IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS QUEVEDO,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI L. LINNGREN

APPELLANT'S BRIEF

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NOTICE OF APPEAL WAS FILED March 24, 2018

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THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS QUEVEDO,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Carlos Quevedo, will be referred to by name. Plaintiff and Appellee, the State of South Dakota will be referred to as "State." All references to the transcript of the sentencing hearing held March 22, 2018, shall be referred to as "SH" followed by the appropriate page number(s). All references to the transcript of the change of plea hearing held November 7, 2017, shall be referred to as "COP" followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant and Appellant, Carlos Quevedo, appeals from the Judgement of Conviction, entered by the Honorable Heidi L. Linngren, Circuit Court Judge, on March 22, 2018. Quevedo filed a timely Notice of Appeal on March 24, 2018. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. A 90-YEAR SENTENCE IS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE AND THEREFORE IS UNCONSTITUTIONAL.

2. A 90-YEAR SENTENCE IT IS DISPROPORTIONATE IN THIS CASE.

Montgomery v. Louisiana, 577 U.S. 460, 136 S. Ct. 718 (2016)
Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012)
Graham v Florida, 560 U.S. 48,130 S. Ct. 2011 (2010)

STATEMENT OF THE CASE

On November 2, 2017, Carlos Quevedo plead guilty to second-degree murder, pursuant to SDCL 22-16-7, in the death of Kasie Lord, on January 18, 2017, when he was only 17 years old. COP 9. On March 24, 2018, the Honorable Heidi L. Linngren, Circuit Court Judge, Seventh Judicial Circuit, imposed a 90-year sentence. SH 236. Quevedo filed a timely Notice of Appeal on April 24, 2018.

STATEMENT OF THE FACTS

Carlos Quevedo was born on September 21, 1999, to Alisia Quevedo and Christopher Yellow Eagle. SH 150. Quevedo's father was in and out of his life, attending roughly only four of Quevedo's birthdays. SH 151. Quevedo was exposed to both of his parents using methamphetamine, his father serving time in prison and many episodes of physical abuse between his parents. Quevedo was exposed to the abusive relationship with his parents at an early age. Quevedo's mother recalled when he was roughly four years old, he had tried to stop a fight between his parents by stepping in between them. SH 154.

Quevedo had an impressive school record, being described by his teachers as respectful and well mannered. SH 155. Quevedo went out of state to Riverside Indian School for high school in Oklahoma and was set to walk at graduation in May of 2017. SH

12. After high school, Quevedo had plans to join the military, like many past generations had done on his father's side of the family.

On January 18, 2017, Quevedo spent the early portion of the day getting rehired at McDonald's in Rapid City. COP 9. That evening, Quevedo was hanging out with his girlfriend and during a period of a few hours, consumed 16-Cold Coricidin pills. COP 10. Quevedo proceeded to meet up with his friends Tuffy, Cody, and Jordan at Quevedo's apartment. COP 9-10. The group smoked four blunts and shared a liter of Sprite, which was also mixed with Robitussin. COP 10. By this time Quevedo was "feeling everything else from those pills to the weed leading up to the Robitussin." COP 10.

Quevedo and Cody proceeded to drive to Fresh Start on Cambell Street, where Cody came into possession of a full gallon of New Amsterdam Vodka. COP 10-11. Quevedo returned to his apartment by car and then proceed to walk to the Circle S with Tavio, Cody, and Jordan, while the four boys consume roughly half the bottle of Vodka. COP 11. The four boys proceed to do a "dash and grab" at the Circle S and then proceed to walk towards South Middle School. COP 11. Jordan and Tavio took the vodka and left Cody and Quevedo near South Middle School. COP 12. Quevedo and Cody were going through cars that were unlocked in the parking lot, from which Cody found a green metallic knife. COP 12. Quevedo took the knife from Cody due to Cody's high-level of intoxication. COP 12. The two boys then proceeded to Loaf 'N Jug, during this time Quevedo's memory was unclear due to him "blacking out" and being highly intoxicated. COP 12. The next thing Quevedo could remember was being in Cody's house and Cody's dog licking blood off of Quevedo's hand. COP 12-13.

Carlos Quevedo's state of maturation and potential for rehabilitation were noted by numerous witnesses. His remorse for the crime and his acknowledgement of the harm he

caused not only to the victim, but also her family, was demonstrated at both the change of plea hearing and the sentencing hearing where Quevedo took full responsibility for the death of Kasie Lord. SH 10. At Sentencing, defense counsel presented the judge with, (1) an apology letter written by Mr. Quevedo, (2) a forensic psychological evaluation with a treatment needs assessment by Dr. Hastings, (3) letters from teachers and pastors on behalf of Quevedo, (4) 22-character letters from family, and 24-character letters from other loved-ones.

At sentencing, Quevedo read aloud a letter to the Lord family stating, "But after I saw and heard the video, it hurts and kills my heart and is more than I can handle. Because I can't remember, it's no excuse at all for what I did. I don't know how to say I am sorry. This is so bad I don't even know where to start." SH 218.

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. A 90-YEAR SENTENCE IS THE FUNCTIONAL EQUIVALENT TO A SENTENCE OF LIFE WITHOUT PAROLE AND THEREFORE IS UNCONSTITUTIONAL.

The 90-year sentence imposed in this case is the legal equivalent to a life sentence without parole. By imposing such a sentence on Quevedo— a 17-year-old at the time of the crime—constitutes cruel and unusual punishment. The United State 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 the above 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 does not qualify as a proportionate sentence, "hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S. Ct. at 736.

The 90-year sentence imposed on Quevedo condemns him to die in prison. Quevedo will be 107 years old before the full-term of his sentence expires. A sentence of 90-years gives no reasonable expectation for release and therefore does not give Quevedo any meaningful hope for life outside of prison. Courts around the country have found that similar lengthy term-of-year 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).

For purposes of the Eighth Amendment, the sentence in this case fails to provide any meaningful opportunity for release necessary to distinguish it from a life-without-parole sentence. Under South Dakota law, a 90-year sentence requires that Quevedo not be eligible for parole for 45 years, when he is 62 years old. SDCL 24-15A-32. A sentence that requires Quevedo to be imprisoned for 45 years before even being eligible for the

possibility of parole denies him any meaningful opportunity for release and therefore is equivalent to a life sentence. 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.

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 "just over 45 years, or where (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.*

Furthermore, in *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that "while 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.

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 Quevedo's earliest possible release date. 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 the case, of 90 years, is such a de facto life sentence. For the reasons discussed above, 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.

II. A SENTENCE OF 90 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 standard of decency that marks the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86 101 (1953).

Applying these principles, the United States Supreme Court states 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." (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 Quevedo 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.

Further, as detailed in the Statement of Facts, there were significant additional mitigating circumstances in this case. Dr. Hastings presented testimony relating to her evaluation of Quevedo and different psychological assessments that she completed with him. SH 173-174. Dr. Hastings completed neuropsychological testing referred to as the MMPI-A which returned a normal result. SH 175-176. Dr. Hastings stated, "I'd never seen something like that," "the testing shows an average psychological functioning for a young man his age. SH 176. Dr. Hastings went on to complete an additional six to seven

tests with Quevedo, which all confirmed very similar results to the MMPI-A. SH 178-179. Dr. Hastings expressed her surprise at how normal the test results were which lead her to think "was this a blackout?" SH 179-180. Overall, Dr. Hastings' evidence established that this was not a case where "rehabilitation is impossible." *Montgomery,* 136 S. Ct. at 733.

The State failed to provide any evidence to contradict or rule out that Quevedo may have been in a state of a blackout or a high-level of intoxication. The State failed to provide a BAC for Quevedo, there was never a blood or UA sample taken the day of his arrest, the State simply referred to the security video, arguing that he walked as if he was not blacked out.

Quevedo's defense counsel put on record numerous letters of support from his community and many character letters from family and friends. Quevedo has a superb high school record from his time at Riverside in Oklahoma and had a minor juvenile record. Moreover, despite all the mitigating evidence presented at the sentencing hearing in this matter—most of which was uncontested by the state—the 90-year sentence is much harsher than sentences given to other children in South Dakota since *Miller*, further illustrating that the sentence is disproportionate.

Jessie Owens who was the same age as Quevedo (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 resentenced to 40 years.[1] Braiden McCahren, who was 16 years old 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

[1] *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.

death of Dalton Williams.[2] 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 sentence Mr. McCahren to only 25 years with 15 years of that time suspended, making Mr. McCahren parole eligible after only five-years served. *State v. McCahren*, 2016 S.D. 34, ¶ 4, 26.

