IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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**APPEAL NO. 29946**

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**RONALD MANUEL MYRON BLACK CLOUD**
Defendant/Appellant

vs.

**STATE OF SOUTH DAKOTA**
Plaintiff/Appellee

---

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

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HONORABLE MATTHEW BROWN, PRESIDING JUDGE

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# APPELLANT'S BRIEF

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Notice of Appeal filed on March 17, 2022

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## PRELIMINARY STATEMENT

Throughout this Appellant's Brief, Ronald Black Cloud, initially Minor Child and later Defendant below and Appellant herein, will be referred to as "Ronny." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." Ross Johnson, Ronny's co-defendant, will be referred to as "Ross." Nathan Graham, the victim in this case, will be referred to as "Graham." Shayla Colbert-Graham, wife of Graham, will be referred to as

"Shayla." Kyliel Colbert, step-son of Graham, will be referred to as "Kyliel." Lara Roetzel, one of the State's trial attorneys, will be referred to as "Ms. Roetzel."[1]

## JURISDICTIONAL STATEMENT

Following a seven-day jury trial, the jury returned a verdict of guilty on the charge of Second-Degree Murder in violation of SDCL 22-16-7. SR 470. On February 15, 2022, effective, however, February 7, 2022, the trial court executed an Amended Judgment sentencing Ronny to a term of forty-years (40) imprisonment in the South Dakota State Penitentiary. SR 611; App. 2. Notice of Appeal from the Amended Judgment was timely filed on March 17, 2022. SR 615. Ronny brings this appeal as a matter of right pursuant to SDCL 23A-32-2 and SDCL 15-26A-3(1).

## STATEMENT OF LEGAL ISSUES

**I. Did the trial court violate Ronny's right to a fair trial and impartial jury by denying his motion for mistrial following comments made by the prosecutor?**

The trial court denied Ronny's oral motion for mistrial. SR 1496.

*State v. Hankins,* 2022 S.D. 67, 2022 WL 16643587
*State v. Mollman*, 2003 S.D. 150, 674 N.W.2d 22
*State v. Smith*, 1999 S.D. 83, 599 N.W.2d 394

**II. Did the trial court err by granting the State's motion to exclude evidence of Graham's parole status thus resulting in a violation of Ronny's right to present a complete defense?**

The trial court precluded the defense from eliciting testimony regarding Graham's parole status. TrV1 120; TrV2 94, 139.

*Irby v. State,* 327 S.W.3d 138 (Tex. Crim. App. 2010)

[1] All references to the transcripts and documents cited in this brief are as follows: (1) "SR" designates the settled record of Pennington County file number 51CRI21-620; (2) "EH" designates the 8-16-21 evidentiary hearing; (3) "MH" designates the 9-3-21 motions hearing; (4) TrV1" designates day-1 of the jury trial; (5) "TrV2" designates day-2 of the jury trial; (6) "TrV3" designates day-3 of the jury trial; (7) "TrV4" designates day-4 of the jury trial; (8) "TrV5" designates day-5 of the jury trial; (9) "SH" designates the 2-7-22 sentencing hearing; and (10) "App." designates the Appendix.

*Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105 (1974)
*Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142

**III. (a) Did the prosecutor's comments to the venire about Ross's guilty plea constitute reversible error? (b) Did the trial court's refusal to instruct the jury not to consider Ross's guilty plea as evidence of Ronny's guilt deprive Ronny of his right to due process and a fair trial?**

(a) This issue was not raised before the trial court; (b) The trial court refused to instruct the jury not to consider Ross's guilty plea as evidence of Ronny's guilt. SR 274; TrV4 169.

*State v. Jordan*, 627 S.W.2d 290 (Mo. 1982)
*State v. Dansberry*, 18 S.W.2d 518 (Mo. Ct. App. 2000)
*People v. Rios*, 2014 COA 90, 338 P.3d 495

**IV. Did the trial court abuse its discretion by transferring Ronny's case to adult court?**

The trial court granted the State's motion to transfer the matter from juvenile court to adult court. App. 3.

SDCL 26-11-4
*State v. Harris*, 494 N.W.2d 619 (S.D. 1993)
*State v. A.B.*, 2008 S.D. 117, 758 N.W.2d 910

**V. Did the trial court abuse its discretion by sentencing Ronny to a term of forty-years imprisonment?**

The trial court sentenced Ronny to a term of forty-years (40) imprisonment in the South Dakota State Penitentiary. SR 611; SH 78.

*State v. Klinetobe*, 2021 S.D. 24, 958 N.W.2d 734
*Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455
*State v. Quevedo*, 2020 S.D. 42, 947 N.W.2d 402

**VI. Did the trial court's sentence amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Art. VI, Sec. 23 of the South Dakota Constitution?**

This issue was not raised before the trial court as it was not ripe for consideration.

*State v. Springer,* 2014 S.D. 80, 856 N.W.2d 460
*Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455
*State v. Quevedo*, 2020 S.D. 42, 947 N.W.2d 402

## STATEMENT OF THE CASE AND FACTS

### Statement of the Case

On August 24, 2018, the State filed a one-count delinquency petition alleging that Ronny committed the public offense of second-degree murder in connection with the death of Graham. App. 3. The conduct giving rise to the petition was alleged to have occurred on August 17, 2018. *Id.* At the time of this incident, Ronny was just fourteen-years-old. *Id.* Pursuant to SDCL 26-11-4, the State moved to transfer the matter from juvenile court to adult court. *Id.* Ronny exercised his right to a hearing "to determine if it [was] in the best interest of the public that [he] be tried in circuit court as an adult." SDCL 26-11-4. On December 2, 2020 and December 3, 2020, the court held a transfer hearing. *Id.* At the conclusion of the same, the court took the matter under advisement and set a briefing schedule. On February 5, 2021, the court issued its memorandum opinion granting the State's motion to transfer the case to adult court. *Id.*

On February 12, 2021, Ronny was charged by complaint with second-degree murder in violation of SDCL 22-16-17. SR 1. At the February 17, 2021 initial appearance hearing, Ronny pleaded not guilty and bail was set at $500,000.00 cash only. SR 634-35. On February 24, 2021, a Pennington County grand jury returned a true bill of indictment charging Ronny with second-degree murder in violation of SDCL 22-16-17. SR 11. At the March 19, 2021 arraignment hearing, Ronny pleaded not guilty. SR 645. At the August 16, 2021 evidentiary hearing, the court held in abeyance the State's motion in limine regarding Graham's criminal history pending testimony from Ronny and Ross. EH 20-31; SR 708-719. At the September 3, 2021 motions hearing, the court granted the State's motion, holding Graham's criminal history was not relevant as Ronny had no knowledge of the same. MH 11-13, 22-23; SR 762-

774, 784-785. At the September 23, 2021 motions hearing, the court denied the joint motion to visit the crime scene. SR 850-51.

Ronny's jury trial commenced on September 28, 2021. SR 964. During voir dire, Ms. Roetzel informed the jury that Ross was charged with the same crime as Ronny and that he had plead guilty and would be testifying. SR 1419-20. Ross did not testify at trial. TrV3 56. At the close of voir dire, Ronny moved for a mistrial due to statements made by Ms. Roetzel with regard to the juvenile court to adult court transfer process. SR 1491-92. After considering argument from both sides, the court denied Ronny's oral motion. *Id.* at 1496. In doing so, the court explained that any potential bias resulting from Ms. Roetzel's comments was cured by its colloquy to the venire about the court's role in the transfer process. *Id.* The court denied Ronny's proposed jury instruction 44 advising the jury that Ross's guilty plea could not be considered as evidence of Ronny's guilt. SR 274; TrV4 169.

On October 6, 2021, the jury returned its verdict finding Ronny guilty of second-degree murder. SR 470. At the February 7, 2022 sentencing hearing, the trial court sentenced Ronny to a term of forty-years (40) imprisonment in the South Dakota State Penitentiary. SR 611; SH 78.

**Statement of the Relevant Facts**

On August 17, 2018, at approximately 10:50 p.m., Rapid City Police were dispatched to 245 ½ East Philadelphia Street following a report of a person being shot. TrV1 21. Officer Mackenzie Armstrong ("Ofc. Armstrong") arrived on scene and observed a male, later identified as Graham, lying on the south side of the street. *Id.* Ofc. Armstrong stated a female, later identified as Shayla, was seated next to Graham's body. *Id.*, 48. When Ofc. Armstrong approached Graham, he observed blood coming from Graham's head. *Id.* Officer Nathan Senesac next arrived on scene and together he and Ofc. Armstrong began

lifesaving measures. *Id.* at 22. Medical personnel arrived on scene soon after and transported Graham to the hospital. *Id.* Graham was pronounced dead on August 22, 2018. SR 433.

Ronny presented himself to the Rapid City Police Department the morning of August 19, 2018 – a day-and-a-half after the shooting. TrV4 34. He was accompanied by several family members, including his legal guardian Pamela Rodriguez. *Id.;* TrV3 5; App. 4 at 93. Initially, Ronny invoked his right to be represented by counsel prior to submitting to custodial interrogation. TrV4 35. After waiting six-hours and still unable to reach his attorney, Ronny changed his mind and agreed to speak without his attorney present. *Id.* At the conclusion of the interrogation, Sergeant Evan Harris ("Sgt. Harris") charged Ronny with second-degree murder. TrV3 42.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED RONNY'S RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY BY DENYING HIS MOTION FOR MISTRIAL FOLLOWING MISCONDUCT BY THE PROSECUTOR.

*A. Standard of review.*

While this Court generally reviews the questions of whether the prosecutor committed misconduct and the denial of motions for mistrial for an abuse of discretion, *See State v. Piper*, 2006 S.D. 1, ¶ 18, 709 N.W.2d 783, 784; *State v. Red Cloud*, 2022 S.D. 17, ¶ 27, 922 N.W.2d 9, 17, Ronny contends the conduct at issue violated his right to a fair trial and impartial jury. U.S. Const. amend. V, VI, and XIV; S.D. Const., art. VI, §§ 2, 7. Since these claims allege constitutional error, *de novo review* is warranted. *State v. Dickerson*, 2022 S.D. 23, ¶ 29, 973 N.W.2d 249, 258-59.

*B. Relevant Facts as to both issues.*

During the State's voir dire examination, Ms. Roetzel stated the following:

> So this is a big one. So Ms. Regalado told you how old Mr. Black Cloud is, but it's even more complicated than that because this crime happened in

> 2018. So the age of Mr. Black Cloud at the time the State is going to allege this crime was committed was 14.

SR 1441. She then inquired: "[D]oes anybody know who decides where and in what court Mr. Black Cloud is going to be tried? Juvenile or adult court, anybody know?" *Id.* One venireperson stated "[i]s it the State's Attorney's Office?" to which Ms. Roetzel replied "No." SR 1442. Another venireperson stated "[t]he [j]udge." *Id.* Ms. Roetzel then stated: "Some decisions have been made about evidence and in this jurisdiction, *and the decision to try Mr. Black Cloud as an adult was a decision made by the Court.*" *Id.* (emphasis added). Defense counsel ("Ms. Regalado") raised a contemporaneous objection and asked to approach. *Id.* In chambers, Ms. Regalado argued Ms. Roetzel's comment was misleading and falsely implied the court alone decided the case should be tried in adult court. SR 1443. Ms. Regalado asked the court to give a clarifying instruction. *Id.* Ms. Roetzel responded by stating "Ms. Regalado's effort to clarify is really a failed attempt to prejudice the State, make us the bad guys, and make us look bad in front of the jury on what is obviously a controversial subject." SR 1443-44. After some discussion, the court agreed a clarifying statement was needed. SR 1449. The court asked Ms. Roetzel, "[d]o you want to do it?" to which she replied "[y]eah." SR 1449.

Ms. Roetzel resumed her examination and stated the following:

> So we decided we're going to clarify this a little bit. So there's laws in South Dakota that govern if and when a juvenile should be transferred to adult court, okay. And there's statutes about factors that should be considered and circumstances that should apply in considering that. The State's Attorney's Office makes the decision about whether to ask that a case go to adult court, [i]f the child is a certain age. If the child is certain age, the defense can ask that a case go back to juvenile court … In this particular case, the State's Attorney's Office, having evaluated those statutes and those facts and circumstances, applied to move the case to adult court. Over years of litigation, the issue was decided by the Court. Is that clear? Is that sufficiently clear, your Honor?

SR 1449-50. To this query, the court replied "It is. Thank you." SR 1450. Ms. Roetzel then asked "So just talking about that process first, the legal process and decision-making, does anybody have a problem with it, the concept that juveniles can be prosecuted as adults?" *Id.* She next stated "So we're starting from the premise that we understand there are circumstances when that's appropriate." *Id.* She then asked the venire what they thought of this concept, which prompted the following responses:

> Venireperson: The law is the law. And whether if it went through all the channels per se, to get where it is today, then I can't see where there would really be a question about it.
>
> …
>
> Venireperson: It had to meet these specifications, and as long as that's happened, I guess that's the law.
>
> …
>
> Venireperson: No. If it's already been decided, that shouldn't be a factor in making the decision. I wouldn't have a problem.
>
> Venireperson: If the Court feels it's appropriate I'm okay with that.
>
> Venireperson: No. It's already kind of been decided that this needs to go up to this level and so this is the level that we're trying this case on.
>
> Venireperson: I don't have a problem with that. It's come to this level for a reason and because of the process, and now it's time to move on, it sounds like, and come to a resolution with it.
>
> Venireperson: If the Court's decided that it should be tried in adult court, then I'm fine with it.
>
> Venireperson: I don't know. I believe the process was followed, that's why it's in adult court. I mean, like you said, it's gone through some time of procedures for years, and for whatever reason it was decided that this is where it should be. So I'm okay with that.
>
> Venireperson: You've went through a process to determine if he should be tried as an adult and this is the conclusion of that process, so you know, I have to look at making my decision just based on the evidence presented in adult court.

SR 1441-1461. A venireperson then inquired "what are the criteria to get him from juvenile court to adult court to begin with?" SR 1463. Ms. Roetzel advised she was not permitted to answer the question. *Id.* At this point, the court interjected and stated the following:

> The issue about what court this case has ended up in is a jurisdictional question and a question therefore of law rather than fact. And that is why the Court made that decision. In making that decision, the Court wants to make it very clear that it is not intending to validate or give the impression of any issue of fact, which is the jury's role alone. So the Court takes care of legal questions and the jury takes care of factual questions, and don't get those two mixed up. So ultimately the bottom line is this, we are where we are. You don't have to worry about how we got here because that was a legal question. Legal questions, you don't have to worry about that. You do have the role of figuring out factual questions. And when the evidentiary portion of the trial starts, that's what you're all going to be doing. [T]he decision was made and has nothing to do with the Court's consideration of how this case should be decided. I'm 100 percent out of that process. That is your process as jurors.

SR 1464-65. Ms. Roetzel asked the venire if they would be less likely to convict due to Ronny's age. SR 1465. Following this inquiry, one venireperson stated: "It's ugly, of course, … so I'm not the expert to determine where it should be raised or shouldn't, so I'm okay with it if the Court has brought it this point." SR 1472. The court took a break during which time Ms. Regalado moved for a mistrial. SR 1491. Ms. Regalado argued Ms. Roetzel's clarifying statement didn't adequately resolve the issue and there still existed a misapprehension the court had made a pre-trial determination as to the validity of the charge. SR 1492. The court denied the motion, holding that any possible bias resulting from Ms. Roetzel's comments was cured by its colloquy to the venire. SR 1494.

