele Cummings and Stacie Nelson Colling, *There Is*

there is some term of years so long that it would deny a meaningful opportunity for release, and would, therefore, be unconstitutional. The State provides no compelling argument in response to the precedent cited in Daniel's opening brief, which holds that a sentence in the same range as Daniel's sentence is unconstitutional. *See, e.g.*, *Bear Cloud v. State*, 334 P.3d 132, 136, 142 (Wyo. 2014) (holding that sentence where earliest possibility of release was after "just over 45 years, or when [the defendant] is 61" is "the functional equivalent of life without parole"); *see also Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1047 (2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (U.S. 2016) (mem.) (holding that 50-year sentence is equivalent to sentence of life without parole); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (holding that 52.5 years "trigger[s] *Miller*-type protections" because "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to

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*No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-*Graham *Sentences*, 18 U.C. Davis J. Juv. L. & Pol'y 267 (2014). For example, someone, like Daniel, who has been incarcerated since he was 14 and who has spent his entire adult life in prison, would be expected to have a shortened life expectancy for any number of reasons, including stress, inadequate medical care, diet, and the risk of being subjected to violence. *Id.* at 272, 283-87. To suggest that Daniel having an opportunity for parole at the age of 60 means that such an opportunity is clearly within Daniel's lifetime, is baseless.

demonstrate the 'maturity and rehabilitation' required to obtain release"); *State v. Ronquillo*, 361 P.3d 779, 784 (Wash. App. 2015) (finding 51.3 years to be "de facto life sentence"); *People v. Guzman*, No. B243895, 2014 WL 5392509, at *26 (Cal. Ct. App. Oct. 23, 2014) (sentence of 50 years to life is de facto LWOP because "[t]he bleak prospect of release at such a late time in life does not afford Guzman a meaningful opportunity to obtain release").

Daniel's sentence provides him with no possibility for parole until he is 60 years old. This chance of geriatric release, if he is able to secure parole, is not a meaningful opportunity to obtain release. The imposition of that sentence in this case is unconstitutional in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

IV. A 92-YEAR SENTENCE IS CATEGORICALLY UNCONSTITUTIONAL FOR A 14-YEAR-OLD.

As set forth in detail in Daniel's opening brief, Appellant's Br. 28-34, the constitution categorically prohibits sentencing a 14-year-old child to die in prison. In a series of cases, the Supreme Court has found that the significant differences between children and adults, mean that "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *see also Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). Given that all of the characteristics of youth that the Supreme Court has recognized apply with even greater force to children as young as 14, these principles lead inexorably to the conclusion that death-in-prison sentences, like that imposed in this case, can never be constitutionally imposed on these youngest teen offenders.

On appeal, the State does not dispute the overwhelming evidence that 14-year-olds are different and especially immature. Further, the State does not dispute the argument that the constitution categorically prohibits 14-year-olds from receiving life-without-parole sentences. Instead, the State's argument centers on its belief that a 92-year sentence is not the equivalent of life without parole. State's Br. 28-30. For the reasons set forth above, sentencing Daniel to 92 years for

a crime he committed as a 14-year-old is the functional equivalent of a life-without-parole sentence and violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

V. A SENTENCE OF 92 YEARS IN THIS CASE IS DISPROPORTIONATE.

Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the harshest adult sentences must be reserved for a narrow category of juvenile offenders who are the worst of the worst. At the sentencing hearing, the State had the burden of establishing that Daniel is the "uncommon" youthful offender "whose crime[] reflect[s] permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, and thus, is deserving of a death-in-prison sentence. However, the State failed to satisfy that burden. Because the evidence presented at the sentencing hearing established that Daniel's "crime reflects transient immaturity," *Montgomery*, 136 S. Ct. at 735, a de facto life sentence of 92 years is disproportionate under the Eighth Amendment.

The State declines to address this Supreme Court precedent or to contest the facts as presented in the opening brief. Instead, the State relies on *State v. Ainsworth* 2016 S.D. 40, 879 N.W.2d 762, and argues that Daniel's sentence is not grossly

disproportionate under the Eighth Amendment. State's Br. 31-32. But *Miller* itself makes clear that an Eighth Amendment analysis of disproportionality, for a sentence involving a child, *must* take into account youth. In *Miller*, the majority distinguished *Harmelin v. Michigan*, 501 U.S. 957 (1991), a prior disproportionality case approving of an adult defendant's mandatory life-without-parole sentence, because "children are different . . . it is the odd legal rule that does not have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction." *Miller*, 132 S. Ct. at 2470. As a result, even though this exact sentence might be constitutional under the typical Eighth Amendment disproportionality test applied to adults, based on the holdings of *Montgomery*, *Miller*, and *Graham v. Florida*, 560 U.S. 48 (2010), a 92-year sentence, imposed on a 14-year-old child, is disproportionate.

Further, the State argues that this sentence is not disproportionate because the trial court "did not impose the most severe penalty of life without parole." State's Br. 32. However, as discussed above, the South Dakota Legislature has now abolished the sentence of life without parole for children. SDCL 22-6-1, 22-6-1.3. While a defendant can be sentenced to a term of years, it is clear that the policy of the State of South

Dakota is for children to receive parolable sentences, and, therefore, whatever term of year sentence is given should include an opportunity for parole for a defendant who was a child at the time of the crime. As a result, even if this Court does not believe that a 92-year sentence is a de facto life-without-parole sentence, such a prolonged sentence is certainly at the upper margin of what could be considered a parolable term of years sentence for a child under this new statute. Given all of the mitigating evidence presented at the sentencing hearing in this case – much of which was completely uncontested by the State – and Daniel's especially young age at the time of the offense, the sentence of 92 years is disproportionate.

In addition, following the filing of Daniel's opening brief with this Court, Paul Jensen – the last known child in South Dakota with a life-without-parole sentence – was resentenced as a result of *Miller*. Mr. Jensen, who was 14 at the time of his crime and participated in the aggravated kidnapping and execution-style murder of a taxi driver, was resentenced to 200 years under the old parole system, making him eligible for parole after serving only 25 years.[4] The State does not dispute that Daniel has

[4]Stephen Lee, *Jensen Gets Life Sentence Cut to 200 Years; Parole Possible in 5 Years in 1996 Fort Pierre Cabdriver Murder*, Capital Journal, http://www.capjournal.com/news/jensen-gets-life-sentence-cut-to-years-parole-possible-in/article_943bdff0-29e4-11e6-b209-9724163c7be0.html; *State v. Jensen*, Nos. 19923, 19926 (Cir.

received the harshest sentence of any child in South Dakota following the *Miller* decision. State's Br. 32-33.

Given Daniel's young age, and the strong mitigating evidence presented here, the sentence in this case is disproportionate and violates Daniel's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

VI. THE TRIAL COURT ERRED IN PERMITTING IMPROPER VICTIM IMPACT TESTIMONY.

During the sentencing hearing, Kari Jensen Thomas presented an oral victim-impact statement to the court. Because Ms. Thomas is not a victim within the definition of SDCL 23A-27-1.1, her testimony was admitted in error.

Ct. 6th Judicial Cir. Stanley Co.).

The State concedes on appeal that the admission of this testimony "may have violated the letter of SDCL 23A-27-1.1," but argues it was a "practical solution" and a "compromise" that did not violate "the spirit and intent of this statute." State's Br. 36-37. However, as *Dale v. Young*, 2015 S.D. 96, 873 N.W.2d 72, makes clear, when determining legislative intent "[t]he language expressed in the statute is the paramount consideration and if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." 2015 S.D. 96, ¶ 6, 873 N.W.2d at 74 (internal quotation marks omitted).