In light of the cases listed above and the strong mitigating evidence presented to the trial court, the sentence in this case is disproportionate and violates Quevedo's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

CONCLUSION

Based on the arguments above and the authorities cited, Carlos Quevedo respectfully requests that this Court vacate the Judgement in this matter and remand this action for resentencing.

Dated this _____ day of March 2019.

GREY &
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_____
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[2] *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/.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

CARLOS QUEVEDO,
Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Paul Eisenbraun, counsel for Defendant/Appellant, does submit the following:

The Appellant's Brief is 10 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there are a total of 2,824 words in the body of the brief.

Dated this 1st day of March 2019.

GREY &
EISENBRAUN LAW

/s/ Paul Eisenbraun
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

CARLOS QUEVEDO,

Defendant and Appellant.

The undersigned hereby certifies that he served two true and correct copies of the Brief of the Defendant/Appellant, Carlos Quevedo, upon the persons herein next designated all on the date shown by email, and mailing said copies in the United States Mail, first-class postage prepaid, in envelopes addressed to said addresses; to wit:

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Mark Vargo
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Rapid City, SD 57701
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Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 1st day of March 2019.

GREY &
EISENBRAUN LAW

_____
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APPENDIX

Appendix **Page**

STATE OF SOUTH DAKOTA.	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	File No. CRI 17-242
Plaintiff,	)	
vs.	)	**JUDGMENT**
CARLOS C. QUEVEDO, DOB: 09-21-99 CR#: 17-200787	)	
Defendant.	)	

On the 22nd day of March, 2018, the Defendant, CARLOS C. QUEVEDO, being present personally and being represented by and through his attorney, Randal Connelly, Rapid City; the State being represented by State's Attorney, Mark A. Vargo, and Deputy State's Attorney, Sarah E. Morrison; the Defendant having previously been arraigned on an Indictment alleging the offense of COUNT 3: SECOND DEGREE MURDER (CLASS B FELONY), committed on or about January 18, 2017, in violation of SDCL 22-16-7; the Defendant having entered a plea of guilty on November 7, 2017, to Count 3 of the Indictment as charged; the Court finding the plea to have been entered knowingly, freely, and voluntarily; a factual basis having been found for accepting the plea; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, CARLOS C. QUEVEDO, upon your conviction for the crime of SECOND DEGREE MURDER (CLASS B FELONY), being under eighteen years of age at the time of the offense herein and pursuant to SDCL 22-6-1.3.

SAO
CSO
Hen
Tran
3-26-18

be and you hereby are sentenced to serve Ninety (90) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota; and it is further

ORDERED, that the Defendant receive credit for time already served in the Pennington County Jail in the amount of Four Hundred Twenty-eight (428) days plus credit for each day served in the Pennington County Jail while awaiting transport to the South Dakota State Penitentiary; and it is further

ORDERED, that the Defendant pay through the Pennington County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Forty Dollars ($40.00); plus the crime victims' compensation surcharge pursuant to SDCL 23A-28B-42 in the amount of Two Dollars and Fifty Cents ($2.50); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-one Dollars and Fifty Cents ($61.50); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the grand jury transcript which has been incurred in this action in the amount of One Hundred One Dollar and Twenty-five Cents ($101.25); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the cost of services rendered from Forensic ITC Services in the amount of One Thousand Five Hundred Eighty-two Dollars and Eighty-six Cents ($1,582.86); and it is further

ORDERED, that any bond which has been posted in this matter be discharged and the bondsman exonerated; and it is further

ORDERED, that the Defendant be remanded to the custody of the Pennington County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 23 day of March, 2017, effective the 22nd day of March, 2018.

BY THE COURT:

The Honorable Heidi Linngren
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts
By: _____ (Deputy)
(SEAL)

NOTICE OF RIGHT TO APPEAL

You, CARLOS C. QUEVEDO, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 2 6 2018
Ranae Truman, Clerk of Courts
By _____ Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS C. QUEVEDO,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI L. LINNGREN
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed April 24, 2018

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS C. QUEVEDO,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." Carlos C. Quevedo, Defendant and Appellant, will be identified as "Defendant," or "Quevedo."

References to the transcripts of the February 1, 2017 grand jury proceedings; March 7, 2017 arraignment; August 20, 2017 waiver of transfer hearing; the November 7, 2017 change of plea proceeding; and the March 22, 2018 sentencing hearing will be designated as "GJT," "ART," "WTH," "CPT," and "SNT," respectively. Citations to the settled record; presentence report; sentencing exhibits; and Defendant's brief will be identified as "SR," "PSR," "EX," and "DB," respectively. All references will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This appeal originates from a Judgment, which was filed on March 26, 2018, by the Honorable Heidi L. Linngren, Circuit Court Judge, Seventh Judicial Circuit, Pennington County. SR 160-62. On April 24, 2018, Defendant filed a Notice of Appeal. SR 561-62. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER DEFENDANT'S PENALTY OF 90 YEARS, WITH CREDIT FOR TIME SERVED, IS THE LEGAL EQUIVALENT OF A LIFE SENTENCE AND UNCONSTITUTIONAL FOR A SEVENTEEN-YEAR-OLD SECOND DEGREE OFFENDER?

Judge Linngren's individualized sentencing decision was appropriate.

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

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)

State v. Jensen, 2017 S.D. 18, 894 N.W.2d 397

State v. Charles, 2017 S.D. 10, 892 N.W.2d 915, *cert. denied,* 138 S.Ct. 407 (Oct. 30, 2017)

II

WHETHER DEFENDANT'S 90-YEAR PENITENTIARY SENTENCE, WITH CREDIT FOR TIME SERVED, IS GROSSLY DISPROPORTIONATE TO HIS CRIME OF SECOND DEGREE MURDER?

The trial court's sentencing analysis was proper.

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

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)

State v. Charles, 2017 S.D. 10, 892 N.W.2d 915, *cert. denied,* 138 S.Ct. 407 (Oct. 30, 2017)

State v. Diaz, 2016 S.D. 78, 887 N.W.2d 751

STATEMENT OF THE CASE

This matter stems from Defendant's brutal knife attack upon the female victim, which resulted in her death from 38 stab wounds. SR 15-17, 124, 157, 160-62; GJT 21-70; CPT 131-42; SNT 631-857; EX 1-9; PSR 164-73, 187-329, 490-539. On January 19, 2017, the Pennington County State's Attorney filed a Complaint, which charged Quevedo with: Count 1--First Degree Murder, Class A felony, in violation of SDCL 22-16-4(2); Count 2--Second Degree Murder, Class B felony, in violation of SDCL 22-16-7; and Count 3--First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-30-1, 22-30-6 and 22-30-7. SR 1-2. This prosecutor filed an Amended Complaint on the same date, which charged Defendant with: Count 1--First Degree Murder, Class A felony, in violation of SDCL 22-16-4(2); Count 2--Second Degree Murder, Class B felony, in violation of SDCL 22-16-7; and First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-30-1, 22-30-6 and 22-30-7. SR 11-12.

On February 1, 2017, a Pennington County Grand Jury issued an Indictment, which charged Quevedo with: Count 1--First Degree Murder, Class A felony, in violation of SDCL 22-16-4(1); Count 2--First Degree Murder (While Engaged in the Perpetration, or Attempted Perpetration, of a Robbery), Class A felony, in violation of SDCL 22-16-4(2); or in the alternative, Count 3--Second Degree Murder, Class B felony, in violation of SDCL 22-16-7; and Count 4--First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-30-1, 22-30-6 and 22-30-7. SR 15-17; GJT 19-71. The Honorable Heidi L. Linngren conducted an arraignment proceeding on March 7, 2017. ART 599-616. On August 30, 2017, the court held a waiver of transfer hearing to make sure that Defendant, who was represented by counsel, understood the ramifications of proceeding in adult court. WTH 889-901.

The Pennington County State's Attorney extended a written plea offer to Quevedo on August 17, 2017. SR 124. Judge Linngren conducted a change of plea proceeding on November 7, 2017. SR 124; CPT 126-44. During this hearing Defendant (still represented by his attorney) knowingly, voluntarily and intelligently pled guilty to Second Degree Murder. SR 124; CPT 127-42. On March 22, 2018, this judge held a sentencing proceeding and required that Quevedo serve a

90-year penitentiary sentence, with credit for 428 days of time served.[1] SR 160-62; SNT 622-857; EX 1-9; PSR 164-73 and attachments. The court also noted that Defendant had the opportunity for parole eligibility by age 62, or within his natural lifetime. SR 160-62; SNT 842-57; PSR 164-73 and attachments. *State v. Charles,* 2017 S.D. 10, ¶¶ 11-15, 30, 892 N.W.2d 915, 920-21, 924, *cert. denied,* 138 S.Ct. 407 (Oct. 30, 2017).