*C. The prosecutor committed misconduct when she misstated the law.*

This Court has held "[p]rosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." *State v. Hankins*, 2022 S.D. 67, ¶ 32, 2022 WL 16643587. "This Court will find that prosecutorial misconduct has occurred if (1) there has been misconduct, and (2) the misconduct prejudiced the party as to deny the party a fair trial." *Id.* (citations omitted). "If both prongs for prosecutorial misconduct are satisfied, this Court will reverse the conviction." *Id.* "[I]f

the prosecutor's conduct affects the fairness of the trial when viewed in the context of the entire proceeding, reversal can be warranted." *Id.* (citations omitted).

The impartiality of a jury is a constitutional guarantee under both the United States Constitution and the South Dakota Constitution. *See* U.S. Const. amend. VI; S.D. Const., art. VI, § 7. "This means in part that 'the minds of the jurors [should] be without bias or prejudice[.]" *Id.* (citations omitted). This right applies equally to the voir dire process. *See State v. Tapio*, 459 N.W.2d 406, 412 (S.D. 1990). In fact, "[t]he purpose of '[v]oir dire examination is to enable counsel to determine whether any prospective jurors … are possessed of beliefs which would cause them to be biased in such a manner as to prevent his client from obtaining a fair and impartial trial.'" *State v. Leader Charge*, 2021 S.D. 1, ¶ 9, 953 N.W.2d 675 (citations omitted); *see also Reynolds v. United States*, 98 U.S. 145, 155 (1878) ("The theory of the law is that a juror who has formed an opinion cannot be impartial").

In this case, Ms. Roetzel misstated the law by incorrectly informing the venire that the court unilaterally decided to try Ronny as an adult. SR 1442. Ronny contends this comment was improper and can only be construed as an attempt to persuade the jury by illegitimate means.

Ms. Roetzel's misstatement was not an oversight or an inadvertent slip of the tongue. Rather, it was a deliberate effort on the part of a seasoned prosecutor – the Chief Deputy, no less – to not look like the "bad guy" in the eyes of the jury. We know this because she told us so. *See* SR 1443-44. This misstatement set in motion a misconception that the trial court made a pre-trial determination as to the validity of the charge. As evidenced above, venireperson after venireperson indicated their assent to Ronny being tried as an adult *because the court determined it was appropriate*. SR 1464-65. In other words, the venire formed an opinion about the transfer process. This predisposition is antithetical to the guarantees of a fair trial

and impartial jury. *See Reynolds*, 98 U.S. at 145 ("[A] juror who has formed an opinion cannot be impartial").

For a jury to fulfill its constitutional mandate, it cannot be misled about the facts or the law. "There is, or should be, a consequence when a party engages in improper [conduct]; when it is a jury trial and the jury may well have been misled, that consequence is a new trial." *Spain v. State*, 386 Md. 145, 177, 872 A.2d 25, 44 (2005) (Bell, J., dissenting). So let it be, here.

*D. The trial court's colloquy to the venire failed eliminate the impact of the prosecutor's misconduct.*

In addition to the prejudice recited above, Ronny's constitutional right to a fair trial and impartial jury was further violated by the trial court's denial of his motion for mistrial.

"In order to justify a mistrial, the defendant must make an actual showing of prejudice. For purposes of determining whether there are grounds for a mistrial, there must be error 'which in all probability, [] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *State v. Mollman*, 2003 S.D. 150, ¶ 23, 674 N.W.2d 22, 29 (citations omitted).

At the time Ms. Roetzel offered her improper remarks, the court did not interject or instruct the jury on the impropriety of the information. Thus, the court's silence in the face of an obvious misstatement of the law could arguably be construed as the court giving the statement its stamp of approval. "[A] trial judge does not sit upon the bench as a silent and passive spectator of what is going on, but sits to administer the law and guide the proceedings before [it]." *State v. Violett*, 79 S.D. 292, 305, 111 N.W.2d 598, 605 (1961), overruled on other grounds. In *State v. Smith*, 1999 S.D. 83, ¶ 61, 599 N.W.2d 344, 356, Justice Konenkamp, in his concurring opinion, stated "[i]n cases of flagrant misbehavior, either by the prosecutor or the defense attorney, a judge should intervene without waiting

for an objection. Opposing counsel ought not to be saddled with the entire burden of upholding the honor of our system." *Id.*

Here, however, defense counsel *did* raise a contemporaneous objection. SR 1442. Although the court agreed that a clarifying remark was needed, it inexplicably abdicated this responsibility to Ms. Roetzel. SR 1449. In doing so, it allowed Ms. Roetzel to explain a complex legal concept to the venire. At the conclusion of Ms. Roetzel's attempt to cure the record, she inquired of the court if her editorial was "sufficiently clear." SR 1449. In stating "it is," the court again gave its stamp of approval, this time explicitly. But judging by the venire comments that followed, it wasn't clear. Not at all. In fact, the dialogue became so muddled and far afield the court was forced to intercede. But rather than address the actual issue – that the State, not the court, was the one who initiated the transfer process and that no determination as to the validity of the charge had been made – the court responded to a query posed by a venireperson about the transfer process *criteria*. SR 1463. The court then offered an extended colloquy that only served to further muddle the issue. The court's explanation was so laden with legalese that it was beyond the comprehension of a regular juror. *See* SR 1464-65. The venire remarks that followed no doubt support this claim. In denying Ronny's motion for mistrial, the court opined that its colloquy to the venire cured any possible bias that may have resulted from Ms. Roetzel's improper comments. SR 1494. But the court's confidence is belied by the record.

For his part, Ronny recognizes that "[a] mistrial is a remedy intended for extreme circumstances, when prejudice is incurable and less drastic alternatives have been explored." *Crayton v. State*, 463 S.W.3d 531,535 (Tex. App. 2015). He contends, however, that such an extreme circumstance is present here. The court could have taken an immediate curative measure by instructing the venire to disregard the improper remarks. It didn't. Most

critically, the efforts taken in the aftermath of the misconduct didn't un-ring the bell of prejudice. Thus, the only remedy capable of protecting Ronny's right to a fair trial and impartial jury was the granting of a mistrial. The court's failure to do so was erroneous and therefore requires reversal.

## II. THE TRIAL COURT VIOLATED RONNY'S RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED EVIDENCE OF GRAHAM'S PAROLE STATUS.

### *A. Standard of review.*

While this Court generally reviews evidentiary decisions for an abuse of discretion, *State v. Packed*, 2007 S.D. 75, ¶ 17, 736 N.W.2d 851, 856, Ronny contends the exclusion at issue deprived him of "his fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145; U.S. Const. Amend. V, VI, and XIV; S.D. Const., art. VI, §§ 2, 7. Since this claim alleges constitutional error, *de novo review* is warranted. *State v. Dickerson*, 2022 S.D. 23 at ¶ 29.

### *B. Relevant Facts.*

On the first day of testimony, Ms. Regalado asked the court to revisit its prior ruling with regard to Graham's parole status. TrV1 117-18. Ms. Regalado argued Graham's parole status was probative of Shayla's motive to lie when she initially told law enforcement that Graham did not lay hands on Ross at any point during the confrontation. *Id.* at 118. More specifically, she argued that Shayla sanitized her version of the story to police because she knew Graham was on parole and that a parole violation could result in him being extradited back to Pennsylvania. *Id.* at 118-19. The court opined that Graham's death rendered void Shayla's motive to lie because he could no longer be extradited. *Id.* at 120. Ms. Regalado argued the original motive persisted because at the time Shayla gave her statement to police,

she didn't know if Graham was alive or dead and she now had to maintain a consistent story to protect her credibility. *Id.* 120-22.

Shayla proffered her understanding of Graham's parole status outside the presence of the jury. She testified that Graham was convicted of drug distribution in Pennsylvania in 2011. TrV2 85. She indicated he absconded from parole and was extradited back to Pennsylvania in 2017. *Id.* at 86. She stated at the time of his death, Graham was still on parole. *Id.* Ms. Regalado renewed her motion to question Shayla about Graham's parole status. *Id.* at 88. The court again denied the motion, stating "given the fact that she's testifying today, the motivation that she may have had before regarding protecting her husband is gone." *Id.* at 94. Shayla was asked if she remembered if her husband struck Ross at any point during the confrontation, to which she replied "I don't." TrV2 126. She was then asked, "If your husband wanted to punch Ross Johnson, could he have?" She stated "[h]e used to be a boxer, absolutely." *Id.* Later the State inquired, "So, Ms. Colbert-Graham, this is your one opportunity to just tell us a little bit about your husband. Would you like to do that?" *Id.* at 137. Shayla responded:

> He wanted to help those kids. That's what the construction company is for. He felt like the children of Rapid City were getting lost, they didn't have a purpose, and he was going to figure out how he can get them in there to at least learn a skill and find a passion. That's what he wanted to do with the construction company.

*Id.* Ms. Regalado argued this testimony opened the door to questioning Shayla about Graham's parole status. *Id.* at 139. The court disagreed. *Id.*

### C. *The excluded testimony was relevant to probe into possible motives influencing Shayla's testimony.*

Under SDCL 19-19-401, evidence is relevant if "(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (2) The fact is of consequence in determining the action." Although relevant evidence is generally admissible,

it may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." *See* SDCL 19-19-403.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process of the Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986). "This right is 'generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness'] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witnesses' testimony.'" *Id.* (citations omitted). "When a defendant is denied the ability to respond to the State's case against him, he is deprived of his 'fundamental constitutional right to a fair opportunity to present a defense." *State v. Huber*, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294.

The admissibility of the deceased victim's spouse's testimony, as it relates to bias and motive to testify falsely about the victim's parole status, has not been addressed by this Court. Nor has the undersigned identified any case law from other jurisdictions that has discussed the same. A few courts have, however, affirmatively considered the admissibility of a victim or State witness's parole or probation status. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *State v. Lucius*, 140 N.H. 60, 62-63, 663 A.2d 605, 607 (1995); *Adcock v. Com.*, 702 S.W.2d 440, 441 (Ky. 1986); *State v. Filler*, 3 A.3d 365, 370-71 (Me. 2010). While these cases are factually distinguishable from the case at bar, the legal reasoning for courts' decision is the same as the issue presented here: the excluded testimony was probative of the witness's possible bias or motive to lie.

Ronny's primary defense at trial was that he shot Graham to defend Ross against further attack. This theory was completely undercut by Shayla's testimony that Graham did not strike Ross *at any point* during the confrontation. In fact, this testimony was so compelling the State cited it in its closing argument. *See* TrV5 8-9 ("Shayla tells you that no punches are thrown. Ross did not get beat up. [I]f Nathan had wanted to beat those boys up, he absolutely could have").

As an eyewitness to the confrontation, Shayla was a critical witness. Thus, the accuracy and truthfulness of her testimony were key elements in the State's case against Ronny. *See generally Irby v. State*, 327 S.W.3d 138, 159 (Tex. Crim. App. 2010). The trial court's relevancy determination was grounded in the notion that any motive Shayla had to lie was rendered void by her husband's death. Even if, for the sake of argument, this is true, the court's ruling ignores the fact that Shayla also had a motive to testify consistent with her initial statement to police to protect her credibility before the jury. It is undisputed that Shayla knew Graham was on parole at the time of his death. It is also undisputed that she knew he had previously been extradited back to Pennsylvania for a parole violation. Thus, the claim the defense sought to develop with regard to Shayla's possible bias or motive was relevant and should have been submitted to the jury. *See Irby*, 327 S.W.3d at 157 ("The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony'"); *Adcock*, 702 S.W.2d at 441 ("[A] defendant has a right to put into evidence any fact which might show bias on the part of the witness who has testified against him").

The trial court's preclusion of evidence relating to Graham's parole status forced Ronny to present an incomplete theory of his defense. Had Shayla testified that Graham struck Ross during the confrontation, the jury reasonably could have believed that Ronny's

conduct was indeed justified. The possibility of a not-guilty verdict for the death of one's husband presents a strong incentive to lie. Likewise, such testimony would be contrary to Shayla's initial statement to police and could thus be used to impeach her credibility. Because the defense's theory presented a credibility determination, it should have remained within the sole province of the jury. *See State v. Buchholtz*, 2013 S.D. 96, ¶ 24, 841 N.W.2d 449, 457 (citations omitted) ("It is the function of the jury to resolve evidentiary conflicts, determine the credibility of the witnesses, and weigh the evidence").

## III. (a) THE PROSECUTOR'S DISCLOSURE OF ROSS'S GUILTY PLEA CONSTITUTES REVERSIBLE ERROR; (b) THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY NOT TO CONSIDER ROSS'S GUILTY PLEA AS EVIDENCE OF RONNY'S GUILT VIOLATED RONNY'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

*A. Standard of review.*

(a) The issue of the prosecutor's comments to the venire was not preserved by objection. Thus, the plain error rule applies. Plain error is error that is plain, affects substantial rights, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Wilson*, 2020 S.D. 41, ¶ 17, 947 N.W.2d 131, 136, reh'g denied (Aug. 31, 2020). (b) While this Court generally reviews evidentiary rulings, *State v. Rhines*, 1996 S.D. 55, ¶ 133, 548 N.W.2d 415, 446, and the refusal of a proposed jury instruction under an abuse of discretion standard, *State v. Webster*, 2001 S.D. 141, ¶ 7, 637 N.W.2d 392, 39, Ronny contends the conduct at issue deprived him of his right to due process and a fair trial. U.S. Const. Amend. V, VI, and XIV; S.D. Const., art. VI, §§ 2, 7. Since this claim alleges constitutional error, *de novo* review is warranted. *State v. Dickerson*, 2022 S.D. 23 at ¶ 29.

*B. Relevant Facts.*

During the State's voir dire examination, Ms. Roetzel stated the following:

> So one of the other issues that's going to come up is that Ronald Black Cloud on the night that this happened was with another young person who name is Ross Johnson. *Ross Johnson was charged in this case with the same crime that Ronald Black Cloud is charged with and he has since pled guilty and he's going to be a testifying witness*. So I am going to ask again, do any of you know Ross Johnson? He's 17; is that right? Seventeen. *So he's testifying. He's pled guilty and been sentenced. But he was asked as part of his plea agreement to testify in this case. So he is testifying as part of a plea agreement*[.]

SR 1419-20. (emphasis added). Following these remarks, Ms. Roetzel asked the venire how they felt about Ross testifying as part of a plea agreement. SR 1420. In response, a venireperson stated: Well, I think it's good that he's working, you know – you said he's telling people he did it. He's admitting it. Could lie to get, you know, but at least he's working with the State." SR 1422. Ms. Roetzel asked another venireperson "So what do you think about having a witness testify that *he's admitted responsibility for being part of a crime*?" SR 1423. (emphasis added). She asked yet another venireperson "[h]ow do you feel about having someone testify who I've made a deal with?" SR 1424. In response to this same question, one venireperson stated "… sometimes when someone does commit a crime and after it's over, they realize the direness of that decision and that if that's – if they are able to come forward, I think that takes some courage too." *Id.*

On the third day of trial, defense counsel ("Ms. Lawler") asked Sgt. Harris if he was aware that Ross "was offered reduced charges in this case," to which he replied "I believe so, yeah." TrV3 48. Ms. Lawler then asked "[a]nd you were actually present when [Ross] agreed to do a proffer interview with you and Detective Freeouf?" *Id.* Ms. Roetzel objected. *Id.* at 49. In chambers, the court asked Ms. Lawler what the basis was for questioning Sgt. Harris about the proffer interview. *Id.* at 50. Ms. Lawler explained it was relevant because the venire panel was explicitly told that Ross had entered into a plea agreement and had plead guilty, but they

weren't told what he plead guilty to. *Id.* The State argued the information wasn't relevant and that the defense was trying to "backdoor hearsay" through Sgt. Harris. *Id.* at 54. The court asked Ms. Roetzel directly if Ross was going to testify, to which she replied "[h]e's not going to testify for anyone." *Id.* at 56. Based upon this information, the court held the defense could ask Sgt. Harris if he conducted the proffer interview, but couldn't go into specific detail about the terms. *Id.* at 66. It then stated, if necessary, the jury could be given further instruction. *Id.* at 67.