The plain meaning of SDCL 23A-27-1.1 is to limit the definition of victims to a narrow category of individuals who are permitted to give oral victim impact statements. SDCL 23A-27-1.1, APP 111. Importantly, the statutory provision for written impact statements has no such limit, defining a victim "[f]or the purpose of this section . . . [as] anyone adversely impacted emotionally, physically, or monetarily by the defendant's crime." SDCL 23A-27-1.3. Taken together, these statutes make very clear that the legislature intended to limit oral victim impact statements to only a narrow group of individuals. This bright-line rule is certainly sensible given the risk of unfair prejudice when victim impact evidence is

presented. *See, e.g.*, *State v. Berget*, 2013 S.D. 1, ¶ 73, 83, 826 N.W.2d 1, 24, 26 (citing *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) and *Booth v. Maryland*, 482 U.S. 496, 504 (1987)); *see also Bosse v. Oklahoma*, 2016 WL 5888333, at *2 (U.S. Oct. 11, 2016).

As a result, the trial court's "compromise" didn't just violate "the letter of SDCL 23A-27-1.1," but the "spirit and intent" of the statute as well. Ms. Thomas's highly inflammatory testimony was not admissible and her testimony violated Daniel's rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, SDCL 23A-27-1.1, and Article 6, Section 23 of the Constitution of South Dakota.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, and those stated in his principal brief to this Court, Daniel Charles respectfully requests that this Court remand this case to the trial court with an order directing the trial court to reverse the Second Amended Judgment of Conviction, and impose a reduced sentence.

REQUEST FOR ORAL ARGUMENT

The attorney for the appellant, Daniel Charles, respectfully renews his request for oral argument.

Respectfully submitted this 21st day of October, 2016,

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1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b)(2) using Century Schoolbook typeface in 12 point type. Appellant's Reply Brief contains 4,965 words.

2. I certify that the word processing software used to prepare this brief is Word Perfect X8.

Dated this 21st day of October, 2016,

/s/Robert W. Van Norman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of October, 2016, a true and correct copy of Appellant's Reply Brief in the matter of State of *South Dakota v. Daniel Charles* was served via electronic mail upon upon Marty J. Jackley, Robert Mayer, and Ann C. Meyer, Attorneys for Appellee, at robert.mayer@state.sd.us, ann.meyer@state.sd.us, and atgservice@state.sd.us.

Dated this 21st day of October, 2016,

/s/Robert W. Van Norman
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a Daniel Heinzelman,
a/k/a Daniel Ingalls,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME ECKRICH
Circuit Court Judge

APPELLEE'S SUPPLEMENTAL BRIEF

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Notice of Appeal filed December 11, 2015

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No. 27691

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANIEL NEIL CHARLES,
a/k/a Daniel Heinzelman,
a/k/a Daniel Ingalls,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this Supplemental Brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." Daniel Neil Charles, a/k/a Daniel Heinzelman, a/k/a Daniel Ingalls, Defendant and Appellant, will be identified as "Defendant," or "Charles." References to the settled record and the transcripts of the October 21 through 23 and 30, 2015, resentencing hearing will be designated as "SR" and "RST," respectively.

This Supplemental Brief is filed pursuant to SDCL 15-26A-73, in order to bring the attention of this Court and opposing counsel to a new case which was recently handed down after the State's brief was filed on September 23, 2016. The new authority involved is *State v. Diaz*, 2016 S.D. 78, ¶¶ 45-58, ____ N.W.2d ____ (Nov. 22, 2016).

JURISDICTIONAL STATEMENT

State relies upon the jurisdictional statement provided in its initial brief.

STATEMENT OF LEGAL ISSUES

State relies upon the legal issues detailed in its original brief.

STATEMENT OF FACTS

State relies upon the factual summary presented in its initial brief.

ARGUMENTS AND AUTHORITIES

State files this Supplemental Brief for the purpose of presenting to the Court and defense counsel the recent case of *Diaz*, 2016 S.D. 78, at ¶¶ 45-58. The *Diaz* Court determined that the Defendant, who had committed first degree murder and kidnapping while a juvenile, was not entitled to any sentencing relief and that the lower court had been guided by the mitigating characteristics of youth, as detailed in by *Miller v. Alabama*, 567 U.S. ____, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). *Diaz*, 2016 S.D. 78, at ¶¶ 46-50. In addition, this Court recognized that no abuse of discretion existed when defendant was sentenced to 80-years in prison with the possibility for parole eligibility at age 55, or after 40 years served, and within her natural lifetime. *Id.* The *Diaz* Court also found that the defendant's sentence was not grossly disproportionate to her crimes, because Diaz had committed

first degree murder, which placed her at the upper most level on the spectrum of criminality; that defendant's sentence for a term of years was not unduly harsh and gave her the possibility of early release on parole; and that no comparison between defendant's penalty and those imposed on other criminals for the same crime was necessary, either within or outside the jurisdiction. *Id.* at ¶¶ 51-56. It further noted that Diaz's sanction did not constitute a de facto life sentence, because she had a meaningful opportunity for release on parole at the age of 55, or after 40 years of incarceration. *Id.* at ¶¶ 57-59; *State v. Springer*, 2014 S.D. 80, ¶¶ 23-25, 856 N.W.2d 460, 469-70.

Likewise, Judge Eckrich carefully took into account the mitigating factors of youth, as identified by *Miller*, in fashioning an appropriate sentence for Charles, who committed first degree murder while a juvenile. SR 694-97; RST 641-47. *Diaz*, 2016 S.D. 78, at ¶¶ 45-58. This judge required that Defendant serve a 92-year penitentiary sentence, with credit for 16 years and 3 months of time served, which gave Charles the opportunity for parole eligibility at the age of 60 (parole eligibility date of 08/05/2045, new parole system), or within his natural lifetime. SR 694-97; RST 641-47; *Springer*, 2014 S.D. 80, at ¶¶ 23-25, 856 N.W.2d at 469-70. Equally important, Judge Eckrich did not abuse his discretion, or impose a sentence, which was grossly disproportionate to the gravity of Defendant's offense because his crime of first degree murder falls within the upper

most level on the spectrum of criminality; Charles' sentence for a term of years gives him the possibility for early release within his life expectancy and judging the harshness of a penalty includes the chance for parole; and no comparison of his penalty to those, which have been imposed upon other criminals for the same crimes is needed, either within or outside the jurisdiction. SR 694-97; RST 641-47. *Diaz*, 2016 S.D. 78, at ¶¶ 51-56. The lower court's sentencing decision also did not result in a de facto life sentence, in Charles' situation, because he has a meaningful chance for parole at age 60, and hope for reconciliation with society. SR 694-97; RST 641-47. As such, no sentencing relief is justified on this record.

CONCLUSION

Based upon *Diaz*, and the arguments and authorities already submitted, the State respectfully requests that Judge Eckrich's November 13, 2015, Second Judgment of Conviction be affirmed in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Supplemental Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Supplemental Brief contains 700 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 30th day of November 2016.

/s/ Ann C. Meyer
Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November 2016, a true and correct copy of Appellee's Supplemental Brief in the matter of *State of South Dakota v. Daniel Neil Charles, a/k/a Daniel Heinzelman, a/k/a Daniel Ingalls*, was served via electronic mail upon the following

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/s/ Ann C. Meyer
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APPENDIX

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

MARICELA DIAZ, Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
HANSON COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE TIMOTHY W. BJORKMAN
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* * * *

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and appellant.

* * * *

ARGUED ON
OCTOBER 3, 2016
OPINION FILED **11/22/16**

#27432

WILBUR, Justice

[¶1.] Defendant appeals her conviction of the 2009 murder and kidnapping of Jasmine Guevara. Defendant, a juvenile at the time of the crime, challenges the transfer of her case to adult court, this Court's previous decision reversing the suppression of statements she made to law enforcement, the circuit court's instructions on imminent fear, and her 80-year sentence with no time suspended. We affirm.