On March 23, 2018, the prosecutor filed a Dismissal of Count 4, of the Indictment. SR 15-17, 157. Judge Linngren filed a Judgment on March 26, 2018. SR 160-62. Quevedo filed a Notice of Appeal on April 24, 2018. SR 561-62. Additional procedural details will be addressed where appropriate.

STATEMENT OF FACTS

A. Facts Concerning Defendant's November 7, 2017 Plea Hearing.

The facts in this case are derived from the transcripts of the grand jury proceeding; the plea hearing; the sentencing proceeding; the exhibits; and the presentence report. GJT 19-70; CPT 126-44; SNT 622-827; EX 1-9; PSR 164-73 and attachments. At the time of his crime, Defendant (DOB 09/21/1999) was seventeen years old; Quevedo had had at least some experience with the juvenile justice system because he had abused alcohol and marijuana and absconded from

[1] 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 when he or she is less than eighteen years of age.

juvenile probation; and Defendant had been ensnarled in the (adult) criminal justice system due to his parents' use of controlled substances. CPT 130-32, 134-41; SNT 628-29, 846, 849, 853-55; EX 1-9; PSR 164-73 and attachments. *State v. Quevedo,* 2014 S.D. 6, ¶¶ 6 n.2, 16-18, 843 N.W.2d 351, 353-54 n.2, 356. Quevedo also repeatedly stabbed Kasie Lord to death because she tried to prevent the theft of a case of beer from the Loaf 'N Jug, which was located on Mt. Rushmore Road in Rapid City, South Dakota. GJT 42-65; CPT 134-42; SNT 630-31; 636-857; EX 1-9; PSR 164-73 and attachments.

As previously mentioned, Judge Linngren conducted a plea proceeding on November 7, 2017. CPT 126-44. This judge made certain that Defendant (eighteen years old), who was represented by counsel, understood that he had agreed to be transferred to adult court and was waiving any request for a juvenile transfer hearing; that Quevedo was aware that he could potentially receive a lengthy term of years sentence with the possibility of parole, but not a mandatory life sentence; and that Defendant had not been threatened, coerced, or promised anything to make him plead guilty to Second Degree Murder. WTH 889-901; CPT 127-34; SNT 627-35; PSR 354-71. *State v. Jensen,* 2017 S.D. 18, ¶¶ 1, 9, 894 N.W.2d 397-98, 400 (citing *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)); *Charles,* 2017 S.D. 10, ¶¶ 1, 9, 19, 892 N.W.2d at 915, 919, 922. In addition, this judge discussed the terms of the (written) plea bargain

with Defendant; reviewed Quevedo's educational background and high school diploma from Riverside Indian School, in Oklahoma; and verified that he was not under the influence of alcohol or any other substances, such as prescription medicines. CPT 127-30; SNT 627-33; PSR 372-418. The court also detailed that Defendant was giving up his rights to a jury trial, to cross-examine or confront the State's witnesses against him, "to bring forward any witnesses" on his own behalf, and to remain silent. CPT 131; SNT 629. *State v. Outka,* 2014 S.D. 11, ¶¶ 32-36, 844 N.W.2d 598, 607-08 (guilty plea was knowing and voluntary under a totality of the circumstances).

Along these same lines, Judge Linngren made sure that Defendant had reviewed the ramifications of his plea deal with his attorney and any possible mental illness, insanity, or diminished capacity defenses; that there was no doubt in Quevedo's mind that he had repeatedly stabbed the victim to death, although he purportedly had difficulty remembering certain aspects of this crime; and that Defendant understood that his self-induced state of intoxication and abuse of various substances did not create any justification for his criminal actions. CPT 132-42; EX 3-4. The court also confirmed that a factual basis existed for Quevedo's guilty plea based upon his own remarks, the videotape and audio tape evidence, the grand jury transcript, police reports, and entire criminal record. GJT 42-65; CPT 131-38; SNT 630-36; EX 3-4; PSR 164-73, 188-329, 354-71, 490-

519, 527-39. *McDonough v. Weber,* 2015 S.D. 1, ¶ 39, 859 N.W.2d 26, 42-43 (factual basis may come from anything in the record).

B. Facts Relating to Defendant's March 22, 2018 Sentencing Hearing.

On March 22, 2018, Judge Linngren held a sentencing hearing. SR 160-62; SNT 622-857; PSR 164-73 and attachments. During this proceeding, four law enforcement officers testified for the State and described their roles in investigating Kasie's brutal murder. SNT 636-78. Brian Fletcher, a police officer, indicated that he had been dispatched on January 18, 2017 at 4:41 a.m. to the Loaf N' Jug on Mount Rushmore Road, where he found Kasie lying on her back in the parking lot, with her eyes open and gasping for air, while a stream of blood drained into the street. SNT 636-40; EX 4; PSR 490-96. This officer stated that he had borrowed a knife from another first responder and used it to cut off the two shirts, which Kasie had been wearing, and that there were holes everywhere in her body from multiple stab wounds, but that none of these injuries were bleeding anymore because no more blood was left in the victim's system. SNT 639-40; EX 6-8; PSR 490-96, 508-19, 527-37. Fletcher also noted that he had held Kasie's hand until an ambulance arrived and transported her to the hospital, where the victim died, after a team of medical professionals tried to save her life. SNT 640-42.

Matthew Almeida, another investigator, explained how he had identified Defendant as the perpetrator of Kasie's murder. SNT 642-48.

Almeida detailed that Kasie's medical situation had looked very bad when he arrived at the crime scene, and that the stab wound that stood out the most was in the center of the victim's chest over her heart. SNT 643-44. This investigator indicated that he had started looking around for evidence and noticed some bloody footprints leading from Kasie's body to the southeast, which had a distinctive tread pattern. SNT 644-45; EX 1-2. In addition, Almeinda related that it had taken him about twenty minutes to follow the zig-zag pattern of these bloody footprints through the parking lot of the Loaf N' Jug, across Mount Rushmore Road, and over the snow to the backyard of a residence, which was located at 715 St. Andrew Street. SNT 645-47; EX 1-2. This officer also searched a detached garage in the backyard and then went inside the nearby home, where Defendant was being handcuffed by other law enforcement personnel and confirmed that the tread pattern on the bottom of Quevedo's shoes matched the bloody trail in the snow, which he had been following. SNT 647-48; EX 1-2.

Sonny Melanson, a police officer, described how he had gone to 715 St. Andrew Street to collect evidence, and discovered two bloody gloves outside this residence in the snow. SNT 650-52. This officer emphasized that the homeowner had given him permission to enter the premises, where he found Defendant, who was a friend of the homeowner's son. SNT 651-52. In addition, Melanson indicated that he had placed Defendant, who was very calm, in handcuffs and

transported Quevedo to jail in his patrol car. SNT 652-57. This officer also detailed that Defendant had asked why he was being detained and if the stabbing in question had taken place at the Loaf N' Jug on Rushmore. SNT 653-54. Melanson further noted that Quevedo had not smelled like alcohol or seemed to be high or intoxicated, and that an almost full case of beer had been found at the crime scene, so no sobriety tests were conducted in this case. SNT 652-57.

Steve Neavill, a detective, testified that he had retrieved a surveillance video (no sound) from the Loaf N' Jug, which had multiple views, and that one of these angles had captured Defendant stabbing Kasie with a knife inside this business, near the front entrance. SNT 657-61; EX 3. This detective emphasized that there was another camera angle, which pointed to the south along the front sidewalk outside of the store, and that it showed that Defendant could have made the choice to walk away from Kasie, but instead Quevedo had deliberately pursued the victim and continued to stab her. SNT 661-62; EX 3. In addition, Neavill indicated that Kasie's autopsy report, which had been prepared by Dr. Donald Habbe (a forensic pathologist), reflected that the victim had been stabbed 38 times and that she had incise wounds on her left hand, which were defensive in nature. SNT 664-67; EX 5-8. This detective also related that he had collected the audio recording of Kasie's 911 call to police and that no blood or urine tests had been obtained from Quevedo. SNT 662-64, 673-74; EX 4.