The following day, the court considered a motion to quash filed by Ross's attorney, Matt Skinner. TrV4 3. Mr. Skinner stated the defense had advised they intended to question him about the plea agreement letter (and any implied agreements) between Ross and the State. *Id.* at 4. Ms. Lawler explained the defense didn't intend to ask Mr. Skinner anything covered by privilege and that it would limit its discussion to information already in the public record. *Id.* at 7. The court refused to quash the subpoena but held Mr. Skinner couldn't testify as his testimony wasn't relevant and could confuse the jury. *Id.* at 9.

During the settling of jury instructions, the State objected to defense proposed instruction 44, which reads as follows:

> You have heard evidence that witness Ross Johnson has pleaded guilty to a crime which arose out of the same events for which the Defendant is on trial here. That guilty plea cannot be considered by you as any evidence of this Defendant's guilt. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely on that witness' testimony.

SR 274. The court denied this instruction. TrV4 169. Ms. Regalado asked the court to consider modifying the language to read "Ross Johnson may have pleaded guilty." *Id.* The court again denied the instruction, stating it was Ross didn't testify and was therefore not a witness. *Id.*

*C. (a) The prosecutor's disclosure of Ross's guilty plea.*

"When two or more individuals are separately charged with the same crime, it generally is reversible error to present evidence *or tell the jury that a jointly accused defendant has been convicted*." *State v. Helms*, 265 S.W.3d 894, 900 (Mo. Ct. App. 2008) (emphasis added). "The basic rationale underlying the concept that this is prejudicial error is that it is irrelevant and incompetent because it infers that since the confederate was guilty the defendant must therefore be guilty and violates the defendant's right to be tried on his own." *Id.*

In *State v. Jordan*, 627 S.W.2d 290 (Mo. 1982), the prosecutor informed the venire that the two codefendants had pleaded guilty to reduced charges in exchange for their testimony. *Id.* at 291-92. But neither of the men testified at trial. *Id.* at 292. Due to uncertainty of whether defense counsel's objection, as made, preserved the issue for appeal, the *Jordan* court invoked the plain error rule. *Id.* at 292-93. In its analysis, the court examined a number of different state and federal court decisions involving similar disclosures by prosecutors during voir dire and opening argument. *Id.* at 293-94. The court's analysis makes clear that these types of disclosures "standing alone is erroneous but under some circumstances not prejudicial." *Id.* at 294. For example, in *State v. Dunn*, 615 S.W.2d 543 (Mo. App. 1981), *State v. Borden*, 605 S.W.2d 88 (Mo. banc 1980), and *United States v. Carr*, 647 F.2d 867 (8th Cir. 1981), the courts upheld the convictions at issue despite the erroneous disclosures, but did so *because each of the codefendants was "subject to the rigors of cross-examination*." *Jordan*, 627 S.W.2d 290. (emphasis added).[2] The *Jordan* court found this distinction

[2] *See also State v. Borden*, 605 S.W.2d 88, 91 (Mo. 1980) (holding prosecutor's improper disclosure of accomplice's plea agreement during voir dire not plain error because relevant to

was significant. *Id.* at 294. But even where courts have affirmed, they have cautioned against the use of such disclosures, to wit: "This portion of the voir dire on the part of the State was not well thought out nor artfully prepared and it was improper." *Dunn,* 615 S.W.2d at 549.

In reversing the defendant's conviction, the *Jordan* court found the prosecutor's disclosure "injected the venom of prejudice into defendant's right to a fair and impartial trial." *Jordan,* 627 S.W.2d at 293. (citations omitted). Likewise, in *State v. Dansberry*, 18 S.W.3d 518 (Mo. Ct. App. 2000), the issue before the court was similarly whether the prosecutor's disclosure to the venire of the non-testifying codefendant's guilty plea denied the defendant his right to a fair trial and impartial jury. *Id.* As in *Jordan*, the case was decided under the plain error rule. *Id.* 522. The court held the facts of the case were "indistinguishable" from *Jordan* and therefore reversed for a new trial. *Id.* at 523.

Ronny acknowledges he carries a heavy burden in demonstrating plain error. But he contends the issue here presents the very type of "exceptional circumstances" the plain error rule was designed to address. *See State v. Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d 196, 200 (citations omitted). Not only did Ms. Roetzel disclose to the venire that Ross was charged "with the same crime" as Ronny, but she also advised that Ross "has since pled guilty" and "is testifying as part of a plea agreement[.]" SR 1419-20. Worse still, she stated that Ross had "… *admitted responsibility for being part of a crime[.]*" SR 1423. But at no point did Ms. Roetzel explain that Ross pleaded guilty to

show bias and witness subject to cross-examination); *State v. Taylor*, 610 S.W.2d 1 (Mo. 1980) (holding prosecutor's statement in opening that codefendant had pled guilty and would receive a 15-year sentence not plain error because relevant to witness' credibility).

a lesser charge. Thus, the venire was left with the misapprehension that Ross had pleaded guilty to second-degree murder. And because Ross never testified, the defense was later precluded from clarifying these prejudicial remarks.

*Jordan*, *supra*, instructs it is generally considered plain error to tell the venire that a jointly accused defendant has pleaded guilty. Only the rigors of cross-examination is said to minimize the taint of this prejudice. But no such cross-examination occurred here. Therefore, this disclosure was erroneous. What's more, the prejudice flowing from Ms. Roetzel's disclosure is obvious. That is, this disclosure "injected the venom of prejudice," *Jordan*, 627 S.W.2d at 293, into Ronny's right to a fair trial in that the venire may very well have considered Ronny's guilt as settled and that the trial was a mere formality. *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985).

The right to a fair trial and impartial jury are among the most sacred tenets of our criminal jurisprudence. *See* U.S. Const. Amend. V, VI, and XIV; S.D. Const., art. VI, §§ 2, 7. For these rights to have any potency, courts must be especially vigilant to ensure that co-accused defendants are not convicted on the theory that "guilty birds of a feather are flocked together." *Griffin*, 778 F.2d at 711. Because no such vigilance was exercised in this case, reversal is warranted.

*D. (b) The trial court's failure to instruct the jury; evidentiary rulings.*

Not only did Ms. Roetzel's improper disclosure cast the taint of prejudice upon Ronny's right to a fair trial and impartial jury, but the trial court compounded its prejudicial effect by refusing to instruct the jury not to consider Ross's guilty plea as evidence of Ronny's guilt.

Generally, "whenever evidence of a codefendant's guilty plea or conviction is introduced, a cautionary instruction limiting the jury's use of the guilty plea is required." *People v. Rios*, 2014 COA 90, ¶ 6, 338 P.3d 495, 497. Ordinarily, this *requirement* applies where the co-charged defendant actually testifies at trial, so as to blunt the impact of possible prejudice. *See also Id.* (quoting *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983)) ("Because of the potential for prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are critical"). This rationale applies equally here.

In denying defendant's proposed instruction 44, the trial court opined that the instruction was unnecessary and irrelevant because Ross didn't testify. TrV4 169-70. When Ms. Regalado asked the court to consider modifying the language, the court again denied the instruction. The court's reasoning wholly discounts the fact that Ross's guilty plea was known to the venire. Moreover, although Ross never personally appeared at trial, his presence echoed throughout the entirety of the case in that virtually every single witness mentioned him. Thus, this was not a situation where the prosecutor made a passing reference to an inconsequential witness.

For the same reasons noted above, the court also precluded the defense from asking Sgt. Harris about the details of his proffer interview with Ross and refused to compel Mr. Skinner's testimony in an attempt to inquire into the same. This despite the fact that Ms. Lawler assured the court she did not intend to ask Mr. Skinner anything covered by privilege. In no uncertain terms, the State was permitted to disclose extremely prejudicial information to the venire, yet the defense's efforts to mitigate this prejudice was frustrated at each and every turn.

To blunt the prejudice of Ms. Roetzels' disclosure and to ensure that Ronny was not "affected by another's act or admission, to which he is a stranger," *State v. Fenton*, 499 S.W.2d 816, 816 (Mo. App. 1973) (citations omitted), the proposed limiting instruction, at a minimum, should have been given. Neither fairness nor the administration of justice is served by the court's reasoning.

## IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT TRANSFERRED RONNY'S CASE TO ADULT COURT.

### *A. Standard of review.*

"[I]t is within the discretion of the trial court to determine whether to transfer juvenile proceedings to adult court." *State v. Jensen*, 1998 S.D. 52, ¶ 20, 579 N.W.2d 613, 617 (citations omitted). "If the court concludes that transfer is warranted, the court shall enter 'findings of fact upon which the court's decision is based." SDCL 22-11-4. "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.*

### *B. The record lacks substantial evidence to support the trial court's finding that transfer to adult court was in the best interest of both Ronny and the public.*

"The transfer of a juvenile offender from juvenile court to criminal court for prosecution should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be 'protected and rehabilitated rather than subjected to the harshness of the criminal system[.]'" *Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App. 2014) (overruled on other grounds).

The State moved by discretionary motion to transfer Ronny's case to adult court. In doing so, it bore the burden of proof. The trial court held a hearing to determine "whether it would be contrary to the best interest of the child and of the

public to retain jurisdiction over the child." SDCL 26-11-4. In making this determination, the court considered the following factors:

> (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, premediated, or willful manner; (3) Whether the alleged felony offense was against persons or property[;] (4) The prosecutive merit of the complaint[;] (5) The desirability of trial and disposition of the entire felony offense in one proceeding if the child's associates in the alleged offense are adults; (6)The record and previous history of the juvenile; and (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.* "[A] court is not required to consider every one of the listed factors nor is it confined to a consideration of only the listed factors to the exclusion of others." *State v. Harris*, 494 N.W.2d 619, 624 (S.D. 1993). And "no controlling weight is to be given to any factor." *Id.* Moreover, neither the interests of the child nor the interests of the State are controlling considerations. *Id.* The record must, however, contain "'substantial evidence' supporting the court's decision." *State v. A.B.*, 2008 S.D. 117, ¶ 14, 758 N.W.2d 910, 914 (citations omitted).

Applying these factors to Ronny's case, the court found the alleged felony offense was (1) "the type that strikes directly at the wellbeing and safety of this community;" (2) "aggressive and violent;" (3) "against persons;" and (4) had prosecutive merit. App. 3. As to factor 5, it found that "[e]ach case must be addressed on their own facts and merit." *Id.* As to factor 6, the court found that Ronny's prior history weighed in favor of transfer. *Id.* And as to factor 7, the court held "that there was little more the juvenile system could offer [Ronny] in ways of rehabilitation." *Id.* Based on these findings, the court determined "that it was in the

best interest of both the public and [Ronny] that the matter be transferred to adult court." *Id.*

Initially, Ronny argues there is no evidence to support the notion that he somehow knew there could be a confrontation between Ross and Graham. App. 3. In fact, the record reflects just the opposite. TrV1 15; TrV4 19. Thus, this finding is clearly erroneous. There is also no evidence there were "concerns in the community that a killer was on the loose." App. 3. This is a generalized assumption on the court's part. This finding, too, is clearly erroneous. More broadly, Ronny contends the record lacks substantial evidence to support the court's transfer finding. Additionally, or alternatively, he contends the court gave the State's interests controlling weight.

The court made much of Ronny's prior history and conduct at JSC. App. 3. Ronny did have a prior juvenile record, however, most of these charges were non-violent in nature. Moreover, although Ronny had a number of disciplinary infractions at JSC, the court's findings failed to address, much less consider, several critical details. For example, Ronny was at JSC for over three-years. When he first arrived, he was traumatized by Graham's death. That trauma remains today. Over this three-year period, Ronny participated in all available programming, including Lakota talking circles and access to mentors. App. 5 at 6. However, the COVID-19 pandemic led to the discontinuation of these services and all in-person family visits. Consequently, Ronny's mental health deteriorated and he was diagnosed with depression. Although he was prescribed medication and underwent counseling, these sessions were changed to telehealth due to COVID restrictions. App. 5 at 4-5. Depression rates among adults spiked during the pandemic. Thus, it's hardly a

surprise that Ronny, a fourteen-year-old incarcerated child, had an increase in behaviors during this time. [3]

Most notably, there is not substantial evidence to support the court's contention that "there is little more the juvenile system c[an] offer [Ronny] in ways of rehabilitation." App. 3. In fact, the testimony of DOC agent Jason Gillaspie directly contradicts this finding. Mr. Gillaspie stated the DOC, through its various placements, can offer programs for children who need behavioral therapy, mental health treatment, and/or chemical dependency treatment. App. 5 at 36-37. It can also place children in an out-of-state facility, should a placement within South Dakota be unavailable. *Id.* at 39. The DOC also offers transitional living programs for older children nearing discharge. *Id.* at 56. Mr. Gillaspie advised that children with very serious charges, including murder and felony child abuse which resulted in the death of a child, have been successfully placed by the DOC. *Id.* at 48, 65. Because these programs are designed to identify problematic behaviors, the recidivism rates for DOC-committed juveniles is less than 20 percent. *Id.* at 60. This despite the fact that children placed under the new DOC guidelines have, on the whole, committed more serious offenses than in years past. *Id.* at 59.

All of this is to say the juvenile justice system is well-equipped to treat children like Ronny. But the court's opinion is completely devoid of any analysis on this front. Instead, it merely offers a conclusory statement that all viable treatment options have been exhausted. Says who? Certainly not the record. In fact, Mr.

[3] *Depression rates tripled and symptoms intensified during first year of COVID-19*, Brown https://www.brown.edu/news/2021-10-05/pandemic-depression (last visited November 23, 2022).

Gillaspie affirmed that a suitable placement could be found depending upon Ronny's needs. *Id.* at 61, 63-65. Contrary to the court's assertion, Ronny has taken steps to rehabilitate himself while at JSC. Namely, at the time of the transfer hearing, Ronny was five-credits shy of obtaining his high-school diploma. App. 4 at 222. Moreover, Ronny aspires to further his education in college. *Id.* at 224. Additionally, Ronny expressed a desire to work with Lakota mentor Erik Brings White of 'I am Legacy' upon his release. App. 5 at 81. While Ronny may be in the nascent stages of rehabilitation, he has made progress nonetheless. Thus, there is a "likelihood of reasonable rehabilitation of the juvenile." SDCL 26-11-4.

The record lacks substantial evidence to support the court's finding that transfer to adult court was "in the best interest of both the public and Ronny." App. 3. The court cited no evidence that Ronny could not be rehabilitated within the juvenile system and the testimony of Mr. Gillaspie disproves this claim. Moreover, the court's opinion is devoid of any evidence that it meaningfully considered Ronny's interests. Instead, the State's interests were seemingly given controlling weight. For these reasons, reversal is warranted.

## V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED RONNY TO A TERM OF FORTY-YEARS.

### *A. Standard of review.*

This Court generally reviews the circuit court's sentencing decision for an abuse of discretion. *State v. Klinetobe*, 2021 S.D. 24, ¶ 26, 958 N.W.2d 734, 740. (citations omitted). "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.* (citations omitted).