Background

[¶2.] On November 10, 2009, law enforcement officers and firefighters responded to a vehicle fire in a wooded area of Hanson County near Mitchell, South Dakota. After extinguishing the fire, they discovered a badly burned body in the vehicle's trunk, later identified as 16-year-old Jasmine Guevara. The autopsy revealed that Guevara had been burned alive.

[¶3.] After tracking the ownership of the vehicle to Guevara, law enforcement reached out to the public for any information on Guevara's whereabouts on November 10, 2009. A citizen witness relayed that she had seen Guevara at Walmart with two Hispanic individuals. The tip led officers to Alexander Salgado and Maricela Diaz. Salgado and Diaz had arrived in Mitchell from Indiana the month before, in October 2009. Diaz was 15 years old; Salgado was 21 years old. Diaz and Salgado, who were in a relationship with each other, were staying in Mitchell with an acquaintance, Steffany Molina.

[¶4.] On November 12, 2009, Investigators Joel Reinesch and Dean Knippling located Diaz and Salgado at Molina's house. The two agreed to go with

the officers to the Mitchell Police Department. At the police department, Investigator Toby Russell attempted to obtain identifying information from Diaz so he could contact Diaz's parents. Diaz gave Investigator Russell false information multiple times. Investigator Russell eventually contacted Diaz's mother, Irma Gutierez-Placencia. Officer Hector Soto of the Sioux Falls Police Department spoke with Gutierez-Placencia in Spanish and obtained Gutierez-Placencia's consent to talk to Diaz.

[¶5.] The officers returned to the interview room and informed Diaz that her mother had given them permission to question her. Investigator Russell told Diaz her *Miranda* rights in English, but Diaz indicated she did not understand what was being said. Diaz spoke limited English. She had emigrated with her mother from Mexico to Indiana when she was 11 years old. Officer Soto then told Diaz her rights in Spanish. Diaz agreed to speak to the officers. For a more extensive description of Diaz's waiver of her *Miranda* rights, see *State v. Diaz* (*Diaz I*), 2014 S.D. 27, 847 N.W.2d 144. In a separate interview room, Salgado also waived his *Miranda* rights and agreed to speak to the officers.

[¶6.] Diaz informed the officers that shortly after arriving in Mitchell, she and Salgado met Molina's neighbor, Guevara. Neither Diaz nor Salgado was employed. Diaz explained that Guevara helped Diaz and Salgado with money, food, clothing, and transportation, and gave them tips for finding jobs. Guevara would also hang out with Diaz and Salgado. But Diaz suspected Salgado and Guevara had romantic interests in each other. Diaz told the officers that she and Salgado made a plan to kill Guevara and burn all the evidence. She said the plan originated with

Salgado and she cooperated because she was mad at and afraid of Salgado. Diaz also claimed that Salgado agreed to kill Guevara to prove his love to Diaz.

[¶7.] Diaz told the officers that on the day of Guevara's murder, Diaz asked Guevara to give Diaz and Salgado a ride to Walmart to purchase lighter fluid. Diaz and Salgado told Guevara that the lighter fluid was for a cookout and invited Guevara to attend with them. Before Guevara picked them up at Molina's house, Diaz and/or Salgado hid two kitchen knives within their clothing. After Guevara purchased the lighter fluid at Walmart for Diaz and Salgado, Diaz and Salgado told Guevara to drive to an area referred to as the "haunted house" in rural Hanson County.

[¶8.] Diaz claimed that it was Salgado's idea that he would get out of the car at the haunted house and Diaz was to start the murder. Salgado disagreed that the murder was his idea. He claimed that Diaz wanted Salgado's help to kill Guevara to prove his love for Diaz. Salgado told the officers that after he exited the vehicle, he returned to the car when he heard Guevara screaming. Diaz claimed that she attempted to stab Guevara, but was unable to follow through. She said Salgado entered the car and grabbed Diaz's knife from her. Diaz also said that her knife broke and Salgado used his own knife. Salgado, however, said that Diaz stabbed Guevara. He admitted that he also stabbed Guevara. Diaz claimed that after Salgado stabbed Guevara in the neck, he picked her up and put her in the trunk of the vehicle. He doused Guevara with lighter fluid. Salgado claimed that Diaz helped him get Guevara into the trunk. It is undisputed that Guevara was still

alive when Salgado and/or Diaz set the vehicle ablaze. Guevara ultimately died of smoke inhalation.

[¶9.] Diaz told the officers that, after setting the vehicle on fire, Diaz and Salgado walked approximately eight miles to Molina's house. Diaz threw the gloves she was wearing into a ditch while they were walking and she tossed her sweatshirt on the railroad tracks in Mitchell. Diaz claimed Salgado threw Guevara's phone in a river. Once they arrived at Molina's house, Diaz and Salgado washed themselves and used bleach on their hands to remove the blood stains. According to Molina, Diaz and Salgado acted normally that night at home.

[¶10.] Ultimately, law enforcement arrested Salgado and Diaz for the kidnapping and murder of Guevara. Salgado pleaded guilty to second-degree murder and agreed to testify against Diaz as part of his plea agreement. On November 17, 2009, the State charged Diaz in juvenile court with first-degree murder, first-degree murder—felony murder: arson, and first-degree arson. Diaz moved to suppress her statements to law enforcement. After a hearing, the juvenile court denied Diaz's motion.

[¶11.] The State moved to transfer Diaz's case to adult court. At the transfer hearing, Salgado testified against Diaz. He explained that he first met Diaz through Diaz's brothers. Salgado was 19 years old; Diaz was 13 years old. Salgado testified about their relationship. He offered that he did not hit Diaz at first, but after he learned that she cheated on him, he got angry and hit Diaz. Salgado tried to end the relationship. He claimed Diaz said she would rather be dead than be without him and tried to kill herself. Salgado admitted that he was in the bathroom

with Diaz while she tried to cut her wrists. Salgado helped her cut her wrists and then left her bleeding in the bathroom. Salgado knew Diaz was pregnant. Others found Diaz and took her to the hospital. Salgado explained that he went to the hospital and renewed their relationship. After this incident, and because Diaz was pregnant, child protection services in Indiana became involved and directed Diaz and Diaz's family that Diaz was to stay away from Salgado. Salgado testified that Diaz defied her mother and child protection services. Diaz would skip school and sneak out of her house to see Salgado.

[¶12.] In July 2009, Diaz gave birth to Salgado's baby. Diaz was 14 years old. After their baby was born, Diaz and Salgado lived together in Salgado's mother's home. Salgado again physically abused Diaz. He testified that Diaz tried to kill herself and cut her wrists again. According to Salgado, Diaz thought Salgado was cheating on her and moved back into her mother's home. She and Salgado continued to spend time with each other. At some point, Salgado's mother kicked him out of her home, and Salgado told Diaz that he was going to leave Indiana for a job, and he would send her money. According to Salgado, Diaz said she would kill herself if Salgado left without her. Salgado let Diaz go with him. They planned to travel to Mitchell, South Dakota by bus.

[¶13.] Salgado testified that Molina picked them up at the bus station in Mitchell in October 2009. According to Salgado, Diaz became jealous of Salgado looking at Molina at the bus station and she yelled at him. Diaz also became jealous of Salgado's interactions with Guevara. They had met Guevara their first night in Mitchell when Molina hosted a party. Salgado testified that he and Diaz

would physically fight because of Diaz's jealousy. One fight occurred two nights before Guevara's murder. Diaz, Salgado, Molina, and Guevara were together at Guevara's boyfriend's house for a party. Diaz had accused Salgado of looking at Guevara, and Diaz tried to punch him and hit him with her elbows. She then yelled at Guevara and wanted to fight her. Diaz eventually calmed down and they all left the party.