Neavill further stated that Defendant had been housed at the Juvenile Services Center and that a note had been found in his room, in which the writer asked the person receiving the note to contact a certain friend, so that the black bandana coat that Quevedo had been wearing when he killed the victim could be removed from its hiding place in the basement ceiling tiles, of the home located at 715 St. Andrew Street. CPT 134-38; SNT 667-69,676-77; EX 9; PSR 156.

As for victim impact evidence, Christopher Lord, the victim's ex-husband, testified for her family and explained that Kasie's death had been very traumatic for everyone and that it splintered their hearts that this grandmother's life had been so violently extinguished. SNT 678-81. In addition, this witness related that Kasie had provided continuity and stability for her children and grandchildren, and that the victim's murder had impacted upon the families of everyone involved and the entire community. SNT 671-81. He also noted that the victim had always done her best to keep the family together and was full of love and joy. SNT 680-81.

Moreover, a number of Defendant's family members, which included his paternal grandfather, several aunts and uncles, and his mother took the stand for the defense at sentencing and described Quevedo as a quiet and respectful young man, who had experienced a violent and dysfunctional family life, because his father physically abused his mother and was frequently in prison due to his drug

problems. SNT 694-752, 770-94. In particular, Defendant's mother indicated that she and her husband had fought a lot and that they had been addicted to methamphetamine, during Quevedo's childhood; that Defendant had been eleven or twelve years old, when his parents had been arrested by a drug task force, and that he had been trying to keep the police out of their home; that Quevedo had always tried to help his mother out with his younger siblings; that Defendant had problems in school because of a learning disability, had held a job and participated in a boxing program, although he smoked marijuana on a daily basis; that Quevedo had graduated from high school at Riverside Indian School and had gotten good grades; and that he wanted to join the military. SNT 772-86, 793-94. *Quevedo,* 2014 S.D. 6, ¶¶ 6 n.2, 16-18, 843 N.W.2d at 353-54 n.2, 356. One of Defendants friends also related that he had been with Quevedo and a group of their buddies shortly before Kasie's murder on January 18, 2017; that Defendant had said that he had taken Robitussin and that they had smoked pot together; and that everyone had been chugging a party-sized bottle of Amsterdam Vodka. SNT 757-69. *Kleinsasser v. Weber,* 2016 S.D. 16, ¶ 24, 877 N.W.2d 86, 94-95 (second degree murder is a general intent crime and voluntary intoxication is not a defense). This young man further noted that Defendant and his companions had been car hopping, and stealing from the interiors of unlocked cars, when someone found a green knife, which ended up in Quevedo's possession. SNT 763-68; PSR 497-98.

Dr. Teri Hastings, a forensic psychologist and defense expert, explained that she had interviewed the Defendant several times and conducted a mental health evaluation, which included testing Quevedo for sociopathic and antisocial personality traits, and disturbed thinking, such as schizophrenia, delusions, manic-depression, or bipolar disorder. SNT 796-801, 804-05, 811-12, 816-20; PSR 354-66. This expert detailed that she had administered a number of tests in Defendant's case, and that he had an average psychological function for a young man his age, but that Quevedo showed some signs of drug and alcohol misuse or abuse. SNT 797-801, 812, 816-20. In addition, Dr. Hastings testified that she could not determine whether or not Defendant had experienced a so-called blackout, at the time of Kasie's stabbing death, but that Quevedo had claimed that he took 16 Coricidin Triple C's, which contained Dextromethorphan, and could cause hallucinations or dissociative symptoms in very high doses; and that Defendant had said that he was drinking from a liter of Sprite that contained 4 or 5 bottles of Robitussin. SNT 801-06, 813-20. This expert also opined that this was an uncertain, or gray area, and that she could not say for sure what had happened. SNT 803, 814-20.

As far as the mitigating factors of youth, Dr. Hastings detailed that she had worked with juveniles at the Juvenile Services Center after referrals from other professionals, and that she had studied the scientific literature, which dealt with the development of adolescent

brains. SNT 807-20. This expert pointed out that an adolescent brain is not fully developed until about age 25; that juveniles frequently have poor decision-making skills and are subject to peer pressure; and that they have heightened emotional responses and poor impulse control. SNT 808-809. Dr. Hastings also related that the biographical data, in Defendant's case, reflected that he had had a violent upbringing when he was very young and that his father had often been in prison; that Quevedo was unusual because he had not dropped out of high school, wanted to get his college degree, and join the military; and that he seemed to have taken responsibility for his crime. SNT 810-11.

Furthermore, this expert admitted, during cross-examination, that Defendant had made a voluntary decision to consume alcohol, cold medicines and marijuana on January 18, 2017; that Quevedo did not appear zombie-like, in the surveillance video from the Loaf N' Jug (EX 3), when he made the choice to turn around and repeatedly stabbed the victim outside of this store; and that he had deliberately fled the crime scene and hid out at a friend's home. SNT 813-16, 818-99, EX 3. *State v. Owens,* 2002 S.D. 42, ¶¶ 80-84, 643 N.W.2d 735, 755-56 (inference of guilt exists if flight takes place immediately after the commission of a crime). In addition, Dr. Hastings reiterated that she could not tell if Defendant had experienced some kind of blackout, or when he came out of it; and that Quevedo had made a conscious effort to conceal the bloody clothing, which he had been wearing at the time of Kasie's

murder, from the police. CPT 134-38; SNT 814-17. This expert also confirmed that Defendant was capable of killing again, if he guzzled Coricidin Triple C's and Robitussin. CPT 134-38; SNT 816-17.

Finally, Judge Linngren took into consideration the testimony provided by all of the witnesses at sentencing; the videotape (EX 3) and audio tape (EX 4) evidence; Defendant's apology for his crime and letters of support; the victim impact statements; the presentence report; and the extensive arguments from both parties about the key sentencing factors in Quevedo's case. SR 160-62; SNT 842-57; PSR 164-73 and attachments. This judge applied the tenets of *Miller* and determined that Defendant had been seventeen years old (and only 8 months shy of adulthood), when he repeatedly stabbed Kasie to death; that Quevedo had a low-level juvenile record, had graduated from high school in 2017, and had a good work history; that Defendant was far more mature for his age than most teenagers because of his dysfunctional home life; and that he had frequently been the most responsible member of his family, while his parents abused illegal drugs. SNT 846-47, 849-55; PSR 164-73 and attachments. *Jensen,* 2017 S.D. 18, ¶ 11, 894 N.W.2d at 400 (citing *Miller,* 132 S.Ct. at 2467-69). In addition, Judge Linngren pointed out that Dr. Hastings' psychological tests had reflected that Defendant's ability to understand and make decisions was normal; that Quevedo had voluntarily engaged in underage drinking, abused cold medicines, and smoked marijuana; and that he had had more

experience with the criminal justice system than most youngsters his age because of his parents' methamphetamine problems. SNT 848-54; PSR 164-73 and attachments. *Quevedo,* 2014 S.D. 6, ¶¶ 6 n.2, 16-18, 843 N.W.2d at 353-54 n.2, 356. This judge also detailed that the police reports and videotape evidence (EX 3) had shown that Defendant was the leader of his group of male friends; that Quevedo had acted alone when he stabbed Kasie 38 times; that Defendant had had the chance to stop attacking the victim at the front door of the Loaf N' Jug, but had continued to act like a predator, who wanted to make sure that his quarry was dead; and that Quevedo had used the same swearwords (EX 4), during Kasie's stabbing death, that his father had yelled while beating this youngster's mother. SNT 848-54; PSR 357, 490-519, 527-39. The court further ordered that Defendant serve a 90-year penitentiary sentence for second degree murder and gave him credit for time served, which resulted in the possibility for parole (approximately 12/06/2061) by age 62 years, or within his life expectancy. SR 160-62; SNT 842-57; PSR 164-73 and attachments. Additional procedural details will be discussed where necessary.

ARGUMENTS

I

DEFENDANT'S PENALTY OF 90 YEARS, WITH CREDIT FOR TIME SERVED, IS NOT THE LEGAL EQUIVALENT OF A LIFE SENTENCE AND UNCONSTITUTIONAL FOR A SEVENTEEN-YEAR-OLD SECOND DEGREE MURDER OFFENDER.