### *B. The trial court did not appropriately apply mitigating factors in fashioning its sentence.*

Following a day-long sentencing hearing, the trial court acknowledged the mitigating factors that weigh in favor of a less punitive sentence for Ronny. *See generally* SH. The court properly relied on *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012), and the characteristics of youth it outlines that mitigate culpability in young defendants and weaken rationales for harsh punishments: the child's age and immaturity; family home environment; circumstances of the offense, including the role the juvenile had in the offense and any influence of peer pressure; the incapacities of youth that may have disadvantaged the juvenile in dealing with the justice system; and the juvenile's potential for rehabilitation. 567 U.S. 460 (2012); *State v. Quevedo*, 2020 S.D. 42, 947 N.W.2d 402. The court found that Ronny was 14 at the time of the offense, and that his reactions that night demonstrated recklessness and immaturity; that he came from a troubled home environment during which he experienced homelessness, abuse, and instability and lacked proper parental guidance; that the facts of this case in particular demonstrate his susceptibility to peer influence and that his co-defendant was largely responsible for the events the night of the offense; and, ultimately, that Ronny was capable of rehabilitation as demonstrated by his graduation from high school while at JSC and his participation in available programming while there. SH 58-75.

Nevertheless, after that thorough analysis, the court then cited to the *dissent* in *Miller* and stated Ronny had a debt to pay for the crime. SH 76-77. In handing down the 40-year sentence, the court didn't indicate the sentence would further any goals of rehabilitation or protection of the community. The sentence runs contrary to the court's finding that Ronny could be rehabilitated: the earliest Ronny will be eligible for parole is at the age of 34, after which he will have spent his entire adolescence

and his early adulthood incarcerated without access to meaningful rehabilitative services.

Moreover, the significant disparity between Ross's sentence of 20-years and Ronny's suggests the court abused its discretion when sentencing Ronny. "A claim of unwarranted sentencing disparity depends upon a record that establishes that co-defendants were similarly situated and inexplicably received different sentences." *State v. Klinetobe*, 2021 S.D. 24, ¶ 39, 958 N.W.2d 734, 743 (citations omitted). Though Ross pleaded to lesser charges, it remains that Ross's actions were a central part of the court's discussion of sentencing, just as Ross was a central figure throughout the trial. The court noted Ross was older, brought the gun, knew that he wasn't welcome at the victim's home, started a physical altercation, and encouraged Ronny to shoot. SH 67-74.

The disparity in sentencing is clear and significant and, along with the lack of appropriate application of the *Miller* factors, amounts to abuse of discretion.

## VI. THE TRIAL COURT'S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

### *A. Standard of review.*

"Whether a circuit court's sentence violates the Eighth Amendment's proscription against cruel or unusual punishment involves a different standard." *Klinetobe,* 2021 S.D. 24, ¶ 27, 958 N.W.2d 734, 740 (citations omitted). "[This Court] review[s] this constitutional question de novo." *Id.*

### *B. Ronny's sentence was disproportionate to the offense and similarly-situated juvenile defendants*

The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 U.S. at 469. Intrinsic to the Eighth Amendment is the

concept of "proportionality," which "flows from the basic precept of justice" and mandates that "punishment for a crime should be graduated and proportioned." *State v. Springer*, 2014 S.D. 80, ¶ 11, 856 N.W.2d 460, 464 (*quoting Miller at 469).*

The Eighth Amendment does not require strict proportionality between the crime and the sentence, but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Quevedo*, 2020 S.D. 42 at ¶ 37.

To determine whether Ronny's 40-year sentence was grossly disproportional, the Court compares the "gravity of the offense against the harshness of the penalty." *Id.* The Court will also "consider other conduct relevant to the crime" when reviewing a sentence for gross disproportionality. *Id.* (quoting *State v. Diaz*, 2016 S.D. 78, ¶ 52, 887 N.W.2d 751, 767). If this threshold inquiry reveals gross disproportionality, the Court compares Ronny's sentence to other sentences imposed on juveniles convicted of second-degree murder. *Id.*

The Court has previously acknowledged that homicide has historically been considered "the highest crime against the law of nature that man is capable of committing." *State v. Rice,* 2016 S.D. 18, ¶14, 877 N.W.2d 75, 80 (internal citations omitted). Because Ronny was a child at the time of the offense, he was not subject to a life sentence the way an adult would be, and his sentence must be graduated and proportioned, including use of the *Miller* factors described above.

Moreover, despite the mitigating factors acknowledged by the trial court, Ronny's sentence of 40-years is harsher than sentences given to other children in South Dakota since *Miller*. This is true even though the facts surrounding those murders were more brutal, further illustrating the sentence is disproportionate.

Jessi Owens, who is white, was 17 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. She was charged with first-degree murder and robbery but pleaded to second-degree murder. *Id.* She was re-sentenced to 40-years, the same term as Ronny. ("Life sentence reduced for convicted murderer," Argus Leader, 8/3/2014 https://www.argusleader.com/story/news/crime/2014/09/03/life-sentence-reduced-convicted-murderer/15032409/).

Carlos Quevedo, who is Native American,[4] was 17 when he was charged with first-degree murder and other crimes after repeatedly stabbing a store clerk during a robbery of a case of beer. *Quevedo*, 2020 S.D. 42. He pleaded guilty to a reduced charge of second-degree murder and was sentenced to 90-years. *Id.* Carlos was older than Ronny when the respective crimes were committed, and Carlos's crime was a sustained and brutal attack during the course of a robbery rather than a reckless firing of a gun from a considerable distance.

Braiden McCahren, who is white and 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, retrieved and inserted a bullet when he realized the gun was unloaded, and pulled the trigger, resulting in the death of one of his friends. He was convicted of a lesser-included offense of second-degree murder and sentenced to only 25-years with 15 years of that time suspended. *State v. McCahren*, 2016 S.D. 34, ¶ 35, 878 N.W.2d 586, 601.

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[4] Racial disparities in sentencing are relevant to the discussion of disproportional sentencing. *See, e.g.,* "Data shows Native Americans in South Dakota receive longer manslaughter sentences," *Argus Leader,* Oct. 4, 2022, https://www.argusleader.com/story/news/crime/2022/10/04/native-americans-south-dakota-got-longer-manslaughter-sentences-data-shows/10182245002/ (about adult sentencing in manslaughter cases, which are comparable to homicide sentencings for children in that there is judicial discretion); Juvenile Court Statistics, Office of Juvenile Justice and Delinquency Prevention, https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2018.pdf/p. 58 (in juvenile court, Native American youths are more likely to receive a disposition of an out-of-home placement for similar offenses than their white counterparts).

And of course, Ronny's co-defendant, Ross, who is white and was 16 at the time of the offense, pleaded guilty to two lesser charges in exchange for testifying against Ronny. Though Ross refused to testify and did not uphold his end of the bargain, his sentence of 20-years stands. *See* SH generally.

Particularly in light of these cases, given Ronny's young age, and the strong mitigating evidence presented, the sentence in this case is disproportionate and violates Ronny's rights under the Eighth Amendment of the United States Constitution and Article 6, Section 23 of the South Dakota Constitution.

## CONCLUSION

For the foregoing reasons, Ronny asks the Court to reverse the judgment of the trial court and remand for a new trial.

## REQUEST FOR ORAL ARGUMENT

Ronny respectfully requests to present oral argument on these issues.

SIGNED this 29th day of November, 2022.

Respectfully submitted,
LAW OFFICE OF THE PUBLIC DEFENDER
For PENNINGTON COUNTY
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181 (telephone)
(605) 394-6008 (facsimile)

By: */s/ Joanna Lawler*
Joanna Lawler
*Attorney for Defendant/ Appellant*

By: */s/ Lori K. Goad*
Lori K. Goad
*Attorney for Defendant/Appellant*

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA<br>Plaintiff and Appellee, | ) | APPEAL NO. 29946 |
| vs. | ) | CERTIFICATE OF SERVICE |
| RONALD BLACK CLOUD,<br>Defendant and Appellant. | ) | |

The undersigned attorneys hereby certify that on this 29th day of November, 2022, a true and correct copy of the Appellant's Brief was served by electronic filing upon the following individuals at the e-mail address listed below:

Ms. Lara Roetzel
Pennington County State's Attorney
larar@pennco.org

Mr. Mark Vargo
South Dakota Attorney General
atgservice@state.sd.us

Ms. Jenny Jorgenson
Assistant Attorney General
jenny.jorgenson@state.sd.us

And served via first class regular mail upon the individual(s) listed below:

Ronald Black Cloud
DOC# 65445
Jameson Annex
Post Office Box 5911
Sioux Falls, South Dakota 57117

SIGNED AND DATED this 29th day of November, 2022.

**OFFICE OF THE PUBLIC DEFENDER**

**FOR PENNINGTON COUNTY**
By:

By: */s/ Joanna Lawler*
Joanna Lawler
*Attorney for Defendant/ Appellant*

By: */s/ Lori K. Goad*
Lori K. Goad
*Attorney for Defendant/Appellant*

## APPENDIX

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| STATE OF SOUTH DAKOTA, | ) | IN CIRCUIT COURT |
| | )SS | |
| COUNTY OF PENNINGTON. | ) | SEVENTH JUDICIAL CIRCUIT |
| STATE OF SOUTH DAKOTA, | ) | File No. CRI 21-620 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | **JUDGMENT** |
| | ) | |
| **RONALD MANUEL MYRON BLACK CLOUD,** | ) | |
| DOB: 10/29/03 | ) | |
| CR#: 18-211182 | ) | |
| Defendant. | ) | |

On the 7th day of February, 2022, the Defendant, RONALD MANUEL MYRON BLACK CLOUD, being present personally and being represented by and through his attorneys, Elizabeth Regalado and JoAnna Lawler, Rapid City; the State being represented by Chief Deputy Attorney Lara R. Roetzel and Deputy State's Attorneys, Angela Shute and Candice Lucklum; the Defendant having previously been arraigned on an Indictment alleging the offense of SECOND DEGREE MURDER (CLASS B FELONY), committed on or about August 17, 2018, in violation of SDCL 22-16-7; the Defendant having entered a plea of not guilty on March 19, 2021, to the Indictment as charged; a trial by jury having been held before this Court on September 28, 2021 through October 6, 2021; the Jury having returned its verdict of Guilty of the offense of SECOND DEGREE MURDER as charged; 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

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**ORDERED AND ADJUDGED,** and the sentence is that you, RONALD MANUEL MYRON BLACK CLOUD, upon your conviction for the crime of SECOND DEGREE

MURDER (CLASS B FELONY), be and you hereby are sentenced to serve Forty (40) 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 One Thousand Two Hundred Sixty-Seven (1,267) 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 Court's Office 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 Five Dollars ($5.00); 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 in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel that may be filed as a lien against the property of the Defendant by the county or municipality is an amount to be determined; and it is further

**ORDERED,** That the Defendant pay restitution to the Crime Victims' Compensation Program in the total amount of Eight Thousand Seven Hundred Seventy-Eight Dollars and Fifty-Three Cents ($8,778.53), to be paid through the Clerk of Court's Office; and it is further

**ORDERED,** That the Defendant reimburse Pennington County for the Grand Jury transcript costs in this matter in the amount of Forty-Eight Dollars and Seventy-Five Cents ($48.75) to be paid through the Clerk of Court's Office; 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 10 day of February, 2022, effective the 7th day of February, 2022.

BY THE COURT:

The Honorable Matt Brown
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts

(Deputy)

(SEAL)

**NOTICE OF RIGHT TO APPEAL**

You, RONALD MANUEL MYRON BLACK CLOUD, 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
FEB 11 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA, | ) | IN CIRCUIT COURT |
| | )SS | |
| COUNTY OF PENNINGTON. | ) | SEVENTH JUDICIAL CIRCUIT |
| STATE OF SOUTH DAKOTA, | ) | File No. CRI 21-620 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | **AMENDED JUDGMENT** |
| | ) | |
| **RONALD MANUEL MYRON BLACK CLOUD,)** | | |
| DOB: 10/29/03 | ) | |
| CR#: 18-211182 | ) | |
| Defendant. | ) | |

On the 7th day of February, 2022, the Defendant, RONALD MANUEL MYRON BLACK CLOUD, being present personally and being represented by and through his attorneys, Elizabeth Regalado and JoAnna Lawler, Rapid City; the State being represented by Chief Deputy Attorney Lara R. Roetzel and Deputy State's Attorneys, Angela Shute and Candice Lucklum; the Defendant having previously been arraigned on an Indictment alleging the offense of SECOND DEGREE MURDER (CLASS B FELONY), committed on or about August 17, 2018, in violation of SDCL 22-16-7; the Defendant having entered a plea of not guilty on March 19, 2021, to the Indictment as charged; a trial by jury having been held before this Court on September 28, 2021 through October 6, 2021; the Jury having returned its verdict of Guilty of the offense of SECOND DEGREE MURDER as charged; 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, RONALD MANUEL MYRON BLACK CLOUD, upon your conviction for the crime of SECOND DEGREE MURDER

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2/16/22

(CLASS B FELONY), be and you hereby are sentenced to serve Forty (40) 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 One Thousand Two Hundred Sixty-Seven (1,267) 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 Court's Office 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 Five Dollars ($5.00); 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 in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel that may be filed as a lien against the property of the Defendant by the county or municipality is an amount to be determined; and it is further

**ORDERED**, That the Defendant, **joint and several with co-defendant, Ross Johnson (File No. CRI 18-4060),** pay restitution to the Crime Victims' Compensation Program in the total amount of Eight Thousand Seven Hundred Seventy-Eight Dollars and Fifty-Three Cents ($8,778.53), to be paid through the Clerk of Court's Office; and it is further

**ORDERED,** That the Defendant reimburse Pennington County for the Grand Jury transcript costs in this matter in the amount of Forty-Eight Dollars and Seventy-Five Cents ($48.75) to be paid through the Clerk of Court's Office; 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 15th day of February, 2022, effective the 7th day of February, 2022.

BY THE COURT:

Matt Brown

The Honorable Matt Brown
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts

(Deputy)

**NOTICE OF RIGHT TO APPEAL**

You, RONALD MANUEL MYRON BLACK CLOUD, 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
FEB 16 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

# IN THE SUPREME COURT
# STATE OF SOUTH DAKOTA

No. 29946

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee*,

v.

RONALD MANUEL MYRON BLACK CLOUD,

*Defendant and Appellant*.

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

THE HONORABLE MATT BROWN
Circuit Court Judge

## APPELLEE'S BRIEF


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ATTORNEY FOR PLAINTIFF
AND APPELLEE



Notice of Appeal filed March 17, 2022

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No. 29946

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee*,

v.

RONALD MANUEL MYRON BLACK CLOUD,

*Defendant and Appellant*.

---

## PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Ronald Manuel Myron Black Cloud, is referred to as "Defendant." The settled record in the underlying case is denoted as "SR." Trial exhibits are referenced as "Ex" followed by the exhibit number and time stamp if applicable. Defendant's Brief is denoted as "DB." All references to documents will be followed by the appropriate page number(s).

## JURISDICTIONAL STATEMENT

On February 15, 2022, the Honorable Matt Brown, Circuit Court Judge, Seventh Judicial Circuit, entered an Amended Judgment of Conviction in *State of South Dakota v. Ronald Manuel Myron Black Cloud*, Pennington County Criminal File Number 51CRI21-000620. SR:611-13. Defendant filed his Notice of Appeal on March 17, 2022.

SR:615-16. Except for Issue IV, this Court has jurisdiction under SDCL 23A-32-2. This Court does not have jurisdiction to consider Issue IV.

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE PROSECUTOR PROPERLY QUESTIONED THE VENIRE?

No allegation of prosecutorial misconduct was raised to the court. The court denied Defendant's motion for a mistrial.

*State v. Hankins*, 2022 S.D. 67, 982 N.W.2d 21

*State v. Muetze*, 368 N.W.2d 575 (S.D. 1985)

*State v. Packard*, 2019 S.D. 61, 935 N.W.2d 804

*State v. Willingham*, 2019 S.D. 55, 933 N.W.2d 619

II.

WHETHER THE COURT PROPERLY LIMITED CROSS-EXAMINATION OF A WITNESS?