[¶14.] The next morning, Diaz suspected Salgado was talking to Guevara outside a pawn shop. According to Salgado, Diaz threatened to fight and kill Guevara. Salgado testified that he did not believe Diaz. He explained that the next day Diaz repeated that she planned to kill Guevara. Salgado testified that he and Diaz watched "A Thousand and One Ways to Die" on television that evening. According to Salgado, the show described how to get rid of evidence by burning someone in the trunk of a car. Salgado testified that Diaz said that she would burn Guevara in the trunk of a car. Salgado explained that he agreed to help Diaz because he felt that if he did not Diaz would believe Salgado was sticking up for Guevara and become more jealous. Salgado then testified in detail regarding the murder of Guevara.

[¶15.] In opposition to the State's motion to transfer her case to adult court, Diaz's counsel had asked Reclaiming Youth International (RYI) to perform a developmental audit on Diaz and make a recommendation to the juvenile court whether Diaz's best interests would be served in the juvenile or adult system. The State asked Dr. Travis Hansen to evaluate Diaz and generate a report containing his psychiatric findings. The State also requested that Dr. Donald Dutton examine

Diaz and review RYI's report. Dr. Dutton specializes in domestic violence. These and other expert witnesses testified about Diaz's mental state, her youth, the fact she was a victim of sexual abuse by Salgado, and about the rehabilitative potential of the State's juvenile and adult prison systems.

[¶16.] In the juvenile court's written findings, it noted the discrepancies in Diaz's statements to law enforcement, RYI, Dr. Hansen, and Dr. Dutton. Despite the conflicting evidence, the court found undisputed that Diaz exhibited a premeditated plan to kill Guevara. The court disagreed that Diaz acted against her will or that Diaz was under duress. Although the report from RYI maintained that Salgado had dominion over and control of Diaz and that Diaz experienced "trauma" because of her relationship with Salgado, the court found more persuasive the statements Diaz made to Drs. Dutton and Hansen. The court wrote,

> Notably, [Diaz] only told Dr. Bean and the RYI team that Salgado forced her to help with the murder. In her interviews with Dr. Hansen, Dr. Dutton, and law enforcement, [Diaz] said that the plan originated with Salgado. She did not state, however, that he forced her to assist him. Salgado's acknowledged responsibility for Jasmine's murder does not obviate the fact that [Diaz], at the very least, aided Salgado in the planning and was an active participant in the murder itself.

The court concluded that Diaz was not under Salgado's control at the time of the murder. The court also concluded that the prosecutive merit against Diaz was substantial. In consideration of Dr. Hansen's and Dr. Dutton's testimony, the RYI developmental audit, Diaz's statements to law enforcement, and other witness testimony, the court found that it would be contrary to Diaz's best interests and the public to retain jurisdiction in juvenile court.

[¶17.] In June 2011, the court granted the State's motion to transfer Diaz to adult court. On October 14, 2011, Diaz moved the circuit court to vacate the transfer order because Diaz discovered that one of the State's experts, Dr. Dutton, had been accused of sexually assaulting a student. After a hearing, the court denied Diaz's motion. In adult court, a Hanson County grand jury indicted Diaz on six counts: (1) first-degree murder, (2) conspiracy to commit first-degree murder, (3) first-degree murder—felony murder (arson), (4) first-degree arson, (5) first-degree murder—felony murder (kidnapping), and (6) second-degree aggravated kidnapping. Diaz pleaded not guilty to all charges.

[¶18.] Diaz again moved to suppress the statements she made to law enforcement. The court granted Diaz's request to reconsider the juvenile court's suppression decision and, after a hearing, granted Diaz's motion to suppress the statements. The court concluded that Diaz did not knowingly and intelligently waive her *Miranda* rights. In November 2012, the State filed a petition for an intermediate appeal, which this Court granted. In May 2014, this Court in a divided decision reversed the circuit court's suppression of Diaz's statements. *Diaz I*, 2014 S.D. 27, 847 N.W.2d 144.

[¶19.] A jury trial began on December 29, 2014, and concluded on January 15, 2015. Over thirty witnesses testified. Nick Rehorst of the Alexandria Fire Department testified about responding to the fire call, extinguishing the fire, and locating Guevara's body in the vehicle's trunk. Two witnesses testified about surveillance footage from Walmart capturing Diaz, Salgado, and Guevara at Walmart on November 10. The jury observed the footage in conjunction with the

witness testimony. Multiple officers testified and explained their roles in the investigation. These roles included: identifying the owner of the car; speaking to Guevara's mother and boyfriend; speaking to witnesses who observed Diaz, Salgado, and Guevara at Walmart; searching for evidence from the scene; obtaining evidence from Diaz's person; obtaining evidence to identify Guevara's DNA; performing DNA testing on the evidence obtained; seizing and securing the vehicle for inspection; etc.

[¶20.] Special Agent James Severson testified that he recovered Guevara's cell phone in the river and Diaz's gloves and hooded sweatshirt on the route Salgado and Diaz walked from the fire to Mitchell. Kevin Winer, the Chief Criminalist Supervisor at the Kansas City Police Department Crime Lab, testified about the bloodstain patterns on two sweatshirts recovered during the investigation. One sweatshirt belonged to Diaz and the other to Salgado. A blood stain pattern, according to Winer, is "a grouping of individual bloodstains that either by their shape, their form, their location, their distribution, suggests they were deposited by a single event or a series of events overlapping one another." Winer then described the different types of bloodstain patterns and the indications gleaned from those patterns.

[¶21.] Winer testified that the DNA testing indicated that the bloodstains on the two sweatshirts were from Guevara. In regard to Diaz's sweatshirt, Winer testified that the front of the sweatshirt contained five or six spatter bloodstains. The left sleeve on the front side contained either a spatter stain or a transfer stain. A transfer stain, according to Winer, is "a bloody object coming in contact with a surface[.]" A spatter stain is:

> a general term that's used to describe blood that has traveled through the air and landed on a surface. . . . It's not blood that's just simply falling down due to the force of gravity. There's some other force involved that propels it through the air and lands on a surface.

Winer also noticed additional transfer stains indicating "some wiping or swiping action that's taking place; again, evidence of a bloody object coming in contact with a surface, or multiple different bloody objects." The left cuff of the same sleeve, on the palm side, also contained a transfer stain. Winer testified in regard to certain stains on the back of Diaz's sweatshirt and could not opine conclusively if the stains were transfer or spatter. On the back elbow, however, Winer testified that the sweatshirt contained a transfer stain.

[¶22.] Based on Winer's examination of Diaz's sweatshirt, he concluded that "there's evidence of the - - presumably, the wearer of this garment coming in contact or manipulating one or more bloody objects, leaving the bloodstains behind in a transfer mechanism or a swipe and wipe[.]" In regard to the spatter stains, Winer opined that "[y]ou can tell that these were dropped - - or deposited due to the force of - - some force propelling them through the air and landing on the garment, but the specific type of mechanism cannot be determined."