A. Background.

Defendant protests, in his first issue, that Judge Linngren violated his state and federal constitutional rights, when the court imposed a 90-year penitentiary sentence upon Quevedo, for Second Degree Murder. DB 4-7. In addition, Defendant contends that this 90-year penalty "condemns him to die in prison" because Quevedo "will be 107 years old before the full-term" of this sentence expires, which precludes any meaningful hope for life outside of confinement. DB 5-7. Defendant also professes that the prospect of geriatric relief, even if he will be parole eligible after 45 years (or at age 62) is the equivalent of a life sentence; and that many other states have allowed juvenile homicide offenders the opportunity for parole eligibility after fifteen or twenty-five years of incarceration. DB 6-7. Defendant further maintains that this Court found, in *State v. Springer,* 2014 S.D. 80, ¶ 25 n.8, 856 N.W.2d 460, 470 n.8, *cert. denied,* 135 S.Ct. 1908 (Apr. 27, 2015), that a lengthy term-of-years sentence might amount to a de facto life sentence, depending upon the circumstances, and that Springer had the chance for parole at age 49, or release "more than a decade before Quevedo's earliest possible release date." DB 7.

B. Standard of Review.

This Court reviews de novo whether a defendant's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Jensen,* 2017 S.D. 18, ¶ 9, 894 N.W.2d at 400. With

respect to juveniles, the United States Supreme Court has determined that "the Eighth Amendment forbids the imposition of the death penalty for any crime, a sentence of life without parole for nonhomicide crimes, and a sentence of mandatory life without parole for homicide crimes." *Id.* (citing *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (barring the imposition of the death penalty); *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (barring sentences of life without parole against juvenile nonhomicide offenders); *Miller,* 132 S.Ct. at 2455 (barring sentencing schemes that mandate life without parole for juvenile homicide offenders)). The United States Supreme Court also decided, in *Montgomery v. Louisiana,* 577 U.S. ____, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016), that *Miller* applies retroactively. *Jensen,* 2017 S.D. 18, ¶ 1, 894 N.W.2d at 398.

Sentencing judges, in juvenile murder cases, must consider the mitigating qualities of youth, as articulated by *Miller,* 132 S.Ct. at 2467-69. *Charles,* 2017 S.D. 10, ¶ 19, 892 N.W.2d at 922 (citing *United States v. Jefferson,* 816 F.3d 1016, 1019-20 (8th Cir. 2016)); *State v. Diaz,* 2016 S.D. 78, ¶¶ 45-58, 887 N.W.2d 751, 764-68. These qualities 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. *Charles,* 2107 S.D. 10, ¶ 19, 892 N.W.2d at 922 (citing *Miller,* 132 S.Ct. at 2467-69). A juvenile's "traits are 'less fixed' and his actions are less likely 'evidence of irretrievabl[e] deprav[ity],'" and so sentencing courts should carefully weigh and consider the mitigating qualities of youth. *Springer,* 2014 S.D. 80, ¶ 14, 856 N.W.2d at 466 (quoting *Miller,* 132 S.Ct. at 2464).

C. Legal Analysis.

State counters that Defendant is trying to expand the scope of *Miller,* 132 S.Ct. at 2455 and *Springer,* 2014 S.D. 80, ¶ 25 n.8, 856 N.W.2d at 470 n.8, to categorically ban his term of years sentence for second degree murder, which gives Quevedo the possibility of parole within his lifetime. DB 4-7; SR 260-62; CPT 138-40; SNT 842-57; EX 1-9; PSR 164-73 and attachments. *Jensen v. Young,* 2019 WL 653063, at *8 (D.S.D. Feb. 15, 2019); *State v. Russell,* 908 N.W.2d 669, 675-78 (Neb. 2018), *cert. denied,* 139 S.Ct. 195 (Oct. 1, 2018) (parole eligibility at age 72 for juvenile murder offender); *Charles,* 2017 S.D. 10, ¶¶ 9-15, 892 N.W.2d at 919-21 (parole eligibility at age 60 for juvenile homicide offender); *State v. Nollen,* 892 N.W.2d 81, 98-99 (Neb. 2017), *cert. denied*, 138 S.Ct. 165 (Oct. 6, 2017) (parole eligibility at age 62 for juvenile murder offender); *Diaz,* 2016 S.D. 78, ¶¶ 56-57, 887 N.W.2d at 768 (parole eligibility at age 55 for juvenile homicide offender); *State v. Cardeilhac,* 876 N.W.2d 876, 886-90 (Neb. 2016) (prison sentence of 60 years to life for second degree murder still gave juvenile the possibility for

parole). Although Defendant argues that his 90-year sentence condemns him to die in prison, Quevedo disregards that Judge Linngren carefully fashioned a lengthy term of years sentence for the vicious stabbing death of Kasie Lord, which is not the equivalent of a life sentence, because it gives him a meaningful opportunity for release at the age of 62 (estimated parole eligibility date 12/06/2061), or well within his lifetime. DB 4-7; CPT 138-40; SNT 631, 639-54, 659-69, 842-57; EX 3-9 PSR 152-55, 490-519, 497-98, 509-19, 527-39. *Russell,* 908 N.W.2d at 675-78; *Jensen,* 2017 S.D. 18, ¶¶ 13-16, 894 N.W.2d at 401-02; *Charles,* 2017 S.D. 10, ¶¶ 9-24, 892 N.W.2d at 919-23; *Nollen,* 892 N.W.2d at 98-99; *Diaz,* 2016 S.D. 78, ¶¶ 56-58, 887 N.W.2d at 768; *Cardeilhac,* 876 N.W.2d at 886-90; *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. DB 4-7; SNT 842-57; EX 1-9; PSR 164-73 and attachments. *Jefferson,* 816 F.3d at 1019-21; *Jensen,* 2019 WL 653062, at *8; *Charles,* 2017 S.D. 10, ¶¶ 9-16, 19, 27, 892 N.W.2d at 919-23 (citing *Miller,* 132 S.Ct. at 2469); *Diaz,* 2016 S.D. 78, ¶¶ 57-58, 887 N.W.2d at 768; *Cardeilhac,* 876 N.W.2d at 886-89 (citing *Montgomery,* 136 S.Ct. at 737).

Critically, Defendant overlooks that many courts have found that a lengthy term of years sentence, in juvenile murder cases, is not the

equivalent of a life sentence, or geriatric relief, despite the fact that a decisional split appears to exist in this area. DB 5-7; SNT 842-57; EX 1-9; PSR 164-73 and attachments. *Demirdjian v. Gipson*, 832 F.3d 1060, 1076-77 (9th Cir. 2016) (nonhomicide offender's release on parole at age 66 did not trigger concerns under *Miller,* 132 S.Ct. at 2466); *Jefferson,* 816 F.3d at 1019-21; *Russell,* 908 N.W.2d at 675-78; *Charles,* 2017 S.D. 10, ¶¶ 11-15, 892 N.W.2d at 919-21; *Nollen,* 892 N.W.2d at 98-99; *State v. Smith,* 892 N.W.2d 52, 63-67 (Neb. 2017) (parole eligibility at age 67 for kidnapping was not geriatric release); *Johnson v. Commonwealth,* 793 S.E.2d 326, 331-32 (Va. 2016) (possibility for geriatric release at age 60 did not violate *Montgomery,* 136 S.Ct. at 736, or *Miller,* 132 S.Ct. at 2460); *Cardeilhac,* 876 N.W.2d at 888-90 (discussing split in authorities); *Diaz,* 2016 S.D. 78, ¶¶ 48-58, 887 N.W.2d at 764-68; *Springer,* 2014 S.D. 80, ¶¶ 15-25, 856 N.W.2d at 466-70. In addition, Judge Linngren pointed out that the *Miller* decision identified the relevant mitigating factors of youth; that a juvenile's character is not as well formed as that of an adult, so his actions are less likely to evince irretrievable depravity; and that these characteristics diminish the penological justifications of retribution, deterrence and incapacitation. SNT 807-12, 844-45, 856-57; PSR 164-73 and attachments. *Jensen,* 2017 S.D. 18, ¶¶ 11-12, 894 N.W.2d at 400-01; *Charles,* 2017 S.D. 10, ¶¶ 19-24, 892 N.W.2d at 922-23 (citing *Miller,* 132 S.Ct. at 2467-69; *Cardeilhac*, 876 N.W.2d at 886-90;