The right to present a defense issue was not presented to the court. The court held that Shayla could not be cross-examined about Graham's parole status.

*State v. Fasthorse*, 2009 S.D. 106, 776 N.W.2d 233

*State v. Kryger*, 2018 S.D. 13, 907 N.W.2d 800

SDCL 19-19-401

SDCL 19-19-403

SDCL 19-19-404

III.

WHETHER THE PROSECUTOR PROPERLY QUESTIONED THE VENIRE AND WHETHER THE JURY WAS PROPERLY INSTRUCTED?[1]

The prosecutorial misconduct issue was not presented to the court. The court denied Defendant's proposed instruction 44.

*State v. Darby*, 1996 S.D. 127, 556 N.W.2d 311

*State v. Nelson*, 2022 S.D. 12, 970 N.W.2d 814

*State v. Scott*, 2013 S.D. 31, 829 N.W.2d 458

*State v. Wilson*, 2020 S.D. 41, 947 N.W.2d 131

IV.

WHETHER THE COURT PROPERLY TRANSFERRED DEFENDANT TO ADULT COURT?

This Court does not have jurisdiction over the issue and the juvenile proceeding are not part of the settled record.

*State v. Edelman*, 2022 S.D. 7, 970 N.W.2d 239

*Tucek v. S.D. Dep't of Soc. Servs.*, 2007 S.D. 106, 740 N.W.2d 867

*Wright v. Young*, 2019 S.D. 22, 927 N.W.2d 116

SDCL 26-7A-112

[1] Defendant failed to comply with SDCL 15-26A-60, which states, in part, that "[e]ach issue shall be separately presented."

V.

WHETHER THE COURT PROPERLY APPLIED *MILLER V. ALABAMA* WHEN SENTENCING DEFENDANT?

This issue was not presented to the court.

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

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

*State v. Quevedo*, 2020 S.D. 42, 947 N.W.2d 402

VI.

WHETHER DEFENDANT'S SENTENCE VIOLATES THE EIGHTH AMENDMENT?

This issue was not presented to the court.

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

*State v. Quevedo*, 2020 S.D. 42, 947 N.W.2d 402

SDCL 22-6-1

## STATEMENT OF THE CASE

On February 24, 2021, a Pennington County Grand Jury issued an Indictment, charging Defendant with one count of second-degree murder in violation of SDCL 22-16-7. SR:11. The victim was Nathan Graham ("Graham"). SR:11. On March 19, 2021, Defendant appeared for an arraignment before the Honorable Matt Brown ("court") and entered a plea of not guilty. SR:641-47.

A jury trial began on September 28, 2021. SR:963. During voir dire, the State informed the venire that "Ross Johnson [("Ross")] was charged in this case with the same crime that [Defendant was] charged

with and he has since pled guilty and he's going to be a testifying witness . . . as part of a plea agreement. How do you feel about that?" SR:1418-19. Defendant did not object. Ross subsequently refused to testify. SR:2218. The court denied Defendant's proposed jury instruction 44 that incorrectly stated that the jury heard evidence that Ross pled guilty, and Ross testified. SR:2536-39.

The State also asked the venire questions regarding juvenile proceedings in adult court. Defendant objected, arguing that the State misstated that law. SR:1441-48. The State subsequently gave a clarifying statement and voir dire continued. SR:1448. The court also sua sponte gave a limiting instruction after a venireperson asked about the criteria to transfer a juvenile to adult court. SR:1462-64. Later, Defendant made a motion for a mistrial. SR:1490. The court denied the motion. SR:1495.

During trial, the court denied Defendant's request to question Shayla Colten-Graham ("Shayla") about the parole status of her husband, Graham, as a motive for her to lie. SR:1670-71. After closing arguments, the case was given to the jury. SR:2681. The jury subsequently found Defendant guilty of second-degree murder. SR:470.

On February 7, 2022, the court sentenced Defendant to forty years in the South Dakota State Penitentiary, with credit for 1,267 days served. SR:611-13. The court also imposed restitution and various costs. SR:612. On February 15, 2022, the circuit court entered an

Amended Judgment of Conviction. SR:611-13. On March 17, 2022, Defendant filed a Notice of Appeal. SR:615.

## STATEMENT OF FACTS

On August 17, 2018, in Rapid City, South Dakota, fourteen-year-old Defendant and sixteen-year-old Ross, who was armed with a 9mm semiautomatic pistol, sought out to find Ross's friend, Kyliel Colbert ("Kyliel"). SR:2057, 2157-63.

Defendant and Ross approached Kyliel's house, where he lived with his mother, Shayla, and stepfather, Graham. SR:1941-42; 1956-67. Ross knocked on the door as Defendant stood behind him. SR:1956-57. Shayla answered the door and stated, "you know you're not supposed to be here." SR:1957-58. Ross responded, "I can go wherever I want to." SR:1958.

Ross and Defendant did not leave, so Graham came to the door to address the trespassers.[2] SR:1958. Graham stated, "[w]hy do you keep coming here knowing you're not supposed to be here?" SR:1959. Ross responded, "I can go wherever I want to. You can't make me stop coming here." SR: 1959.

Graham stepped out of the doorway. SR:1960. Graham repeatedly stated that Ross needed to leave. SR:1961. Ross and

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[2] At trial, Defendant agreed that he was a trespasser, which he defined as someone who is on property who is not allowed to be there or not supposed to be there. SR:2465.

Defendant backed up into the yard. SR:1961-63. Ross lifted the front of his shirt, showed Graham the gun tucked into his waistband, and stated, "[a]in't nobody scared of you." SR:1961-62. Ross handed Defendant the gun. SR:2166, 2438, 2464. Defendant was not involved in the arguing and was standing off to the side in the yard. SR:1963-68. Eventually, Defendant walked towards the driveway, which was located away from Ross and Graham and towards the road. SR:2466.

Graham walked towards Ross in the yard, Ross pushed Graham, and Graham pushed Ross back. SR:1964. Graham demanded that Ross leave and Ross refused. SR:1965. Graham proceeds towards Ross and Ross walked backwards down the driveway. SR:1967-68. Shayla was trailing behind Graham in the yard. SR:1968. Shayla did not see where Defendant was at this point. SR:1968-69.

Graham and Ross reached the end of the driveway. SR:1969. Ross pushed Graham and Graham almost lost his footing. SR:1969. Graham pushed Ross from the driveway and into the street. SR:2006. Ross fell onto his knees and got up. SR:1970-73. Ross and Defendant finally started to walk up the road. SR:1969, 1973.

After the trespassers were removed from the property, Shayla turned away from Ross and Defendant and walked back towards the house. SR:1973. Graham was approximately five feet behind Shayla, yelling "[d]on't come back" as Defendant and Ross walked away.

SR:1974-75, 2003. Graham turned away from Ross and Defendant and walked towards Shayla. SR:2480-83.

Defendant heard Ross say, "Ronny, shoot that motherfucker," so he did. SR:2499. Defendant raised the 9mm semiautomatic pistol at Graham who was around 69 feet, 6 inches away and fired two shots. SR:2484; *see* SR:1692 (distance between shell casing and where Graham was found by law enforcement).

The first bullet ricocheted off the road and hit a mailbox. SR:1738, 1882. The second shot hit Graham in the back of the head and was a through-and-through shot. SR:1882, 2310. Defendant and Ross fled. SR:2400.

Law enforcement arrived and attempted lifesaving measures on Graham. SR:1574. Graham was nonresponsive. SR:1601-02. Graham's left hand was tucked in his pocket. Ex:1 0:02:41; SR:2300. Graham had no injuries showing that he was in a fist fight. SR:1603, 1785, 1871. Graham was transported to the hospital and was pronounced dead the next day. SR:1576, 1980.

Two days later, Defendant heard rumors that "Ross had turned on him" so Defendant sought out law enforcement and eventually admitted he shot Graham. SR:2403-04, 2158-68. Defendant also made incriminating statements on a recorded phone line while detained at the Juvenile Services Center ("JSC"). *See* Ex:85 10.65.021 at 4:30 ("If I could go back to that night, instead of like shooting him from so far

away, I should have like ran up and like, BOOM, hit him in the foot."); Ex:85 10.67.021 at 5:30 (Defendant admitted how he shot Graham and fled); Ex:85 10.80.021 at 12:47 ("Damn. If I get out before I'm 18, that's like basically getting away with murder."). Documents were also confiscated from Defendant while at JSC where he made additional incriminating statements. SR:2272-77, Ex:82-84. Defendant testified at trial that he shot Graham but alleged for the first time that he did it because he thought Shayla may have had a gun. SR:2398.

## ARGUMENTS

### I.

### DEFENDANT WAIVED THE ARGUMENT OF WHETHER HIS MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED BECAUSE OF PROSECUTORIAL MISCONDUCT.

A. *Background.*

During voir dire, the State asked, "[s]o here's the thing, does anybody know who decides where and in what court [Defendant] is going to be tried? Juvenile or adult court, anybody know?" SR:1440. Multiple venirepersons responded that they did not know. SR:1440. One venireperson asked, "Is it the State's Attorney's Office." SR:1441. The State responded, "No." SR:1441. Another asked, "The Judge?" SR:1441. The State responded, "So, you know, that's one of the really kind of weird things about being a juror is so much has been done and litigated before you ever become involved. Years. Some decisions have been made about evidence and in this case jurisdiction, and the

decision to try [Defendant] as an adult was a decision made by the Court." SR:1441.

Defendant objected, arguing that the State misstated the law regarding the State's involvement in the transfer proceedings and was misleading the jury to believe that the court made a sua sponte decision to charge Defendant in adult court. SR:1441-48. Defendant requested that the court clarify to the venire why the case was in adult court. SR:1442. The court held that either the State or the court could make the clarification to the venire that there was a petition by the State to transfer Defendant from juvenile court to adult court and the court made the decision to have the matter in adult court. SR:1445-48. The court asked if there was any other record that the parties wanted to make and both sides responded that they did not need to make a further record. SR:1448.

The State continued its voir dire examination and gave the clarifying statement. SR:1448-49. The State said,

> So we decided we're going to clarify this a little bit. So there's laws in South Dakota that govern if and when a juvenile should be transferred to adult court, okay. And there's statutes about factors that should be considered and circumstances that should apply in considering that. The State's Attorney's Office makes the decision about whether to ask that a case go to adult court, okay, if the child is a certain age. If the child is certain age, the defense can ask that a case go back to juvenile court. It's all very complicated. I'm giving you an overview. In this particular case, the State's Attorney's Office, having evaluated those statutes and those facts and circumstances, applied to move the case to adult court. Over years of litigation, the issue

was decided by the Court. Is that clear? Is that sufficiently clear, your Honor?

SR:1448-49. The court replied, "[i]t is. Thank you." SR:1449. Defendant did not object to these statements, and voir dire continued. SR:1449.

The State then asked, "So just talking about that process first, the legal process and decision-making, does anybody have a problem with it, the concept that juveniles can be prosecuted as adults?" SR:1449. Venirepersons responded. *See, e.g.*, SR:1450 ("The law is the law. And whether if it went through all the channels per se, to get where it is today, then I can't see where there would really be a question about it."); SR:1456 ("If it's already been decided, that shouldn't be a factor in making the decision. I wouldn't have a problem."); SR:1457 ("If the Court feels it's appropriate I'm okay with that."); SR:1458 ("I don't have a problem with that. It's come to this level for a reason and because of the process, and now it's time to move on, it sounds like, and come to a resolution with it."); SR:1458 ("If the Court's decided that it should be tried in adult court, then I'm fine with it."); SR:1460 ("You've went through a process to determine if he should be tried as an adult and this is the conclusion of that process, so you know, I have to look at making my decision just based on the evidence presented in adult court.").

One venireperson asked what the criteria for a transfer were. SR:1462. The court intervened and stated:

> I'll tell you all because this question of process has come up. The issue about what court this case has ended up in is a jurisdictional question and a question therefore of law rather than fact. And that is why the Court made that decision. In making that decision, the Court wants to make it very clear that it is not intending to validate or give the impression of any issue of fact, which is the jury's role alone. So the Court takes care of legal questions and the jury takes care of factual questions, and don't get those two mixed up. So ultimately the bottom line is this, we are where we are. You don't have to worry about how we got here because that was a legal question. Legal questions, you don't have to worry about that. You do have the role of figuring out factual questions. And when the evidentiary portion of the trial starts, that's what you're all going to be doing . . . You don't have to worry what the rationale was. The decision was made and has nothing to do with the Court's consideration of how this case should be decided. I'm 100 percent out of that process. That is your process as jurors . . . I have restricted counsel from getting into the details because ultimately it's not relevant for what you will be doing.

SR:1463-64.

During the next break in the voir dire proceedings, Defendant made a motion for a mistrial. SR:1490. Defendant argued, "I think *our* efforts to cure the issue with the [juvenile transfer] procedure, I don't think *we* made it better" based on responses and follow-up questions from the jury. SR:1490-91 (emphasis added). Defendant argued that the jury now thought that the court made factual determinations about the case and determined the validity of the charges. SR:1490-91. The court denied Defendant's motion and reasoned that any potential bias resulting transfer procedure discussions was cured by its colloquy to the venire. SR:1495.

B. *Standard of Review.*

A circuit court's decision to deny a motion for a mistrial will not be overturned unless there is an abuse of discretion. *State v. Nelson*, 2022 S.D. 12, ¶ 35, 970 N.W.2d 814, 826. "Abuse of discretion is 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* When bias is alleged to exist, actual prejudice must be shown which arises when in all probability, the comments "produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *State v. Packard*, 2019 S.D. 61, ¶ 15, 935 N.W.2d 804, 809.

C. *Defendant Failed to Preserve his Prosecutorial Misconduct Argument for Appeal.*

The United States Constitution and the South Dakota Constitution guarantee the right to an impartial jury. U.S. Const. amend. VI; S.D. Const. art. VI, § 7. "The purpose of '[v]oir dire examination is to enable counsel to determine whether any prospective jurors . . . are possessed of beliefs which would cause them to be biased in such a manner as to prevent his client from obtaining a fair and impartial trial.'" *State v. Leader Charge*, 2021 S.D. 1, ¶ 9, 953 N.W.2d 672, 675 (quotation omitted). In deciding whether questions exceed the proper scope of voir dire, courts look to whether the questions: (1) seek to uncover biases, prejudgments, or prejudices; (2) attempt to ascertain impartiality and qualifications; or (3) undertake to entrap, influence, or

obtain a pledge on issues expected to arise in trial. *State v. Scott*, 2013 S.D. 31, ¶ 13, 829 N.W.2d 458, 464.

Defendant has waived the argument that his motion for mistrial should have been granted because of prosecutorial misconduct during voir dire. This Court will find that prosecutorial misconduct has occurred if (1) the issue is preserved with a timely objection, (2) there has been misconduct, and (3) the misconduct prejudiced the party as to deny the party a fair trial. *State v. Hankins*, 2022 S.D. 67, ¶¶ 31-32, 982 N.W.2d 21, 32-33 (citing *State v. Hayes*, 2014 S.D. 72, ¶¶ 22, 24, 855 N.W.2d 668, 675).

Although Defendant did make a motion for a mistrial during voir dire, he did not argue that the mistrial should be granted because of prosecutorial misconduct. To "preserve issues for appellate review litigants must [timely] make known to the [circuit] courts the actions they seek to achieve or object to the actions of the court, giving their reasons." *State v. Bryant*, 2020 S.D. 49, ¶ 18, 948 N.W.2d 333, 338. When a defendant even acquiesces to a ruling, the defendant is deemed to have accepted that ruling and waived his right to argue the issue on appeal. *State v. Muetze*, 368 N.W.2d 575, 584-85 (S.D. 1985). Indeed, "[e]ven a fundamental right may be deemed [unpreserved and] waived if it is raised for the first time on appeal." *State v. Wright*, 2009 S.D. 51, ¶ 68, 768 N.W.2d 512, 534 (declining to consider an unpreserved double jeopardy challenge).