[¶23.] Investigator Russell and Officer Soto testified about their interrogation of Diaz and Diaz's incriminating statements. Investigator Russell testified that Diaz appeared calm and not afraid. He attempted to explain Diaz's rights to her, but she indicated she did not understand. Officer Soto testified that after being informed of her rights in Spanish, Diaz waived them. He believed Diaz felt more comfortable speaking in Spanish and the questioning continued in Spanish. Officer

Soto testified that Diaz did not claim that she was threatened by Salgado or that she was afraid of him. She also never claimed to have been held captive by Salgado. According to Officer Soto, when he began pointing out discrepancies in Diaz's statements, Diaz changed her story. He began to ask Diaz more in-depth questions and Diaz responded by answering more slowly, in a "more calculated" manner. Officer Soto could tell that Diaz was a bit more nervous and, based on his experience, she felt burdened. Officer Soto testified that Diaz finally said, "We did it." After that statement, Diaz walked Officer Soto through her version of what happened. He testified that Diaz's demeanor was calm and conversational. He claimed he did not use a harsh voice and used no threats.

[¶24.] The parties had stipulated to allow the jury to read a physical transcript with Spanish-to-English translation while the video played depicting Officer Soto's interrogation of Diaz in Spanish. The jury observed the interrogation video and listened to the audio recording in conjunction with reading the translated interrogation. The jury also observed a video depicting Diaz's communication with Salgado while Salgado and Diaz were in adjacent interview rooms.

[¶25.] Salgado testified at trial. Salgado answered the majority of his questions evasively, claiming a lack of knowledge. The State spent the bulk of its examination impeaching Salgado or calling Salgado's attention to his testimony from Diaz's transfer hearing. Salgado mainly responded to questions with, "I don't remember" or "I don't know." However, when given the opportunity, Salgado claimed that he murdered Guevara. He testified that Diaz did not tell him she had a plan to kill Guevara and that Diaz did not want to have anything to do with the

murder. During cross-examination, Salgado refused to answer any more questions. The court declared Salgado unavailable as a witness and counsel for Diaz read to the jury excerpts of Salgado's testimony from the transfer hearing.

[¶26.] Diaz's mother and sister testified that Diaz never had any problems until she met Salgado. They also both claimed that Salgado abused Diaz and tried to have Diaz commit suicide. An expert witness testified about gangs and gang-related activities. He opined that Salgado was a member of a gang and that burning Guevara's car and disposing of evidence indicated a criminally sophisticated mind. One of Diaz's middle school teachers from Indiana testified. The teacher had taught Diaz English as a second language for three years. She described Diaz as "vivacious, outgoing, made friends easily, always willing to help." The teacher testified that Diaz "was a very good student. She caught on quickly. She worked hard. Her grades were good." According to the teacher, Diaz's attendance and grades suffered and Diaz's demeanor changed in eighth grade. She lost friends after becoming pregnant and became, as her teacher described, "quieter and more sullen." Diaz's teacher remained in contact with Diaz's mother and was concerned about Diaz's relationship with Salgado. Diaz ultimately dropped out of school in ninth grade when she ran away with Salgado.

[¶27.] Dr. David Bean had conducted a psychiatric evaluation of Diaz in February 2010. He testified to his protocol and the results he obtained. He diagnosed Diaz with conduct disorder, adolescent-onset type; adjustment disorder with a depressed and anxious mood; physical abuse; and sexual abuse of a child. Dr. Bean described conduct disorder as a showing of "social misbehavior of one sort

or another[.]" He listed different ways an adolescent could show a social misbehavior: lying and truancy to petty criminal acts; doing "mean, nasty things to other people"; or, for school-age children, being "generally disobedient" to both parental figures and those with authority.

[¶28.] Dr. Craig Rypma also testified. He examined Diaz shortly before the trial, approximately five years after Guevara's murder. Dr. Rypma also reviewed Diaz's other evaluations. As a result of his evaluation of Diaz and in consideration of the other materials he reviewed, Dr. Rypma formed several diagnostic impressions. He diagnosed Diaz with adjustment disorder with disturbance of conduct and emotion (but he ruled out depressive disorder), sexual abuse of a child, and physical abuse of a child. Dr. Rypma also testified about the characteristics of a battered woman. He opined that Diaz's situation exhibited characteristics consistent with the characteristics of a battered woman. Dr. Rypma further opined that Diaz's statements to him were consistent with the characteristics of the four stages of the cycle of abuse.

[¶29.] After the defense rested its case, Diaz renewed a motion she had made at the close of the State's case to dismiss the charges against her, asserting the State failed to submit sufficient evidence to support a conviction. The court granted Diaz's motion to dismiss the conspiracy to commit murder charge, but denied her motion regarding the remaining charges. During the settling of the jury instructions, Diaz proposed two instructions related to Diaz's heightened sense of imminent harm as a juvenile battered woman. The court denied Diaz's requested instructions.

[¶30.] On January 15, 2015, the jury found Diaz guilty of (1) first-degree murder, (2) first-degree felony murder (arson), (3) first-degree arson, (4) felony murder—aggravated kidnapping, and (5) second-degree aggravated kidnapping. Following the verdict, Diaz moved to dismiss the guilty verdicts for first-degree felony murder (arson), first-degree arson, and felony murder—aggravated kidnapping. The court granted Diaz's motion. After a sentencing hearing, the circuit court sentenced Diaz to 80 years in the South Dakota State Penitentiary and a $25,000 fine for first-degree murder and a concurrent 50-year sentence for second-degree aggravated kidnapping.

[¶31.] Diaz appeals and raises the following issues for our review:

1. Whether the juvenile court abused its discretion when it transferred Diaz to adult court.
2. Whether the juvenile court abused its discretion in denying a new hearing on the transfer of Diaz to adult court after the presentation of newly discovered evidence concerning a state witness.
3. Whether the South Dakota Supreme Court should reconsider its decision in *Diaz I*, 2014 S.D. 27, 847 N.W.2d 144 to reverse the circuit court's order suppressing Diaz's statements to law enforcement.
4. Whether the circuit court inadequately instructed the jury on the statement of law applicable to the effects of physical and sexual abuse on a juvenile's perception of imminent fear.
5. Whether the circuit court abused its discretion when it sentenced Diaz to 80 years with no time suspended.
6. Whether Diaz's 80-year sentence is grossly disproportionate in violation of the Eighth Amendment.
7. Whether Diaz's 80-year sentence is a de facto life sentence in violation of *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Analysis

A. Transfer to Adult Court

[¶32.] We combine the first two issues. Diaz challenges the juvenile court's decision to transfer her to adult court and denial of her motion to vacate its decision to transfer her to adult court. She claims that the juvenile court based its decision to transfer her on three interrelated "fallacious" premises. The first fallacy, according to Diaz, arises from the fact Salgado testified during Diaz's jury trial in direct contradiction to his testimony at the transfer hearing. Diaz highlights that the juvenile court relied on Salgado's now-discredited testimony at the transfer hearing in concluding that the idea to murder Guevara originated with Diaz and that Diaz carried out the plan. Diaz secondly claims the juvenile court based its decision in part on the now-unreliable opinions of Dr. Hansen and Dr. Dutton. Dr. Hansen relied on Salgado's statements, which Salgado retracted at the jury trial. And Dr. Hansen relied on Dr. Dutton's opinions. But, according to Diaz, Dr. Dutton's opinion is discredited because Dr. Dutton has "been found to have engaged in sexual harassment himself[.]"

[¶33.] SDCL 26-11-4 gives the juvenile court discretion to transfer a juvenile to adult court. The juvenile court may consider:

> (1) The seriousness of the alleged felony offense to the community and whether protection of the community requires waiver;
>
> (2) Whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner;
>
> (3) Whether the alleged felony offense was against persons or property with greater weight being given to offenses against persons;
>
> (4) The prosecutive merit of the complaint. The state is not required to establish probable cause to show prosecutive merit;

> (5) The desirability of trial and disposition of the entire felony offense in one proceeding if the child's associates in the alleged felony offense are adults;
>
> (6) The record and previous history of the juvenile;
>
> (7) The prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile, if the juvenile is found to have committed the alleged felony offense, by the use of procedures, services, and facilities currently available to the juvenile court.