Springer, 2014 S.D. 80, ¶ 14, 856 N.W.2d at 465-66. This judge also detailed the individual sentencing factors, in Defendant's case, which included that he was just 8 months short of turning eighteen years old, when Quevedo stabbed the victim 38 times and left her to die in the street; that Defendant was more mature than most seventeen-year-olds because he frequently was the only responsible person in his family's home, given his parents' turbulent relationship and illegal drug use; and that Dr. Hastings' testimony (defense expert) reflected that Quevedo had average psychological functioning for a juvenile his age and that his ability to understand and make good decisions was at a normal level. SNT 796-805, 816-17, 845, 855-57; PSR 164-73, 354-66. *Jensen,* 2017 S.D. 18, ¶¶ 11-12, 894 N.W.2d at 400; *Charles,* 2017 S.D. 10, ¶¶ 19-24, 892 N.W.2d at 922-23 (citing *Miller,* 132 S.Ct. at 2467-69); *Quevedo,* 2014 S.D. 6, ¶¶ 6 n.2, 16-18, 843 N.W.2d at 353-54 n.2, 356; *Bult v. Leapley,* 507 N.W.2d 325-26 (S.D. 1993) (sentencing court had the benefit of a presentence report). The court further held that it was not surprising that Defendant had engaged in reckless criminal behavior, due to his dysfunctional family background; that Quevedo had revealed, in his Treatment Needs Assessment, that he loved feeling drunk and tripping out (PSR 368 and SNT 854); and that Defendant's abuse of alcohol, several cold medicines (Coricidin Triple C's and Robitussin) and marijuana did not excuse Kasie's brutal death, during the early morning hours of January 18, 2017. SNT 801-12, 814-17, 846-53, 854;

PSR 164-73, 354-71. *Kleinsasser,* 2016 S.D. 16, ¶ 24, 877 N.W.2d at 94-95 (Second Degree Murder is a general intent crime and voluntary intoxication is not a defense); *State v. Primeaux,* 328 N.W.2d 256, 259 (S.D. 1992); SDCL 22-16-7.

Moreover, Judge Linngren discerned that Defendant was the leader of his group of friends and had been acting alone, when he repeatedly stabbed Kasie 38 times with a knife, because she tried to prevent the theft of a case of beer; that Defendant had inflicted about seven blows at the door of the Loaf N' Jug, which was not enough to get Kasie out of his way, so Quevedo had turned back and continued to attack the victim outside of this convenience store, as if he was a predator making sure that his prey was dead; and that Defendant had used the same expletives to shut Kasie up, which his father had frequently yelled while beating his mother. SNT 848, 856-57; EX 3-4; PSR 173, 357-68, 490-519, 527-39. *Jefferson,* 816 F.3d at 1019-21; *Charles,* 2017 S.D. 10, ¶¶ 9-24, 892 N.W.2d at 919-23; *Nollen,* 892 N.W.2d at 98-99 (manner of victim's death was callous and chilling); *Diaz,* 2016 S.D. 78, ¶¶ 50, 53, 887 N.W.2d at 766-67 (victim's demise was vicious and unnecessary). In addition, this judge indicated that it was not possible to determine whether or not Defendant had blacked out, when he brutally stabbed Kasie to death; that perhaps Quevedo had repressed what he had done, or blocked out the victim's murder because he could not believe that he had committed such an egregious

act; or that maybe Defendant was engaging in the same type of silence, which he had exhibited in the past, due to the cycle of violence in his home life. SNT 801-12, 814, 843-44, 848-55; EX 3-4; PSR 164-73, 354-71. *Charles,* 2017 S.D. 10, ¶¶ 19-24, 892 N.W.2d at 921-28 (citing *Miller,* 132 S.Ct. at 2467-69); *Cardeilhac,* 876 N.W.2d at 886-90 (sentencing record included expert testimony about defendant's particularized characteristics and *Miller* requirements). The court also ruled that Defendant had more experience with the criminal justice system than most juveniles his age because of the illegal drug activities of both of his parents, and that Quevedo had actually witnessed his mother's arrest by a drug task force for possession of a controlled substance. SNT 846-47, 849-52; PSR 164-73 and attachments. *Charles,* 2017 S.D. 10, ¶¶ 19-24, 892 N.W.2d at 921-23 (citing *Miller,* 132 S.Ct. at 2467-69); *Quevedo,* 2014 S.D. 6, ¶¶ 6 n.2, 16-18, 843 N.W.2d at 353-54 n.2, 356.

Furthermore, Judge Linngren emphasized that Defendant's criminal behavior posed a serious risk that he might violently lash out again against another innocent victim, while under the voluntary influence of a variety of substances, despite the fact that Quevedo had accepted responsibility for Kasie's murder; that Defendant's illegal activities had escalated from a low-level juvenile history, which included alcohol and marijuana use, to homicide; that Quevedo had absconded from juvenile probation and started taking pills, while attending high

school in Oklahoma; and that he had fled from the scene of the victim's murder and tried to conceal his bloody jacket from the police. DB 2-4; SNT 644-48, 652-56, 660-69, 843-44, 847-50, 853-57; EX 3-4, 9; PSR 164-73, 353-418. *Owens,* 2002 S.D. 42, ¶¶ 80-84, 643 N.W.2d at 755-56 (flight shows consciousness of guilt); *State v. Hamel,* 2003 S.D. 139, ¶ 11, 672 N.W.2d 685, 688-89 (risk to society is a concern). In addition, this judge observed that Defendant's criminal conduct was not the result of an accident, or a struggle, in which he had inadvertently hit Kasie's artery with a knife, or any other part of her body; and that very clear video evidence existed that Defendant had walked away and then turned back (EX 3) to ruthlessly stab the victim to death, so that Quevedo could keep the high going from the combination of substances, which he had taken for fun. SNT 856-57; PSR 164-73, 508-19, 527-39. *State v. Quist,* 2018 S.D. 30, ¶¶ 4, 14-15, 910 N.W.2d 900, 902, 904-05 (surveillance video camera captured Second Degree murder). The court also noted that Defendant's potential for rehabilitation and mitigating evidence were factors in his case because of his traumatic childhood, but that the numerous letters from Quevedo's supporters often provided excuses for his lethal actions, while asking for leniency. DB 4; SNT 845, 849-50, 856-57; 423-89. *Jensen,* 2017 S.D. 18, ¶¶ 12-13, 894 N.W.2d at 400; *Charles,* 2017 S.D. 10, ¶¶ 19-24, 892 N.W.2d at 921-23 (citing *Miller,* 132 S.Ct. at 2467-69).

Lastly, Judge Linngren gave Defendant a term of years sanction, which resulted in a realistic opportunity for reconciliation with society and is not a functional life sentence. SR 160-62, SNT 855-57; PSR 164-73 and attachments. *Russell,* 908 N.W.2d at 675-78; *Charles,* 2017 S.D. 10, ¶¶ 9-24, 892 N.W.2d at 919-23; *Nollen,* 892 N.W.2d at 98-99; *Diaz,* 2016 S.D. 78, ¶¶ 56-58, 887 N.W.2d at 768; *Cardeilhac,* 876 N.W.2d at 886-90 (citing *Montgomery,* 136 S.Ct. at 737) (light outside prison walls is all that is required). Quevedo also forgets that the court was not presented with any life expectancy calculations, during the March 22, 2018 sentencing hearing, although using such data creates additional problems about differentiating between races, ethnicities, or sexes and some of the equalizing effects of prison sentences. DB 4-7; SNT 842-57. *Springer,* 2014 S.D. 80, ¶¶ 20-21, 856 N.W.2d at 468; *People v. Lucero,* 410 P.3d 467, 470-71 (Colo. App. 2013). Thus, no errors of constitutional magnitude exist here.

II

DEFENDANT'S 90-YEAR PENITENTIARY SENTENCE, WITH CREDIT FOR TIME SERVED, IS NOT GROSSLY DISPROPORTIONATE TO HIS CRIME OF SECOND DEGREE MURDER.

A. Overview.

Defendant complains, in his second issue, that his 90-year penalty for second degree murder, with credit for time served, is grossly disproportionate to his crime and constitutes cruel and unusual

punishment. DB 7-10. In addition, Quevedo alleges that the State failed to meet its burden and did not establish, during the March 22, 2018 sentencing hearing, that he is an uncommon youthful offender, whose homicide crime reflects permanent incorrigibility under *Montgomery,* 136 S.Ct. at 734, or that he deserved a death-in-prison sentence. DB 7-8. Defendant also posits that the prosecution failed to present any evidence to contradict, or rule out, that Quevedo may have been in a blackout, or high-level stage of intoxication, when he stabbed the victim 38 times and killed her. DB 9. Defendant further insists that Dr. Hastings' testimony (defense expert), during the sentencing hearing, showed that Quevedo had average psychological functioning for a young man his age and that rehabilitation was "not impossible"; that Defendant had a minor juvenile record, a "superior" high school background and many letters of support; and that his 90-year sentence is much harsher than the penalties given to other juveniles in South Dakota, as evinced by *State v. McCahren,* 2016 S.D. 34, ¶ 4, 878 N.W.2d 586, 590 and *Owens v. Russell,* 2007 S.D. 3, ¶¶ 2-5, 726 N.W.2d 610, 613-14. DB 9-10 nn.1-2.