During voir dire, Defendant objected to the State's questions regarding juvenile proceedings in adult court. Defendant asked the court to clarify why the case was in adult court. The court agreed and asked the State to give a clarifying statement. Defendant raised no issue with how the court proposed the clarification matter be handled. The State subsequently gave the clarifying statement without objection from Defendant. Now, Defendant alleges that the clarifying statement, which he requested, was insufficient and the State committed prosecutorial misconduct. Defendant has waived these arguments. *See generally Muetze*, 368 N.W.2d at 584-85.

Some of the juror expressed opinions that they were okay with having a juvenile prosecuted in adult court if it followed "the process" and the transfer matter was already decided by the court. Later, Defendant argued that a mistrial should be granted because of alleged juror misconceptions regarding the transfer process. SR:1490. Defendant did not advance the argument that the State's line of questioning was prosecutorial misconduct and was the grounds for the motion for mistrial. Nor did the court issue a ruling on whether prosecutorial misconduct occurred. *See State v. Willingham*, 2019 S.D. 55, ¶ 25, 933 N.W.2d 619, 625 (defendant waived his argument on appeal that the duration of the stop was unlawful, when he only argued before the circuit court that the stop was unlawful because of racial profiling). Therefore, the issue of whether the court erred in denying the

motion for a mistrial based on prosecutorial misconduct is not preserved for appeal and is waived. Furthermore, Defendant has not requested, and therefore is not entitled to, plain error review. *State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818 (refusing to apply plain error review in the absence of a party's request); *see id.* ("As a general rule, an appellate court may review only the issues specifically raised and argued in an appellant's brief." (quotation omitted)).

D. *Defendant Received a Fair and Impartial Trial.*

Even if the issue is preserved, no prosecutorial misconduct occurred. "Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." *Hankins*, 2022 S.D. 67, ¶ 32, 982 N.W.2d at 33 (quoting *Hayes*, 2014 S.D. 72, ¶ 24, 855 N.W.2d at 675). "[N]o hard and fast rules exist which state with certainty when prosecutorial misconduct reaches a level of prejudicial error . . . each case must be decided on its own facts." *Id.* ¶ 33, 982 N.W.2d at 33 (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 27, 931 N.W.2d 725, 733). Prosecutorial misconduct is prejudicial when it "so infect[s] the trial with unfairness as to make the resulting convictions a denial of due process." *Id.* (quoting *State v. Smith*, 1999 S.D. 83, ¶ 52, 599 N.W.2d 344, 355).

The State committed no misconduct, let alone misconduct which so prejudiced the jury to require reversal of Defendant's conviction. The State's comments did not involve an attempt to persuade the jury

by use of deception or by reprehensible methods. The State's comments, taken in their totality, accurately summarize the transfer procedures. The State accurately stated that years of litigation happened before the case came to trial and "the decision to try [Defendant] as an adult was a decision made by the Court." SR:1441.

The State had a legitimate interest in ensuring the venire did not have a bias regarding the controversial subject of juvenile proceedings in adult court. The State's statements do not raise to the level of dishonesty used to persuade the jury. At most, the statements were vague and corrected by the State's clarifying statement.

The statements that allegedly biased the venire happened during voir dire. On appeal, Defendant isolates specific venirepersons that he alleges "formed an opinion about the transfer process." DB:10. Defendant had the opportunity to question the venirepersons about their beliefs and challenge them for cause. *See* SR:1170-71, SDCL 23A-20-13.1(11), (12), (21) (listing challenges for cause that may be taken to eliminate a biased prospective juror); *Packard*, 2019 S.D. 61, ¶ 17, 935 N.W.2d at 809 (holding that the defendant failed to show prejudice when voir dire continued, and counsel had the opportunity to question the venire to discover any prejudice). He did not. *See Peterson v. La Croix*, 420 N.W.2d 18, 20 (S.D. 1988) (holding that this Court "will not reward a defendant who lies in the weeds"). Defendant fails to show that the jurors—who were passed for cause and ultimately

seated to hear the case—were not impartial. *See State v. Darby*, 1996 S.D. 127, ¶ 43, 556 N.W.2d 311, 322; *State v. Knoche*, 515 N.W.2d 834, 840 (S.D. 1994) ("Although a potential juror may express a predetermined opinion during voir dire, once she has declared under oath that she can act fair and impartial, she should not be disqualified as a juror.").

In addition to the clarifying statements made by the State and the court, the jury was given multiple other instructions regarding the juror's role in the trial. *See* SR:218 ("Instruction No. 4 . . . First, you must determine the facts from the evidence received in the trial and not from any other source . . ."); SR:219 ("Instruction No. 5 . . . Certain things are not evidence. Statements, arguments, questions and comments made by the attorneys during the trial are not evidence . . ."); SR:223 ("Instruction No. 9 . . . Now that you have been chosen as a juror for this trial, you are required to decide this case based solely on the evidence and exhibits that you see and hear in the courtroom . . ."); SR:261 ("Instruction No. 44 . . . You are the exclusive judges of all questions of fact. . ."); *see also State v. Janis*, 2016 S.D. 43, ¶¶ 25-28, 880 N.W.2d 43, 83-84 (holding that despite improper conduct by the prosecutor, the result of the trial weas not affected when the circuit court gave the jury a correct instruction on the elements of the offense and jury's duties). We generally presume that juries follow the court's instructions and have no reason to believe they failed to do so in this

case. *Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d at 828. Thus, the court properly denied Defendant's motion for a mistrial.

Regardless, the evidence was overwhelming. *Hankins*, 2022 S.D. 67, ¶ 39 n.2, 982 N.W.2d at 35 n.2 (noting evidence of guilt negates prejudice). Trial testimony from witnesses and Defendant himself supports his conviction. Defendant does not dispute that he shot Graham. Testimony from Shayla and Defendant showed that the confrontation between Ross and Graham had ended, and Graham was walking away. Evidence of Graham's injuries showed he was shot in the back of the head. Graham had no injuries showing he was in a fist fight. A reconstruction of the scene showed that Defendant was standing about 69 feet, 6 inches away when he shot Graham. The State's comments during voir dire did not affect the entire proceedings, alter the jury's verdict, or overcome the jury's ability to fairly weigh the evidence. Defendant has failed to show prejudicial error.

II.

DEFENDANT HAS NOT PRESERVED HIS RIGHT TO PRESENT A DEFENSE ARGUMENT AND IS NOT ENTITLED TO A LIMITLESS CROSS-EXAMINATION OF A WITNESS.

A. *Background.*

On August 10, 2021, the State filed a motion in limine moving the "[c]ourt for an [o]rder prohibiting Defendant or any of his witnesses from making any reference, direct or indirect, in . . . cross-examination [to] the victim's criminal history." SR:81. Defendant did not object because

he did not anticipate getting into the victim's criminal history. SR:774. The court granted the motion. SR:784.

During trial, Defendant sought to cross-examine Shayla about Graham's parole status as a motive for her to lie. SR:1670-71. Defendant argued that if Shayla had knowledge that Graham was on parole and could be extradited, she had a motive to lie to law enforcement about Graham's involvement in the altercation. SR:1670-73. Defendant argued that when Shayla made her initial statements to law enforcement, Graham was not declared dead yet, so Shayla had a motive to lie to protect her husband from being extradited and a continued motive to keep her initial story consistent. SR:1932-33. The State argued that the evidence was irrelevant, extremely prejudicial, and a back-dooring attempt to make the victim scarier to bolster a self-defense claim. SR:1936-37.

Outside the presence of the jury, Shayla proffered her understanding of Graham's parole status. SR:1928-31. Shayla testified that she believed Graham was convicted of a drug delivery crime in 2012 in Pennsylvania and was on parole at the time of his death. SR:1929-31. She believed Graham received permission to move to Rapid City but did not go back to Pennsylvania in July 2017 as required. SR:1929-30. Graham went in front of the parole board for absconding, but it was Shayla's understanding that the board did not find a violation of his parole. SR:1929. Shayla believed that in

February 2018, Graham was authorized to move to Rapid City. SR:1930. The court subsequently held that Defendant could not use Shayla's understanding of Graham's parole status as impeachment evidence against Shayla. SR:1938.

B. *Standard of Review.*

This Court reviews "a circuit court's evidentiary rulings under an abuse of discretion standard with a presumption that the rulings are correct." *State v. Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d 800, 807 (quoting *State v. Birdshead*, 2015 S.D. 77, ¶ 36, 871 N.W.2d 62, 75-76). A court's decision limiting cross-examination is an evidentiary ruling that "will be reversed only if there is both an abuse of discretion and a showing of prejudice to the defendant." *State v. Dickerson*, 2022 S.D. 23, ¶ 29 n.3, 973 N.W.2d 249, 259 n.3 (quoting *Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d at 807). Prejudice exists only when "a reasonable jury probably would have a significantly different impression if otherwise appropriate cross-examination had been permitted." *Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d at 807 (quoting *Birdshead*, 2015 S.D. 77, ¶ 36, 871 N.W.2d at 76).

C. *Defendant Failed to Preserve His Right to Present a Defense Argument for Appeal.*

"An accused must be afforded a meaningful opportunity to present a complete defense." *State v. Reay*, 2009 S.D. 10, ¶ 34, 762 N.W.2d 356 (cleaned up). But a defendant's theory must: 1) be supported by law; and 2) have some foundation in the evidence. *Id.*

Defendant has not preserved an argument that his right to present a defense was violated. Before trial, Defendant did not object to the court's order that "there will be no discussion about Mr. Graham's prior criminal history from any witnesses." Later, Defendant argued before the court that Graham's parole status was "relevant on a very limited basis" to show Shayla's motive to lie. SR:1670. Defendant did not argue that the limitations placed on his cross-examination of Shayla would violate his right to present a defense. Accordingly, the court did not rule on this issue. SR:1932-39. Therefore, the issue is waived. *See Willingham*, 2019 S.D. 55, ¶ 25, 933 N.W.2d at 625. Furthermore, Defendant has not requested, and therefore is not entitled to, plain error review. *Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d at 818.

This Court "may in its discretion decide to consider a constitutional issue raised for the first time on appeal [if the] question is a matter of considerable importance to the public policy of the state." *State v. Chant*, 2014 S.D. 77, ¶ 7, 856 N.W.2d 167, 169. Such a matter of dire public policy does not exist here. Defendant was able to present a defense. Defendant cross-examined Shayla and had an opportunity to expose bias and alleged factual fabrications. Defendant also testified at trial. He alleged he did not intervene in the alleged fist fight because he believed in one-on-one fights. SR:2395-96. He testified that he believed he was acting in self-defense because Shayla may have had a gun, not because of any alleged fist fight. SR:2398. Defendant was not

precluded from cross-examining Shayla about these facts. The court's limitation on Shayla's cross-examination did not prohibit Defendant from presenting his defense.

D. *The Court Properly Excluded Evidence of Graham's Parole Status.*

"An individual is only guaranteed 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Kryger*, 2018 S.D. 13, ¶ 16, 907 N.W.2d at 808 (quoting *State v. Spaniol*, 2017 S.D. 20, ¶ 29, 895 N.W.2d 329, 340). The admission of cross-examination evidence involves two inquiries: first, whether the evidence is relevant and, second, if relevant, whether the prejudicial effect of the evidence substantially outweighs its probative value. *See* SDCL 19-19-401; SDCL 19-19-402; SDCL 19-19-403 ("Rule 403"); *State v. Shelton*, 2021 S.D. 22, ¶ 17, 958 N.W.2d 721, 727. A court may impose reasonable limits on defense counsel's cross-examination as to the potential bias of a prosecution witness to avoid such things as "harassment, prejudice, confusion of the issues . . . or interrogation that [would be] . . . only marginally relevant." *Dickerson*, 2022 S.D. 23, ¶ 28, 973 N.W.2d at 258 (quotation omitted).

Defendant argues Shayla had motive to lie because she believed her husband was on parole. This Court has recently confirmed "that 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-

examination." *Id.* ¶ 28, 973 N.W.2d at 258 (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). In *Dickerson*, this Court held that the defendants' rights to confrontation were violated when defendants were precluded from cross-examining a victim about his status of being an illegal citizen. *Id.* ¶ 35, 973 N.W.2d at 261. This Court reasoned that the victim had an alleged motive to lie about a forced sexual contact incident to avoid deportation. *Id.* The parties did not dispute that rape is a deportable offence. *Id.* Here, Shayla believed Graham was on parole. The proffer did not establish that, even if Graham did punch Ross, Shayla thought that conduct was a parole violation. Additionally, Shayla would conceivably only have motive to lie to protect her husband if she thought he might live and need protection, but there was no indication this might happen.

Defendant's proposed impeachment evidence was not relevant. "Evidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." *Shelton*, 2021 S.D. 22, ¶ 17, 958 N.W.2d at 727. Graham's parole status was irrelevant to show that Shayla had a motive to lie. The parole status was also irrelevant on the question before the jury: whether Defendant shot Graham under fear that Shayla had a gun.

Even if the evidence was relevant, the dangers set out in Rule 403 substantially outweigh probative value. The court's ruling prevented

evidence from being presented to the jury that was unfairly prejudicial, would have confused the issue, misled the jury, and wasted time. *See Kryger*, 2018 S.D. 13, ¶¶ 15-16, 907 N.W.2d at 808 (holding that the limited cross-examination was proper when defendant could still impeach the witness on bias or factual issues when the proposed evidence was marginally relevant and the "marginal probative value of the threats was substantially outweighed by the danger of unfair prejudice—including the possibility of jury confusion of the issues and a waste of time"). Delving into what Shayla knew about Graham's parole status would have required questions about Graham's prior criminal record, Graham's alleged prior parole violation, what Shayla knew about Graham's parole, what she believed were parole violations, and whether she thought any actions Defendant alleged Graham committed would be parole violations. All these collateral matters would only mislead the jury and cause confusion.

Furthermore, the proposed cross-examination would have been unfairly prejudicial by persuading the jury by illegitimate means—by attempting to make Graham look like he was a man of bad character who commits crimes, and he acted in accordance with that character trait on the night he was shot. *See* SDCL 19-19-404. The proposed cross-examination would have attacked Graham's character in an impermissible manner. *See State v. Fasthorse*, 2009 S.D. 106, ¶ 15, 776 N.W.2d 233, 239 (holing that "[t]he inference [defendant] was

attempting to make about A.S.'s familiarity with drugs and her drug-using lifestyle was not relevant to whether she was raped").

Defendant's prejudice argument is factually flawed. Defendant argues that if he was able to impeach Shayla, Shayla would have morphed her trial testimony and testified that Graham struck Ross during the confrontation. DB:16. He argues that once Shayla testified that Graham struck Ross, and he could have used a statement she allegedly gave to law enforcement as an inconsistent statement to impeach her credibility. There is no evidence in the proffer or settled record that Shayla would have changed her testimony if asked about Graham's parole status.

The court properly exercised its discretion when it imposed a reasonable limit on Defendant's cross-examination and the reasonable limitation did not result in prejudice. Defendant was still allowed to cross-examine Shayla about her alleged motive to lie. *See* SR:2002. Defendant was not precluded from asking if Shayla held any bias against Defendant because she was married to Graham. Even without this cross-examination question, the jury would have been aware of this bias. *See Kryger*, 2018 S.D. 13, ¶ 15, 907 N.W.2d at 808. Defendant also had the opportunity to question Shayla on any factual matters that were allegedly fabricated, like whether Graham punched Ross or whether she had a gun. *See* SR:1985-2005; *Kryger*, 2018 S.D. 13, ¶¶ 15-16, 907 N.W.2d at 808. Indeed, Defendant cross-examined Shayla

about the altercation and about Graham being a trained boxer. SR:1994. Defendant has not shown "a reasonable jury probably would have [come] to a significantly different impression" had he been able to cross-examine Shayla about Graham's parole status. *See Fasthorse*, 2009 S.D. 106, ¶ 17, 776 N.W.2d at 239; *State v. Johnson*, 2007 S.D. 86, ¶ 35, 739 N.W.2d 1, 13.