Id. If the court concludes that transfer is warranted, the court shall enter "findings of fact upon which the court's decision is based." *Id.* "The findings may not be set aside upon review unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

[¶34.] At the time of the transfer hearing, Diaz was alleged to have committed the offenses of murder and aggravated kidnapping. The court recognized that the alleged felonies are of the most serious type and, because so, concluded that the community requires protection. The court also considered that the alleged felonies were committed in a premeditated, violent, and willful manner, against a person as opposed to property.

[¶35.] Diaz relies heavily on the fact that Salgado changed his testimony at trial, admitting that he murdered Guevara and Diaz had nothing to do with it. But, even if we disregard Salgado's transfer hearing testimony, Diaz's statements to law enforcement support the juvenile court's conclusion that Diaz exhibited a willing and premeditated participation in Guevara's murder and kidnapping. Also, the record supports the court's findings that Diaz's actions were not a product of control by Salgado or a product of her fear of him. The court found that Diaz did not exhibit fear of Salgado during her interrogation and inconsistently claimed that

Salgado forced her during her subsequent psychological examinations. The court's finding of prosecutive merit is also supportable. Diaz's statements to law enforcement, the Walmart video, and Diaz's sweatshirt with Guevara's blood support Diaz's participation in Guevara's murder.

[¶36.] Diaz further claims that the court erred when it transferred her to adult court given the evidence of her prospects for rehabilitation by the use of procedures, services, and facilities available to the juvenile court. She emphasizes that she was only 15 years old at the time of the crime and under the control of Salgado.[1] Salgado had sexually abused her, and she became pregnant with Salgado's baby at 13 years old. Salgado encouraged Diaz to kill herself and even helped her cut her wrists. She claims that the evidence indisputably showed that before her relationship with Salgado, she had obtained good grades in school and was a "happy, joyful little girl." Diaz contends that she was completely dependent upon Salgado in Mitchell with no identification, no job, and no way to return home. She further emphasizes that she had no prior experience with the criminal system.

[¶37.] The circuit court specifically considered Diaz's claims—her youth, her relationship with Salgado, her life before her relationship with Salgado, and her emigrant status. Diaz postures her argument as though this Court should disregard Salgado's entire testimony at the transfer hearing and Dr. Dutton's

1. At the time of her appeal, Diaz was over 21 years old. Had Diaz remained in juvenile court and been adjudicated, the Department of Corrections would no longer have jurisdiction over Diaz. *See* SDCL 26-11A-5. Under SDCL 26-11A-20, "[n]o adjudicated juvenile may remain within the jurisdiction of the Department of Corrections beyond the age of twenty-one years."

testimony. But Salgado's refusal to testify at Diaz's trial does not, as a matter of law, nullify his transfer hearing testimony. And the circuit court examined Diaz's evidence that Dr. Dutton sexually assaulted a student, concluding that it nonetheless found Dr. Dutton's testimony at the transfer hearing credible. Our review of the court's findings and conclusions support that it would be contrary to the best interests of Diaz and the public that the juvenile court retain jurisdiction.

B. This Court's Reconsideration of *Diaz I*

[¶38.] Diaz asks this Court to reconsider its ruling in *Diaz I* in light of the United States Supreme Court's continuing concern over the rights of juveniles in criminal court expressed most recently in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Diaz claims reconsideration is warranted because Salgado testified during the jury trial that Guevara's murder was his idea and that Diaz did not help. Diaz also claims that this Court did not know when it decided *Diaz I* that law enforcement placed a bottle of lighter fluid on the table in front of Diaz when interrogating her. To Diaz, that tactic was "an abominable practice with a 15-year-old defendant, clearly designed to intimidate her."

[¶39.] The State claims Diaz failed to preserve this issue for our review because she did not specifically move the *circuit court* to reconsider its suppression ruling. But Diaz seeks not to have the circuit court reconsider its decision—rather, she asks *this* Court to reconsider its ruling in *Diaz I*. Also, Diaz repeatedly challenged the admission of her statements before the circuit court. Before trial, she sought a motion in limine to prevent the admission of the evidence, which the

court denied. She also requested a standing objection during the trial, which the court granted. We address Diaz's issue.

[¶40.] A review of the United States Supreme Court's opinions in *Montgomery*, ___ U.S. ___, 136 S. Ct. 718 and *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) does not warrant this Court reconsidering its ruling in *Diaz I*, 2014 S.D. 27, 847 N.W.2d 144. The United States Supreme Court opinions adopt the view that juveniles are different than adults and, because so, certain sentences for juveniles are unconstitutional. Though *Diaz I* did not involve a review of Diaz's sentence, our decision adhered to the principle that Diaz, a juvenile, deserves "additional, not less, protection of [her] constitutional rights." 2014 S.D. 27, ¶ 22, 847 N.W.2d at 154 (alteration in original) (quoting *In re J.M.J.*, 2007 S.D. 1, ¶ 15, 726 N.W.2d 621, 628). We identified that "'children can be easy victims of the law' and 'may lack the sophistication, knowledge, or maturity to understand the ramifications of an admission[.]'" *Id.* So we examined Diaz's confession with "special care[.]" *Id.* A review of the record also reveals that this Court had before it, when deciding *Diaz I*, that law enforcement placed a bottle of lighter fluid in front of Diaz during the interrogation.

C. Jury Instructions on Imminent Fear

[¶41.] Diaz avers that the circuit court failed to adequately instruct the jury on her theory of the defense because the court's standard instruction on duress did not explain the heightened sense of imminent danger felt by an abused minor. In Diaz's view, the court's use of the general reasonable person standard failed to direct the jury to consider necessary juvenile considerations. She also claims that

her requested instructions were correct statements of the law and were warranted by the evidence. She argues that the court's refusal prejudiced her because "[w]ithout a specific instruction bringing attention to the fact that a child perceives danger in a different light than an adult," she was unable to "argue that the law supports a different standard for a child than for an adult." According to Diaz, "[h]ad the jury been instructed as requested the jury would likely have given more consideration to the defense of duress and would have probably returned a not-guilty verdict."

[¶42.] As we recently stated in *State v. Birdshead*, "[w]e review a circuit 'court's decision to grant or deny a particular instruction' and 'the wording and arrangement of its jury instructions' for an abuse of discretion." 2015 S.D. 77, ¶ 14, 871 N.W.2d 62, 70 (quoting *State v. Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d 258, 263). However, "'a court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error.'" *State v. Jones*, 2011 S.D. 60, ¶ 5 n.1, 804 N.W.2d 409, 411 n.1 (quoting *Kadrmas, Lee & Jackson, Inc. v. Morris*, 2010 S.D. 61, ¶ 5 n.1, 786 N.W.2d 381, 382 n.1). Whether the court gave incorrect or misleading instructions to a defendant's prejudice is a question of law reviewed de novo. *Birdshead*, 2015 S.D. 77, ¶ 14, 871 N.W.2d at 70. We, therefore, consider jury instructions "as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient." *State v. Waloke*, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 13, 772 N.W.2d 117, 121).

[¶43.] The circuit court instructed the jury that:

> A person may not be convicted of a crime based upon conduct engaged in because of the use or threatened use of unlawful force upon the defendant which force or threatened use thereof a reasonable person in his situation would have been unable to resist.
>
> This use or threatened use of force must be present and immediate and of such a nature as to induce in the defendant's mind the well-grounded apprehension of imminent death or serious bodily injury if the act is not done. Threat or fear of future injury is not sufficient. There must be no reasonable opportunity for the defendant to escape the danger without committing the crime. If you have a reasonable doubt whether the defendant committed the act with which the defendant is charged under the use or threatened use of force as it has been defined, you must return a verdict of not guilty.