B. Standard of Review.

In addressing a juvenile murder offender's disproportionality claims, this Court applies the United States Supreme Court's Eighth Amendment precedent. *Charles,* 2017 S.D. 10, ¶ 27, 892 N.W.2d at 923-24. The Eighth Amendment "forbids only extreme sentences that

are 'grossly disproportionate' to the crime." *Id.* If an appearance of gross disproportionality results after the initial comparison, only then does this Court compare a defendant's sentence to those imposed on other criminals in the jurisdiction. *Diaz,* 2016 S.D. 78, ¶ 51, 887 N.W.2d at 766 (citing *State v. Chipps,* 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486). In making this determination, it examines the gravity of the offense, and the harshness of the penalty. *Charles,* 2017 S.D. 10, ¶¶ 29-30, 892 N.W.2d at 924; *Diaz,* 2016 S.D. 78, ¶¶ 51-56, 887 N.W.2d at 766-68. Some of the factors, which are considered when judging the gravity of an offense include its violent versus non-violent nature, the level of intent required and the other conduct relevant to the crime. *State v. Traversie,* 2016 S.D. 19, ¶ 16, 877 N.W.2d 327, 332; *Diaz,* 2016 S.D. 78, ¶ 52, 887 N.W.2d at 766-67.

As for the harshness of a penalty, this Court looks not to the maximum penalty available, but "to the penalty's relative position on the spectrum of permitted punishment." *Charles,* 2017 S.D. 10, ¶ 29, 892 N.W.2d at 924 (citing *Chipps,* 2016 S.D. 8, ¶ 37, 874 N.W.2d at 488); *Diaz,* 2016 S.D. 78, ¶ 54, 887 N.W.2d at 767. When a juvenile defendant receives a sentence to a term of years, the comparison for purposes of proportionality is one of degree and line-drawing. *Charles,* 2017 S.D. 10, ¶ 29, 892 N.W.2d at 924. In judging the harshness of the penalty, the possibility of parole is a consideration. *Diaz,* 2016 S.D. 78,

¶ 55, 887 N.W.2d at 768; *McCahren,* 2016 S.D. 34, ¶¶ 34-37, 878 N.W.2d at 601-02.

C. Legal Synopsis.

1. Gravity component.

State argues that Defendant's sentence for Second Degree Murder is not grossly disproportionate because the gravity of Quevedo's offense, which is a Class B felony, sits on the upper level of the spectrum of criminality. DB 7-10; SR 160-62; CPT 127-42; SNT 636-857; EX 1-9; PSR 164-73 and attachments. *Charles,* 2017 S.D. 10, ¶ 30, 892 N.W.2d at 924 (citing *State v. Rice,* 2016 S.D. 18, ¶ 14, 887 N.W.2d 75, 80); *Diaz,* 2016 S.D. 78, ¶¶ 52-53, 887 N.W.2d at 766-67; *State v. Miller,* 2014 S.D. 49, ¶ 14, 851 N.W.2d 703, 706; SDCL 22-16-7. In addition, Judge Linngren took into consideration the testimony from all of the witnesses for both sides, during the sentencing hearing; reviewed the exhibits and presentence report in this case; was fully informed about the recent developments in juvenile brain science; and understood the severity of Defendant's criminal behavior, which resulted in the victim's horrific and painful death. DB 7-10; SR 160-62; CPT 127-42; SNT 636-857; EX 3-8; PSR 164-73 and attachments. *Russell,* 908 N.W.2d at 675-79; *State v. Tovas,* 2017 S.D. 93, ¶¶ 13-14, 906 N.W.2d 354, 357-58 (sentencing court took into account factors articulated in presentence report); *Charles,* 2017 S.D. 10, ¶¶ 25-30, 892 N.W.2d at 923-24 (murder is a severe crime and against the laws of nature);

Nollen, 892 N.W.2d at 98-99; *Diaz,* 2016 S.D. 78, ¶¶ 53-58, 887 N.W.2d at 767-68; *Cardeilhac,* 876 N.W.2d at 888-89; *Springer,* 2014 S.D. 80, ¶¶ 18, 23-25, 856 N.W.2d at 467, 469-70. This judge also heard the input from Melanson, a police officer, which reflected that Defendant did not appear high or intoxicated on January 18, 2017, when he was apprehended by the police; and that Quevedo had asked if the stabbing under investigation had taken place at the Loaf N' Jug on Rushmore Road. DB 9; CPT 134-42; SNT 652-56, 670-71, 814; PSR 164-73, 354-71. *Charles,* 2017 S.D. 10, ¶ 23, 892 N.W.2d at 923 (sentencing court makes credibility determinations). The court also was aware from Detective Neavill's testimony that Defendant's bloody jacket had been hidden in the ceiling tiles of a friend's basement and that a note had been found in Quevedo's room at the Juvenile Services Center, which asked someone to retrieve this item, before the police found it. CPT 138; SNT 667-69, 676; EX 3, 9. *Owens,* 2002 S.D. 42, ¶¶ 80-84, 643 N.W.2d at 55-56.

Moreover, Judge Linngren did not give superficial treatment to Defendant's capacity for incorrigibility, or to the fact that Quevedo may have been in a blackout, when he stabbed Kasie 38 times and destroyed her life. DB 7-9; SNT 801-17, 848-50, 854-57; EX 3-8; PSR 164-73, 354-71. *Russell,* 908 N.W.2d at 675-79; *Charles,* 2017 S.D. 10, ¶¶ 11-15, 29-30, 892 N.W.2d at 920-21, 924; *Nollen,* 892 N.W.2d at 98-99; *Diaz,* 2016 S.D. 78, ¶¶ 53-58, 887 N.W.2d at 767-68 (homicide is a

severe crime); *Traversie,* 2016 S.D. 19, ¶ 16, 877 N.W.2d at 332. Again, this judge reasoned that no one could be certain whether Defendant was in a blackout, when he repeatedly stabbed the victim, and the court did not impose a death-in-prison sentence because Quevedo has a meaningful chance to obtain release on parole by age 62, or within his lifetime. DB 7-9; SNT 801-17, 884-49, 854-57; PSR 164-73, 354-71. *Charles,* 2017 S.D. 10, ¶¶ 11-15, 29-30, 892 N.W.2d at 919-21, 923-24; *Diaz,* 2016 S.D. 78, ¶¶ 52-53, 57-58, 887 N.W.2d at 766-69; *Cardeilhac,* 876 N.W.2d at 886-89 (citing *Montgomery,* 136 S.Ct. at 737); *Springer,* 2014 S.D. 80, ¶¶ 18, 23-25, 856 N.W.2d at 467, 469-70 (glimmer of hope exists). This analysis also dovetails with Dr. Hastings' conclusion that Defendant's situation fell in a gray area and that he could kill again, if Quevedo took the same quantity and quality of substances. DB 9; SNT 803-12, 814-17; EX 3-4; PSR 164-73, 354-71. *Hamel,* 2003 S.D. 139, ¶ 11, 672 N.W.2d at 688-89 (risk to other members of the public is a concern).

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 involved different factual circumstances and levels of intense.[2] DB 10

[2] State was not able to access the article "Woman Given Life in Prison for Murder Resentenced," KELOland Television website, which is referenced in Defendant's brief at page 10 and in footnote 1; and the defense informed it on April 3, 2019, that this material is no longer

(continued . . .)

nn.1-2. *Charles,* 2017 S.D. 10, ¶¶ 28-30, 892 N.W.2d at 924-25; *Diaz,* 2016 S.D. 78, ¶¶ 51-53, 887 N.W.2d at 766-68; *State v. Bonner,* 1998 S.D. 30, ¶ 11, 577 N.W.2d 575, 578 (South Dakota does not have pervasive sentencing guidelines).