III.

THE COURT DID NOT PLAINLY ERR DURING THE STATE'S VOIR DIRE REGARDING ROSS'S PLEA AGREEMENT AND THE COURT PROPERLY INSTRUCTED THE JURY.

A. *Background.*

The State stated the following during voir dire:

> So one of the other issues that's going to come up is that Ronald Black Cloud on the night that this happened was with another young person who name is Ross Johnson. Ross Johnson was charged in this case with the same crime that Ronald Black Cloud is charged with and he has since pled guilty and he's going to be a testifying witness. So I am going to ask again, do any of you know Ross Johnson? He's 17; is that right? Seventeen. So he is testifying. He's pled guilty and been sentenced. But he was asked as part of his plea agreement to testify in this case. So he is testifying as part of a plea agreement. How do you feel about that?

SR:1418-19. Venirepersons responded. *See* SR:1420-24. Defendant did not object. SR:1418.

Ross refused to testify at trial. Outside the presence of the jury, the State stated, "I had every reason to believe in voir dire that [Ross] was testifying. I only learned moments before I was to call him as a witness, that he was refusing to testify. And I know that at least the

defendant knew that because he told the jailer on the way back that day, happily, I told you, [Ross] would never testify. He knew it." SR:2218.

The court declined to give Defendant's proposed instruction 44, which reads as follows:

> You have heard evidence that witness [Ross] has pleaded guilty to a crime which arose out of the same events for which the Defendant is on trial here. That guilty plea cannot be considered by you as any evidence of this Defendant's guilt. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely on that witness' testimony.

SR:2536-37. Defendant asked the court to consider modifying the language to read Ross "may have pleaded guilty," reasoning that "[a]lthough I know that was not evidence, it was something this jury did hear [during voir dire]." SR:2537. The court declined to give the modified instruction. SR:2538-39.

B. *Standard of Review.*

Defendant asks this Court to apply plain-error review because the claim was not preserved. DB:17. Discretionary review under the plain error doctrine should be "applied cautiously and only in exceptional circumstances." *State v. Krueger*, 2020 S.D. 57, ¶ 38, 950 N.W.2d 664, 674 (quoting *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729). To establish a plain error, a defendant "must show '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the

fairness, integrity, or public reputation of judicial proceedings.'" *Id.* ¶ 13, 931 N.W.2d at 729 (quotation omitted). "Additionally, 'with plain error analysis, the defendant bears the burden of showing the error was prejudicial.'" *Id.* (quotation omitted).

This Court reviews a circuit court's denial of a proposed jury instruction for an abuse of discretion. *Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d at 828.

C. *The Court did not Plainly Err by its Lack of Intervention During the State's Voir Dire Examination.*

The authority under Issue I.C. and D. is incorporated here by reference.

The court did not err when the State asked the venire about plea agreements because the State's comments did not exceed the scope of voir dire. The State had a legitimate interest in determining how the venire felt about a person testifying as part of a plea agreement. Prospective jurors may be properly questioned about their attitudes on certain matters. In *State v. Scott*, this Court held that the State's questions regarding domestic violence and who brings the charges against a Defendant was within the scope of voir dire. *Scott*, 2013 S.D. 31, ¶¶ 10-14, 829 N.W.2d at 462-64. This Court cautioned, however, that the questions "might have touched a fine line—especially in suggesting why the victim might not testify, knowing that no evidence on the question would be offered at trial." *Id.* ¶¶ 10-14, 829 N.W.2d at 462-64. Unlike *Scott*, the State believed Ross would testify and only

learned moments before calling him as a witness, that he was refusing to testify. SR:2218. Furthermore, prospective jurors can have knowledge of the case or the parties if they "show an ability to be impartial and unbiased and weigh only the evidence presented at trial." *Leader Charge*, 2021 S.D. 1, ¶ 18, 953 N.W.2d at 677 (citing *State v. Owens*, 2002 S.D. 42, ¶¶ 30-31, 643 N.W.2d 735, 745-46); *see State v. Verhoef*, 2001 S.D. 58, ¶ 13, 627 N.W.2d 437, 440 (holding that the trial court did not abuse its discretion by declining to excuse a juror for cause who was acquainted with the defendant, victim, and victim's grandmother). Therefore, the State's comments were within the scope of voir dire because the questions sought to uncover bias and determine if the venire could be impartial.

Additionally, Defendant fails to argue what the court should have done during voir dire when the State made the comments. Defendant argues that the State committed misconduct but fails to argue what specifically the court should have done *during voir dire*, but did not do. Accordingly, defendant has failed to show who the court erred during voir dire.

Furthermore, any error on the part of the court is not "plain" on this record. "An error is 'plain' when it is clear or obvious." *State v. Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d 131, 136 (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). This "means that [circuit] court decisions that are questionable but not *plainly* wrong (at time of

trial or at time of appeal) fall outside the Rule's scope." *Id.* (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). An error is plain when the Supreme Court of the United States or this Court has resolved the issue beyond debate. *Id.* (citations omitted).

Defendant fails to identify controlling authority where this issue has been resolved beyond debate. DB:20-22. Indeed, this Court has not previously discussed whether the State asking the venire how it felt about a person who was charged with the same crime as Defendant testifying as part of a plea agreement is a clear and obvious error. At the time the State's comments were made, any error was not clear and obvious. The court could not have known that in the future, Ross would refuse to testify. Therefore, the court's lack of intervention, without any objection from Defendant, was not plainly wrong.

The third prong for plain-error review imposes on Defendant "the burden of showing that the error affected [his] substantial rights, which 'means [he] must demonstrate that it affected the outcome of the [circuit] court proceeding.'" *McMillen*, 2019 S.D. 40, ¶ 29, 931 N.W.2d at 734 (quotations omitted). As stated under Issue I, the comments happened during voir dire. Defendant had the opportunity to challenge any venireperson he believed could not be impartial. The court also instructed the jury on what could be used as evidence. Defendant has failed to show the jurors who heard the evidence and convicted him based on that evidence were not impartial. *See Darby*, 1996 S.D. 127,

¶ 43, 556 N.W.2d at 322. Nor did Defendant suffer prejudice because the evidence was overwhelming. Accordingly, Defendant cannot demonstrate error, much less plain error.

D. *The Jury was Properly Instructed.*

Defendant argues that the jury should have been instructed that it heard evidence that Ross testified and that the jury heard evidence that Ross pled guilty to a crime. DB:23-24. "[A] trial court need not instruct on matters that find no support in the evidence." *State v. Traversie*, 2016 S.D. 19, ¶ 12, 877 N.W.2d 327, 331 (quotations omitted).

The court did not abuse its discretion in refusing to give Defendants proposed instruction or modify the proposed instruction because both instructions had no support in the evidence. "[A] court has no discretion to give incorrect or misleading instructions." *Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d at 828. Ross did not testify, and evidence was not presented that Ross pled guilty. Defendant presented no authority to the court that the proposed instruction was appropriate under these circumstances. Therefore, the court properly refused the instructions.

IV.

THIS COURT LACKS JURISDICTION OVER THE TRANSFER ORDER ISSUE.

A. *Background.*

The juvenile court proceedings are not part of the settled record.

B. *Standard of Review.*

"Whether this Court has jurisdiction is a legal issue which is reviewed de novo." *Wright v. Young*, 2019 S.D. 22, ¶ 11, 927 N.W.2d 116, 119.

C. *This Court Lacks Appellate Jurisdiction.*

Defendant's arguments cannot be heard by this Court. The right to appeal does not exist in the absence of a statute permitting it. *Id.* ¶ 10, 927 N.W.2d at 119. SDCL 26-7A-112 provides the rules to appeal juvenile court orders and states that appeals are governed by the rules of civil procedure. SDCL 26-7A-112. No notice of appeal or docketing statement for the juvenile case were ever filed in accordance with SDCL 26-7A-112. No appeal for the transfer order complied with the rules of civil procedure, contained the juvenile caption, or reference the juvenile case in any way. SR:615. Thus, this Court lacks jurisdiction.

While SDCL 26-7A-112 states the rules of procedure governing civil appeals apply, if this Court applies the criminal rules, this Court "may review all matters appearing on the record." SDCL 23A-32-9. Likewise, appellate jurisdiction will not be presumed but must affirmatively appear from the record. *State v. Schwaller*, 2006 S.D. 30, ¶ 5, 712 N.W.2d 869, 871; *State v. Edelman*, 2022 S.D. 7, ¶ 8, 970 N.W.2d 239, 241. The transfer order cannot be reviewed because it is not in the record and without record evidence, this Court does not have

jurisdiction over this issue. This Court therefore does not have jurisdiction to review this issue.

D. *Defendant Failed to Preserve this Issue.*

If this Court holds that it has jurisdiction, Defendant has failed to preserve this issue for appeal. In Defendant's appendix, he includes sealed juvenile court records and relies on those documents to support his argument. DB:3.1-6.2. An appendix does not replace a party's duty to "see that the settled record contains all matters necessary for the disposition of the issues raised on appeal, and the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." *Strong v. Gant*, 2014 S.D. 8, ¶ 23, 843 N.W.2d 357, 363; *see* SDCL 15-26A-47 ("The clerk's certified record, together with the transcript, shall constitute the record on appeal."); SDCL 15-26A-49. Moreover, "[d]ocuments in the appendix must be included within, and should be cross-referenced to, the settled record." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 37, 769 N.W.2d 440, 454 (citing SDCL 15-26A-60(8)). Defendant did not follow these rules. The documents are not part of the settled record and are not cross-referenced. The State objects to the inclusion of the juvenile court records in the appendix and asks this Court to strike them from the appendix.

Without a complete record, the State is unable to fully address this issue. *See* DB:5.99 (post hearing briefs missing); *see, e.g.*, *Gant*, 2014 S.D. 8, ¶ 24, 843 N.W.2d at 363-64 (discussing how an issue can

be waived). Defendant argues that the record lacks substantial evidence to support the court's conclusion, but any "lack of substantial evidence" in the record is only based on Defendant's failure to present an adequate record on appeal. With an incomplete appellate record, "this Court presumes that the trial court acted correctly." *Tucek v. S.D. Dep't of Soc. Servs.*, 2007 S.D. 106, ¶ 22, 740 N.W.2d 867, 873 (citing *State v. Corey,* 2001 S.D. 53, ¶ 8, 624 N.W.2d 841, 843-44).

The State is prepared to brief the arguments made by Defendant in this section of his brief should this Court require. But because Defendant's allegations reference documents not properly in the record and preserved for appellate review, the State believes it must receive explicit instruction to do so.

V.

DEFENDANT RECEIVED AN APPROPRIATE SENTENCE.

A. *Background.*

Defendant claims the court failed to appropriately apply *Miller v. Alabama*, 567 U.S. 460 (2012), when it imposed a forty-year sentence without stating that the sentence would further any goals of rehabilitation or protect the community. DB:27-28. The court properly weighed the ample evidence before it and fashioned an appropriate sentence.

B. *Standard of Review.*

A circuit court's sentencing decision is generally reviewed under the abuse of discretion standard. *State v. Deleon*, 2022 S.D. 21, ¶ 17, 973 N.W.2d 241, 246. A circuit court possesses broad discretion in crafting a sentence that falls "[w]ithin constitutional and statutory limits." *Id.*

In determining its sentence, a circuit court should weigh the traditional sentencing factors which include retribution, rehabilitation, deterrence (individual and general) and incapacitation. *Id.* (quotation omitted). These factors are to be weighed case by case, with no single factor overriding the others. *Id.* (quotation omitted). Additionally, a court "should acquire a thorough acquaintance with the character and history of the defendant by studying 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." *Id.* ¶ 18, 973 N.W.2d at 246 (cleaned up).

C. *The Court Appropriately Applied* Miller v. Alabama.

In *Miller v. Alabama*, the Supreme Court of the United States instructed sentencing courts in juvenile murder cases to consider individualized factors of youth to adequately account for the offender's status as a juvenile before imposing a sentence. *Miller*, 567 U.S. at 477-78. *Miller* discussed the following mitigating factors of youth: (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. *State v. Quevedo*, 2020 S.D. 42, ¶ 22, 947 N.W.2d 402, 407 (citing *Miller*, 567 U.S. at 477-78).

Here, the court did not abuse its discretion. Prior to sentencing Defendant, the court presided over the matter for years, including Defendant's transfer hearing and jury trial. SR:918. Before imposing its sentence, the court heard victim impact statements, statements in support of Defendant, arguments of counsel, and gave Defendant an opportunity to address the court. SR:865-915. The court reviewed Defendant's PSI which included information about Defendant's age, criminal history, family, and life. SR:500-603. Defendant did not object to the contents of the PSI. SR:866-67.

In making its decision, the court extensively reviewed and recited controlling case law and identified the relevant mitigating factors of youth. The court stated, Defendant was found guilty "of second-degree murder, which would have required a mandatory life sentence if he had been 18 at the time of the offense. However, the *Miller* decision by the United States Supreme Court prohibits the imposition of a mandatory life sentence without the possibility of parole." SR:921. The record demonstrates that the court was aware of the *Miller* decision and

correctly perceived the limits of its sentencing authority when it considered Defendant's sentence. SR:918-21.

The court specifically acknowledged Defendant's young age of fourteen at the time of the offense and his positive relationship with his grandmother. SR:923-29. The court also recognized that Defendant can be rehabilitated. SR:937. The court considered the fact that Defendant was competent in dealing with law enforcement and the adult criminal system. SR:925.

The court also considered that Defendant is surrounded by criminally minded individuals, including most of his family and peers. SR:928-29. Defendant had a dangerous home life where his parents were in and out of his life and had been in prison. SR:926-27. Defendant reported that most of his peer group had been in trouble with the law. SR:928. Defendant reported that the only people he had to look up to were in prison or dealing drugs. SR:926. The court emphasized Defendant's susceptibility to negative peer influence. SR:930.

The court delved into the facts of the case, noting that before the shooting, Defendant had been drinking alcohol, smoking marijuana, and took at least one tab of acid. SR:935. It then summarized that when Defendant fired the gun, the confrontation between Ross and Graham was over and Graham was walking away. SR:932. The court stated, "[t]he shooting and killing of [Graham] was absolutely

unnecessary, unlawful, unjustified, and dare this Court say a reckless, impetuous, immature, and reactive afterthought." SR:933.

Defendant argues that the court did not properly consider mitigating factors at sentencing. DB:29. However, the court did carefully consider all the factors and weighed the mitigating factors against the aggravating factors. Further, Defendant failed to raise any issues to the court with the way the court considered the mitigation factors. *See State v. McKinney*, 2005 S.D. 74, ¶ 18, 699 N.W.2d 460, 466 (holding that the circuit court properly considered evidence at sentencing when the defendant did not object or otherwise contest the evidence). Merely because Defendant has mitigating factors does not mean that he should avoid prison time for a second-degree murder conviction. *See State v. Diaz*, 2016 S.D. 78, ¶ 50, 887 N.W.2d 751, 766 (holding that the circuit court did not abuse it discretion when imposing an eighty-year sentence for a juvenile despite it finding that defendant exhibited prospects for rehabilitation). The court acquired a thorough acquaintance with the character and history of Defendant, sufficiently considered Defendant's youth, and fashioned an appropriate sentence which was within the range of permissible choices.