Instruction 44. In regard to the Battered Woman's Syndrome, the court instructed the jury as follows:

> Evidence has been presented concerning the characteristics of a condition known as Battered Woman Syndrome. It is for you to determine if the defendant was suffering from Battered Woman Syndrome at the time of the alleged offense. If you find that the defendant was suffering from Battered Woman Syndrome, you may then use that evidence in evaluating any claim that the defendant feared imminent death or serious bodily injury if she did not carry out the criminal acts for which she is charged.

Instruction 45. Diaz did not object to the court's instructions. She requested that the court additionally instruct the jury as follows:

> Instruction No. 99: You may consider whether or not the defendant was battered or abused by Alexander Salgado. If you decide that the defendant was battered or abused by Alexander Salgado, you may consider that in determining the reasonableness of the defendant's perception of the immediacy of the harm in light of the defendant's experience of abuse.
>
> Instruction No. 100: The imminent danger element may be satisfied when a child believes she is in imminent danger of death or serious bodily harm even though her abuser is not physically abusing her at the time. This is because an abused child can experience a heightened sense of imminent danger arising from perpetual physical and mental abuse.

[¶44.] From our review of the court's instructions, the court adequately instructed the jury on Diaz's theory of the defense. The court's instructions informed the jury that it could consider whether Diaz (a juvenile) was a battered woman and that Diaz could not be convicted of a crime if her conduct was the product of a threatened use of unlawful force of which a reasonable person in Diaz's situation would not have been able to resist. These instructions connect Diaz's defense to her juvenile status—a reasonable person in Diaz's situation is a 15-year-old runaway, an emigrant, and a child sexually and physically abused. Also, Diaz directs this Court to no authority that the law on duress or imminent fear is different when the case involves a juvenile.

D. Diaz's 80-Year Sentence

[¶45.] We combine Diaz's last three issues. Diaz challenges the court's 80-year sentence for several reasons. She claims the court's sentence is an abuse of discretion because the court did not adequately consider that Diaz exhibited the potential for rehabilitation. She further claims that the court's sentence is grossly disproportionate to the conduct for which she was convicted. Lastly, Diaz argues that the court's sentence is a de facto life sentence in violation of the spirit of *Montgomery*, ___ U.S. ___, 136 S. Ct. 718, *Miller*, ___ U.S. ___, 132 S. Ct. 2455, *Graham*, 560 U.S. 48, 130 S. Ct. 2011, and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

1. Abuse of Discretion

[¶46.] Diaz claims the court abused its discretion when it sentenced her to 80 years without any time suspended because, in her view, the sentence disregarded

any potential for her rehabilitation. Amicus, Center on Wrongful Convictions of Youth (CWCY), argues that the circuit court considered only the violent nature of Diaz's crime, not her age, developmental immaturity, and vulnerability. CWCY also contends that the court disregarded peer pressure as a factor and instead faulted Diaz for seeking out her relationship with Salgado and her choice to continue that abusive relationship. According to CWCY, the circuit court "misses the point"—Diaz's coercive and abusive relationship directly mitigates Diaz's culpability and Diaz was less culpable than an adult making a similar decision. Amicus, The Consulate of Mexico (Consulate), claims that "the court failed to acknowledge the poverty and dislocation experienced by [Diaz] as a child brought by a single parent to the United States from Mexico at the age of eleven." It highlights that Diaz was brought to the United States less than four years before the commission of the crime. In the Consulate's view, the circuit court minimized and dismissed the factor of "family environment" when considering Diaz's culpability.

[¶47.] Before sentencing a defendant, the court is to "acquire a thorough acquaintance with the character and history of the [person] before it." *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412 (quoting *State v. Chase in Winter*, 534 N.W.2d 350, 354-55 (S.D. 1995)). "In fashioning an appropriate sentence, courts must also look to the character and history of the defendant. This requires an examination of the defendant's 'general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record' as well as rehabilitation prospects." *State v. Bruce*, 2011 S.D. 14, ¶ 29, 796 N.W.2d 397, 406 (quoting *State v. Bonner*, 1998

S.D. 30, ¶ 19, 577 N.W.2d 575, 580). A sentence within the statutory maximum is generally reviewed for an abuse of discretion, and we give great deference to the court's sentencing decision. *State v. McKinney*, 2005 S.D. 73, ¶ 10, 699 N.W.2d 471, 476.

[¶48.] The court identified that "[i]n this particular case," the court must be guided by the considerations set out in *Miller* because Diaz is a juvenile. In particular, the court noted its duty to consider mitigating factors. In doing so, the court noted that "children tend to have a lack of maturity and an underdeveloped sense of responsibility that can often lead to recklessness and impulsivity." The court also observed that children "are more vulnerable to negative influences and outside pressures, including from family and peers." The court observed "that a child's character is not as hardened, the mold is not as firm as that of most adults, their traits not as fixed and therefore more malleable, more capable of change on average than an adult." The court further identified four factors it would consider: (1) Diaz's chronological age and characteristics, including any immaturity and failure to appreciate risks and consequences; (2) Diaz's family and home environment; (3) the circumstances of the homicide, including the extent of Diaz's participation and the manner in which peer pressures may have affected her; and (4) the reasonable possibility of rehabilitation.

[¶49.] The court then identified Diaz's youth, her emigrant status, and her life in poverty. The court considered that Diaz "was a responsible, caring, loving person" up until a certain age and to some extent in the five years preceding sentencing. The court noted that it believed that Diaz does "have genuine sorrow[.]"

The court was "confident" that Salgado's abuse of Diaz was "true." But the court explained that "despite having the repeated efforts of your mother, your older sisters, school officials, Child Protection Services, [you] stayed with him, even after your wrists were slit and he left you to die, even after a protection order was entered against him to keep him away from you. And even when he planned to leave the State of Indiana alone, you insisted on abandoning your own daughter to go with him."

[¶50.] The court considered Diaz's role in Guevara's murder. To the court, Diaz repaid Guevara's "kindness with the worst kind of evil" and "for no reason." The court highlighted that the crime was deliberate, gruesome, wanton, and chilling, after which Diaz showed no remorse. The court found that Diaz exhibited prospects for rehabilitation but concluded that much of that would "need to take place behind the walls of an institution." The circumstances, in the court's view, warranted imposing a "serious punishment." From our review, the court became acquainted with Diaz through the trial and sentencing hearing and gave due consideration to the sentencing factors. The court did not abuse its discretion when it sentenced Diaz.

2. Gross Disproportionality

[¶51.] We conduct a de novo review to determine whether Diaz's sentence is grossly disproportionate to the gravity of the offense. *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486. Under the Eighth Amendment to the United States Constitution, "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001,

3009, 77 L. Ed. 2d 637 (1983). Yet, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed. 2d (1991) (Kennedy, J., concurring in part and concurring in the judgment). If an appearance of gross disproportionality results after the initial comparison of the gravity of the offense against the harshness of the penalty, only then will we compare Diaz's sentence to those imposed on other criminals for the same crime within or, if necessary, outside the jurisdiction. *Chipps*, 2016 S.D. 8, ¶¶ 34, 38, 874 N.W.2d at 487, 489.

a. Gravity

[¶52.] "[T]he gravity of the offense refers to the offense's relative position on the spectrum of all criminality." *Id.* ¶ 35. "Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." *Helm*, 463 U.S. at 292, 103 S. Ct. at 3011. As we noted in *Chipps*, additional principles aid in judging the gravity of the offense. 2016 S.D. 8, ¶ 35, 874 N.W.2d at 487-88.