2. Harshness element.

Finally, Judge Linngren recognized that the harshest penalty that a court can impose against a juvenile for Second Degree murder, in South Dakota, is a term of years in the penitentiary and a fine. CPT 131-32; SNT 844-46; EX 3-4; PSR 164-73 and attachments. *Charles,* 2017 S.D. 10, ¶¶ 29-30, 892 N.W.2d at 924; *Diaz,* 2016 S.D. 78, ¶¶ 54-58, 887 N.W.2d at 767-68; SDCL §§ 22-6-1, 22-6-1.3, 22-16-7 and 22-16-12. Based upon the gravity of his crime, Quevedo's 90-year prison sentence gives him the possibility of release on parole at age 62; the chance to prove that he can function as a productive member of society; and is not unduly harsh. DB 9-10; 841-57; EX 3-4; PSR 164-73 and attachments. *Charles,* 2017 S.D. 10, ¶¶ 29-30, 892 N.W.2d at 924; *Diaz,* 2016 S.D. 78, ¶¶ 54-58, 887 N.W.2d at 767-68; *Cardeilhac,* 876 N.W.2d at 889 (citing *Montgomery,* 136 S.Ct. at 737); *McCahren,* 2016 S.D. 34, ¶ 36, 878 N.W.2d at 601. It also bears remembering that

_____
(. . . continued)
available because this website is outdated and unrecoverable. DB 10 n.1. Nevertheless, State submits that neither of the websites, which are mentioned in Defendant's brief at page 10 (footnote 1 and 2), are controlling legal authorities in Quevedo's case and that they are not subject to judicial notice. DB 10 nn.1-2. *Ageton v. Jackley,* 2016 S.D. 29, ¶¶ 18-20, 878 N.W.2d 90, 94-95.

sentencing courts do not "color match" sentences, in juvenile murder prosecutions, and it would be impossible to find two murder cases that are the same in all respects. DB 7-10; SR 160-62; SNT 841-57; EX 1-9; PSR 164-73 and attachments. *State v. Thieszen,* 912 N.W.2d 696, 705 (Neb. 2018); *Charles,* 2017 S.D. 10, ¶¶ 29-30, 892 N.W.2d at 924; *Diaz,* 2016 S.D. 78, ¶¶ 51-58, 887 N.W.2d at 766-78; *State v. Schmidt,* 2012 S.D. 77, ¶¶ 39-40, 46, 825 N.W.2d 888, 899-900 (this court does not micromanage sentences). As such, Defendant is not fated to die in prison and no relief is justified on this record.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that Quevedo'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 7,659 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 2nd day of May 2019.

Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this May 2, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Carlos C. Quevedo* was served via electronic mail upon Paul Eisenbraun at paul@greyeisenbraunlaw.com.

Ann C. Meyer
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS C. QUEVEDO,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI L. LINNGREN

APPELLANT'S REPLY BRIEF

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THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARLOS C. QUEVEDO,

Defendant and Appellant.

PRELIMINARY STATEMENT

Mr. Quevedo adopts the preliminary statement from his Appellant's Brief. Additionally, the State's Appellee's Brief shall be referred to as "SB" followed by the specific page number(s).

JURISDICTIONAL STATEMENT

Mr. Quevedo reasserts the Jurisdictional Statement contained in his original Appellant's Brief and further, Mr. Quevedo does not contest the Jurisdictional Statement contained within the State's Appellee's Brief.

STATEMENT OF LEGAL ISSUES

1. A 90-YEAR SENTENCE IS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE AND THEREFORE IS UNCONSITUTIONAL.

2. A 90-YEAR SETNENCE IS DISPROPORTIONATE IN THIS CASE.

ARGUMENT

1. A 90-year sentence is the functional equivalent to a sentence of life without parole and therefore is unconstitutional.

The 90-year sentence imposed in this case is the legal equivalent to a sentence of life without parole because it denies the Defendant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). (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 fails to directly address the cases cited in Defendant's opening brief, noting instead that a "decisional split appears to exist in this area." SB 21.

In support of its argument that "many courts have found that a lengthy term of years sentence...is not the function equivalent of a life sentence," the State relies on *State v Springer*, 2014 S.D. 80, 856 N.W.2d 460 and *Jensen v. Young*, 2019 WL 653063, at *8 (D.S.D. Feb 15, 2019). SB 19. Springer was sentenced to 261-year term-of-year sentence but was allowed to have parole eligibility after he serves 33 years, which would make Springer 49 years old. 2014 S.D. 80 ¶ 1, 856 N.W.2d at 461. The State relies on *Springer* but does not address the fact that Springer was given parole eligibility more than a decade sooner than the Defendant's age of parole eligibility.

Jensen was originally sentenced to life without parole for first degree murder and kidnapping, as well as four other counts. 2019 WL 653063, at *1. Jensen was resentenced in 2016 to a term of 200 years but would be eligible for parole at the age of 39. *Id.* In contrast to the case at hand, the Defendant plead guilty to only second-degree murder but will not be eligible for parole until he is 62 years old, 23 years older than Jensen who was found guilty of a higher degree of murder and multiple other counts.

The State also relies on *State v. Cardeilhac*, 876 N.W.2d 876 (Neb. 2016). SB 19. In *Cardeilhac*, the defendant was eligible for parole at half his 60-year sentence, when he would be 45 years old, again, significantly younger than the Defendant will be at his first parole eligibility. 876 N.W.2d at 879, 888.

The State goes on to argue that the Defendant is ignoring both *Montgomery* and *Miller* since both cases stated in rare instances, a sentence of life in prison even without parole may be appropriate for juvenile homicide offenders when their crimes reflect irreparable corruption, the Defendant respectfully disagrees. SB 20. The court in *Miller* goes on to say:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we note in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crimes reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper v. Simmons*, 543 U.S. 551, at 573, 125 S.Ct. 1183, *Graham v Florida*, 560 U.S. 48, at 68, 130 S.Ct. 2011, at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.
>
> *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455.

The Defendant would argue that Defendant's original brief does consider *Miller* and aligns with *Miller's* statements, that the harshest punishments are for the "uncommon" offender and that juvenile offender's youth needs to be a primary concern when being sentenced.

Finally, the State does not address the Defendant's argument as to whether a 90-year sentence provides the Defendant with a "meaningful opportunity for release," but goes

on to argue that the possibility of parole after 45 years would satisfies Defendant's argument. Given this argument, it follows that 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 response to the precedent cited by the Defendant in the opening brief; Defendant cited *Bear Cloud v. State*, 334 P.3d 132, 136, 142 (Wyo. 2014), holding that a sentence where the earliest possibility of release was after "just over 45 years, or when [Bear Cloud] is 61" is "the functional equivalent of life without parole.

The Defendant's sentence provides him with no possibility for parole until he is 62 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.

2. A sentence of 90-years in this matter is disproportionate.

Under *Montgomery v. Louisiana,* 577 U.S. ____,136 S.Ct. 718, 193 L. Ed.2d 599 (2016), and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (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 Defendant 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 has failed to satisfy this burden, due to the evidence presented at sentencing regarding the Defendant's prominent school record, numerous letters of support, and Dr. Hastings psychological testing results.

The State declines to address the argument and case law presented in the opening brief and instead relists Judge Linngren's sentencing considerations. The State focuses more on what witnesses were presented against the Defendant and what the harshest punishment could impose instead of focusing on the Defendant's "youth" factor. *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 distinction." *Miller*, 132 S.Ct. at 2470. As a result, even though this 90-year sentence might be constitutional under the typical Eighth Amendment disproportionality test applied to adults, based on the holdings of *Miller*, *Montgomery*, and *Graham v. Florida*, 560 U.S. 48 (2010) a 90-year sentence, imposed on a juvenile is disproportionate.

Further the South Dakota Legislature has now abolished the sentence of life without parole for children offenders. 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 probable 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 90-year sentence is a life-without-parole sentence, such a prolonged sentence is certainly at the upper margin of what could be considered a probable term of years sentence for a child under this new statute. Given that law enforcement failed to assess the Defendant properly when arresting him (no

proper intoxication determination) and the Defendant was still a minor at the time of the offense, the sentence of 90 years is disproportionate.

CONCLUSION

Based on the arguments above, the authorities cited, and Appellant's original Brief, the Appellant respectfully requests that this court remand this matter to the Circuit Court for resentencing.

Dated this 16th day of May 2019.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

CARLOS C. QUEVEDO,
Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Paul Eisenbraun, counsel for Carlos Quevedo, Defendant/Appellant, does submit the following:

The Appellant's Reply Brief is 6 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there is a total of 1399 words in the body of the brief.

Dated this 16th day of May 2019.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #28608

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

CARLOS C. QUEVEDO,

Defendant and Appellant.

The undersigned hereby certifies that he served two true and correct copies of the Brief of the Defendant/Appellant, Carlos Quevedo, upon the persons herein next designated on the date shown by email to said addresses; to wit:

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