> [N]onviolent crimes are less serious than crimes marked by violence or the threat of violence. . . . Stealing a million dollars is viewed as more serious than stealing a hundred dollars. . . . [A] lesser included offense should not be punished more severely than the greater offense. . . . It also is generally recognized that attempts are less serious than completed crimes. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. . . . Most would agree that negligent conduct is less serious than intentional conduct. . . . A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. This list is by no means exhaustive.

Id. (quoting *Helm*, 463 U.S. at 292-94, 103 S. Ct. at 3011 (internal citations omitted)). "In conducting the threshold comparison between the crime and the sentence, we also consider other conduct relevant to the crime" of conviction. *State v. Garreau*, 2015 S.D. 36, ¶ 12, 864 N.W.2d 771, 776.

[¶53.] The jury convicted Diaz of first-degree murder. In *State v. Rice*, we recognized that "homicide has long been considered 'the highest crime against the law of nature, that man is capable of committing.'" 2016 S.D. 18, ¶ 14, 877 N.W.2d 75, 80 (quoting 4 Williams Blackstone, *Commentaries* 177-78). "It is axiomatic that the unlawful, premeditated killing of one person by another . . . is one of the most egregious acts contemplated by our criminal justice system." *Garreau*, 2015 S.D. 36, ¶ 11, 864 N.W.2d at 775. Guevara's death resulted from a premeditated killing, and Diaz took no step to protect Guevara's life. Each act Diaz took during her role in the murder of Guevara exhibited an indifference to Guevara's life. Diaz lured Guevara to her death under the false pretense of an invitation to join her new friends for a cookout. Diaz then gave no warning to Guevara, despite having opportunity to do so at Walmart and when Diaz and Guevara were alone in the vehicle. Diaz's conviction of first-degree murder places Diaz's crime at the uppermost level on the spectrum of criminality.

b. Harshness

[¶54.] The harshness component looks, not to the maximum penalty available, but "to the penalty's relative position on the spectrum of permitted punishments." *Chipps*, 2016 S.D. 8, ¶ 37, 874 N.W.2d at 488. Diaz only challenges her sentence for first-degree murder. First-degree murder is a Class A felony and carries a maximum sentence of death or mandatory life and a maximum fine of $50,000. SDCL 22-16-12; SDCL 22-6-1. However, neither a sentence of death nor a sentence of mandatory life is a permitted punishment against a juvenile. *Roper*, 534 U.S. 551, 125 S. Ct. 1183; *Miller*, ___ U.S. ___, 132 S. Ct. 2455. This means that the spectrum of permitted punishments does not include or end at death as it would in our review of an adult sentence under the Eighth Amendment.[2] Under SDCL 22-6-1, the harshest penalty a court can impose against a juvenile convicted of this State's most severe crime is "a term of years in the state penitentiary, and a fine of fifty thousand dollars[.]"[3]

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2. In *Miller*, the United States Supreme Court recognized that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing." ___ U.S. ___, 132 S. Ct. at 2464. Therefore, the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at ___, 132 S. Ct. at 2466. Following the decision in *Miller*, we recognized that "[s]entencing courts must consider what the United States Supreme Court termed the 'mitigating qualities of youth.'" *State v. Springer*, 2014 S.D. 80, ¶ 14, 856 N.W.2d 460, 465 (quoting *Miller*, __ U.S. ___, 132 S. Ct. at 2467).

3. In *Springer*, we examined whether a sentence of 216 years constitutes a de facto life sentence in violation of the Eighth Amendment. 2014 S.D. 80, ¶ 15, 856 N.W.2d at 466. We recognized that neither *Graham* nor *Miller* explicitly applied to sentences for a term of years. Springer argued, however, that his (continued . . .)

See Helm, 463 U.S. at 298, 103 S. Ct. at 3013 ("consider the sentences that could be imposed on other criminals in the same jurisdiction").

[¶55.] In *Chipps*, we recognized that "[f]or sentences of imprisonment, the question is one of degree—e.g., '[i]t is clear that a 25-year sentence generally is more severe than a 15-year sentence[.]'" 2016 S.D. 8, ¶ 37, 874 N.W.2d at 488 (alterations in original) (quoting *Helm*, 463 U.S. at 294, 103 S. Ct. at 3012). The comparison is really "one of line-drawing." *Helm*, 463 U.S. at 294, 103 S. Ct. at 3012. However, in judging the harshness of the penalty, we also consider the possibility of parole. *Chipps*, 2016 S.D. 8, ¶ 37, 874 N.W.2d at 488.

[¶56.] Here, the court sentenced Diaz to 80 years with no time suspended for her conviction of first-degree murder. We also consider that Diaz would be eligible for parole at 55 years old, after 40 years served. *Chipps*, 2016 S.D. 8, ¶ 37, 874 N.W.2d at 489. Based on the gravity of the crime of first-degree murder, Diaz's sentence for a term of years allowing her the possibility of early release does not appear grossly disproportionate. Therefore, we will not compare Diaz's sentence to

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(. . . continued)

sentence violated *Graham* and *Miller* because the sentence is the functional equivalent of life without parole. *Id.* ¶ 17. We disagreed in part because Springer had the possibility of parole when he would be 49 years old. The Court noted that without evidence that 49 years old falls outside of Springer's practical life expectancy, his sentence could not be the functional equivalent of life without parole. *Id.* ¶ 22. We further concluded that Springer had a meaningful opportunity to obtain release as required by *Graham*. *Id.* ¶ 25.

Similarly, here, the circuit court specifically considered the mitigating qualities of youth and Diaz's opportunity to obtain release. Diaz would be eligible for parole possibly after 40 years served. Diaz presented evidence that her life expectancy at the time of trial was 83.7 years. If she obtained release on parole after serving 40 years, Diaz would be 55 years old.

those imposed on other criminals for the same crime within or outside the jurisdiction.

3. De Facto Life Sentence

[¶57.] Diaz relies on her expert testimony that she could live for an estimated 68.7 additional years. At the time of her sentence, five years had elapsed and Diaz was 20 years old. According to Diaz's evidence, a sentence of 80 years is beyond her life expectancy and constitutes a de facto life sentence in violation of *Montgomery*, ___ U.S. ___, 136 S. Ct. 718, *Miller*, ___ U.S. ___, 132 S. Ct. 2455, *Graham*, 560 U.S. 48, 130 S. Ct. 2011, and *Roper*, 543 U.S. 551, 125 S. Ct. 1183. CWCY joins Diaz's argument, asserting that Diaz's sentence is the equivalent of life without parole because the sentence fails to provide a meaningful opportunity for release. CWCY insists that "[p]roviding parole eligibility after four decades in prison denies [Diaz] an opportunity to live a meaningful life in the community and contribute to society."

[¶58.] Diaz was 20 years old when she was sentenced to 80 years in prison, but had already been incarcerated for five years. Based on SDCL 24-15A-32, she could be released on parole after serving 40 years in prison. Diaz asks this Court not to "consider possible parole as a factor in deciding whether the court has imposed a life sentence." But Diaz's meaningful opportunity for release requires this Court to consider Diaz's opportunity for parole. *See Springer*, 2014 S.D. 80, ¶ 24, 856 N.W.2d at 469. Diaz's sentence is not a de facto life sentence. Diaz directs us to no law supporting that release at 55 years old or after 40 years in prison means Diaz is without a meaningful opportunity to obtain release. *See id.* ¶ 25.

[¶59.] Affirmed.

[¶60.] GILBERTSON, Chief Justice, and ZINTER and SEVERSON, Justices, and SOMMERS, Circuit Court Judge, concur.

[¶61.] SOMMERS, Circuit Court Judge, sitting for KERN, Justice, disqualified.