## VI.

## DEFENDANT'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.

A. *Background.*

Defendant complains that his forty-year sentence, with credit for time served, is grossly disproportionate to his crime and constitutes cruel and unusual punishment. The court did not violate Defendant's Eighth Amendment rights because Defendant's forty-year sentence for second-degree murder is not unduly harsh.

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. *Quevedo*, 2020 S.D. 42, ¶ 19, 947 N.W.2d at 406 (quoting *State v. Jensen,* 2017 S.D. 18, ¶ 9, 894 N.W.2d 397, 400).

C. *Defendant's Sentence is not Grossly Disproportionate to the Crime.*

The Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Gross disproportionality is determined by examining the gravity of the offense and the harshness of the penalty. *Id.* ¶ 37, 947 N.W.2d at 410 (quoting *Diaz,* 2016 S.D. 78, ¶ 51, 887 N.W.2d at 766). Only if this threshold inquiry reveals gross disproportionality will this Court compare Defendant's sentence to other sentences imposed on juveniles convicted of second-degree murder. *Id.* (citing *Diaz,* 2016 S.D. 78, ¶ 51, 887 N.W.2d at 766).

Some factors considered when judging the gravity of an offense include its violent versus non-violent nature, the level of intent required, and other conduct relevant to the crime. *Diaz,* 2016 S.D. 78, ¶ 52, 887 N.W.2d at 766-67. Defendant's second-degree murder offense, a Class

B felony, ranks high in its "relative position on the spectrum of all criminality." *Quevedo*, 2020 S.D. 42, ¶ 38, 947 N.W.2d at 411 (quoting *Diaz,* 2016 S.D. 78, ¶ 52, 887 N.W.2d at 766). Regarding the conduct relevant to the crime factor, at the time Defendant shot Graham in the back of the head, Graham was walking away from Ross and Defendant. SR:932. As the court noted, "[t]he shooting and killing of [Graham] was absolutely unnecessary, unlawful, unjustified, and dare this Court say a reckless, impetuous, immature, and reactive afterthought."

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." *Quevedo*, 2020 S.D. 42, ¶ 39, 947 N.W.2d at 411 (quoting *Diaz,* 2016 S.D. 78, ¶ 54, 887 N.W.2d at 767). When a juvenile defendant receives a sentence of a term of years, the comparison for purposes of proportionality is one of degree and line-drawing. *State v. Charles,* 2017 S.D. 10, ¶ 29, 892 N.W.2d 915, 924. In judging the harshness of the penalty, the possibility of parole is a consideration. *Quevedo*, 2020 S.D. 42, ¶ 39, 947 N.W.2d at 411 (citing *Diaz,* 2016 S.D. 78, ¶ 55, 887 N.W.2d at 768).

The court's forty-year sentence leaves Defendant eligible for parole at age thirty-four. *See* SR:500, 614. He also received credit for 1,267 days served. SR:611-13. This punishment, on the spectrum of possible punishments for second-degree murder, is not unduly harsh. *See Quevedo*, 2020 S.D. 42, ¶ 39, 947 N.W.2d at 411.

Defendant's sentence, therefore, fails to suggest gross disproportionality and it is unnecessary to compare this penalty with those of other juvenile murder offenders in South Dakota. *See id.* ¶ 41, 947 N.W.2d at 411. His sentence does not violate the Constitution and no relief is justified on this record.

## CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that 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 9,172 words.

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

Dated this 12th day of January 2023.

*/s/ Jennifer M. Jorgenson*
Jennifer M. Jorgenson
Assistant Attorney General

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 12, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ronald Manuel Myron Black Cloud* was served via electronic mail upon Joanna Lawler at joanna.lawler@pennco.org and Lori Goad at lori.goad@pennco.org.

*/s/ Jennifer M. Jorgenson*
Jennifer M. Jorgenson
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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**APPEAL NO. 29946**

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**RONALD MANUEL MYRON BLACK CLOUD**
Defendant/Appellant

vs.

**STATE OF SOUTH DAKOTA**
Plaintiff/Appellee

---

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

---

HONORABLE MATTHEW BROWN, PRESIDING JUDGE

---

# APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on March 17, 2022

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# APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

For purposes of brevity, Appellant will limit discussion in this reply brief to the issues raised by the State that require further development or clarification. Any matters argued in the Appellant's initial brief but not specifically mentioned herein are not intended to be waived.

All references to the parties and other persons cited in Appellant's initial brief will be designated the same herein. All references to the settled record and the transcripts cited in

the Appellant's initial brief will likewise be designated the same herein. All references to the State's Appellee's Brief will be designated as "SB," followed by the appropriate page number.

Ronny relies upon the jurisdictional statement, statement of the case, statement of the facts, and statement of the legal issues presented in the Appellant's initial brief that was submitted for filing and service on November 29, 2022.

## REPLY TO MATTERS WITHIN THE STATE'S STATEMENT OF FACTS

While the State's statement of facts is technically correct, its offered recitation is devoid of adequate completeness and context.

The State recounts that two days following the shooting, "Defendant heard rumors that 'Ross had turned on him' so Defendant sought out law enforcement and eventually admitted that he shot Graham." SB 8. Within the same paragraph, the State describes various other written and oral admissions made by Ronny during his confinement at JSC. *See* SB 8-9. This is not a case where Ronny disclaimed responsibility for causing Graham's death. In fact, Ms. Lawler made this very point in her opening argument to the jury. *See* TrV1 13. But more importantly, these "admissions" noted by the State were made well over a year *after* Ronny was first taken into custody. Thus, they are not germane to the issues before the Court. TrV2 242.

## REPLY ARGUMENT

### I. THE TRIAL COURT VIOLATED RONNY'S RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY BY DENYING HIS MOTION FOR MISTRIAL FOLLOWING MISCONDUCT BY THE PROSECUTOR.

#### A. *Ronny's objection to the prosecutor's misstatement of the law was sufficient to preserve the issue of prosecutorial misconduct for appeal.*

The State contends that Ronny failed to preserve the issue of prosecutorial misconduct for appeal because he did not explicitly argue this as grounds for the mistrial. SB 14. Ronny disagrees.

"To preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court [or counsel], giving their reasons." *State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261 (citations omitted). This is so because the trial court "must be given an opportunity to correct any claimed error before [the Supreme Court] will review it on appeal." *Id.* But an appellate court can review any issue ruled on by the trial court, and even a "skeletal argument below" may be "fleshed out and emphasized on appeal" where it is clear the trial court recognized and considered the issue. *Bailey v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Loc. 374*, 175 F.3d 526, 529-30 (7th Cir. 1999).

There is no dispute that immediately following Ms. Roetzel's misstatement of the law, Ms. Regalado raised a contemporaneous objection and asked to approach the bench. SB 15. Outside the presence of the jury, Ms. Regalado argued as follows:

> Ms. Roetzel got into a line of questioning where she asked jurors whose decision it was to charge Mr. Black Cloud in adult court essentially. That was my understanding. When a juror answered – the answer essentially was given to the jury that it was solely the Court's decision to try Mr. Black Cloud in adult court. In this instance, as a 14-year-old, it was the State's decision to seek transfer. … To leave the jury with the misinformation that it was this Court who looked at the case and made the determination that this should be tried in adult court is misleading to the jury. I think it's an attempt by the State to kind of take some of that feeling of charging a 14-year-old with murder and put it on the Court, which is ultimately your call, but it was the State who decided to seek that transfer. And to mislead the jury in that way, I think is inappropriate.

SR 1443. The Court then asked the court reporter to read back the specific dialogue at issue after which Ms. Regalado continued with her argument, to wit:

> But the answer when asked was *did the State play a role in that and she answers no, that's fundamentally not correct.* The State – there was a presumption in favor of Mr. Black Cloud being in juvenile court due to his age. He started in juvenile court. It was the State who sought him to be charged as an adult. They proactively sought that because the law requires proactivity. *I think it's misleading to the jury to leave them with the misapprehension that the State got stuck with*

*this in adult court when they actively sought it. It also kind of sounds like the State had no choice but to try him in adult court, and that's just incorrect.*

SR 1444-45. (emphasis added). After considering the same, the court agreed that Ms. Roetzel's improper comment warranted clarification. *See* SR 1446 ("And I'm not trying to make this part of the trial because *this is going to get really messy. I think that there has to be clarification*, and I don't have to make it unless you want me to, Ms. Roetzel, but I think the State or the Court can state that there was a petition made to put this matter ... into adult court instead of juvenile court by the State"). (emphasis added).

Ms. Roetzel resumed her examination and attempted to clarify her misstatement of the law. SR 1449-50. But in view of the numerous concerning venireperson comments that followed, Ms. Regalado moved for a mistrial. SR 1491. In doing so, she argued the lingering impact of Ms. Roetzel's original misstatement of the law coupled with an inadequate clarifying statement had tainted the entire venire beyond repair. SR 1492.

Despite the State's urging, the law does not require the use of "magic language" when raising an objection or request. *See Mary Lee Found. v. Texas Emp. Comm'n*, 817 S.W.2d 725, 728 (Tex. App. 1991), writ denied (Apr. 1, 1992). Rather, all that is required is that the court understood the basis of the argument. *See generally State v. Rosseau*, 396 S.W.3d 550, 555 (Tex. Crim. App. 2013); *see also* SDCL 19-19-103(1)(B); *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992) (recognizing that as long as a party's statement or action is expressed clearly enough for the judge to understand and it's made at a time where the court is in a position to do something about it, the appellate court "should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known").

In this case, Ronny has satisfied these requirements. Thus, he believes the issue of prosecutorial misconduct is ripe for the Court's consideration. Although Ms. Regalado made

a generalized objection immediately following Ms. Roetzel's improper comment, she articulated the specific basis of her objection outside the presence of the jury. The court explicitly indicated it understood the argument – and was in a position to do something about it. *See* SR 1445. Moreover, the basis for Ms. Regalado's motion for mistrial was, for all practical purposes, a renewal or continuation of her previous objection – that the prejudice caused by Ms. Roetzel's misstatement of the law could not be cured.

B. *Even if the Court believes Ronny failed to preserve the issue of prosecutorial misconduct for appeal, it should still consider whether the trial court abused its discretion by denying Ronny's motion for mistrial.*

Even if the Court believes that Ronny didn't preserve the issue of prosecutorial misconduct for appeal, the Court should still consider whether the trial court abused its discretion in denying Ronny's motion for mistrial. *See State v. Nelson*, 2022 S.D. 12, ¶ 35, 970 N.W.2d 814, 826.

"An abuse of discretion is 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.* (citations omitted). "For purposes of determining whether there are grounds for mistrial there must be error 'which, in all probability, produced some effect upon the jury's verdict and is harmful to the substantial rights to the party assigning it.'" *Id.* (citations omitted).

Ronny contends the trial court's denial of his motion for mistrial was arbitrary or unreasonable. Namely, the court failed to provide an immediate curative instruction following a blatant misstatement of the law by the prosecutor. Moreover, its delayed colloquy following Ms. Roetzel's failed attempt to clarify her misstatement only served to further prejudice Ronny, as evidenced by the venireperson comments that followed. And although the State contends the jury was given multiple instructions explaining its role, SB

18, this wholly discounts the fact that Ms. Roetzel's misstatement was one of law, not fact. All of this is to say the totality of these deficiencies deprived Ronny of his right to a fair and impartial jury, and therefore reversal is warranted.

## II. THE TRIAL COURT VIOLATED RONNY'S RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED EVIDENCE OF GRAHAM'S PAROLE STATUS.

### *A. Ronny preserved his argument with regard to his right to present a complete defense.*

The State similarly contends Ronny failed to preserve this issue because he "did not object to the court's order that 'there will be no discussion about Mr. Graham's prior criminal history from any witnesses.'" SB 22. The State notes, however, that Ronny later argued Graham's parole status was relevant to show Shayla's motive to lie. SB 22.

Ronny acknowledges proper presentation of an issue to the trial court helps to ensure this Court has an adequate record to review on appeal. Nothing is undeveloped in the record as to this issue. In fact, the trial court heard extended discussion about the relevancy of Graham's parole status and Shayla's motive to lie. This motive went to the heart of Ronny's defense. That is, had Shayla testified that Graham struck Ross during the confrontation, the jury reasonably could have believed Ronny's conduct was justified. More critically, the court noted Ms. Regalado's objection following its ruling on the matter. TrV2 88-94, 138-141. Thus, Ronny believes this issue is procedurally viable.

Even if the Court believes Ronny's argument on appeal is a narrower subset of a broader theory presented below, review is appropriate where, as here, no new evidence has been presented and the issue is a pure question of law that does not implicate the trial court's comparative advantage in fact-finding. *See Krumme v. West Pointe Stevens, Inc.*, 238 F.3d 133, 142 (2d Cir. 2000) ("[w]e have repeatedly recognized that the [waiver] rule is not an absolute

bar 'where the issue is purely legal and there is no need for additional fact finding'"). Accordingly, Ronny asks the Court to reach the merits of this issue.

*B. Ronny never argued Shayla was biased against him.*

The State argues the trial court properly limited Ronny's cross-examination of Shayla, and that, in spite of this limitation, no prejudice ensued. SB 26. In the State's view, Ronny was still permitted to question Shayla about her alleged motive to lie, and any biases she might hold toward Ronny since she was married to Graham. SB 26. This claim is simply untenable.

At no point did Ronny ever allege that Shayla was biased against him *personally.* In fact, the record plainly indicates that prior to August 17, 2018, Shayla and Ronny had never met. TrV2 107, 148. Instead, Ronny argued Graham's parole status, of which Shayla was aware, was probative of Shayla's motive to lie when she initially told law enforcement Graham never struck Ross during the confrontation, and that this motive persisted even after Graham's death because Shayla now had to maintain a consistent story. TrV2 85, 89, 103-04, 126. It is uncontroverted that Ronny never got to question Shayla about her motive to lie because the trial court held Graham's parole status was irrelevant. Therefore, Ronny asks the Court to reject the State's argument.

*C. The State mischaracterizes the question before the jury.*

The State argues not only was Graham's parole status "irrelevant to show that Shayla had a motive to lie," but it "was also irrelevant on the question before the jury: whether Defendant shot Graham under fear that Shayla had a gun." SB 24. Ronny contends the State mischaracterizes the question before the jury.

Although Ronny indeed testified he believed Shayla possibly had a gun when he saw her approach Graham in the street, this is only part of the overall story. TrV4 30. Ronny

never testified he feared Shayla herself would shoot Ross. Rather, he explained he feared the confrontation between Ross and Graham would culminate in Graham shooting Ross if Shayla did have a gun. TrV4 30. Nonetheless, Ronny's primary defense at trial was that he shot Graham to defend Ross against an ongoing attack by a bigger, stronger adult male. TrV1 12, 14-15, 17, TrV4 68, 71. Thus, the issue before the jury was not whether Shayla had a gun but rather if Ronny was justified in using deadly force to defend his friend.

Ronny again asserts Graham's parole status was relevant to the issue before the jury because it bore directly on Shayla's credibility. "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony." *Irby v. State*, 327 S.W.3d 138, 157 (Tex. Crim. App. 2010); *see also Adcock v. Com.*, 702 S.W.2d 440, 441 (Ky. 1986) ("[A] defendant has a right to put into evidence any fact which might show bias on the part of the witness who testified against him"). By the trial court's own admission "[r]elevance is a fairly low standard." TrV3 19. Thus, exclusion of this highly relevant evidence was error.

*D. The State advances theories of inadmissibility with regard to Graham's parole status that were not contemplated by the trial court.*

The State contends that even if Graham's parole status was relevant, the trial court properly excluded this evidence because "the dangers set out in Rule 403 substantially outweigh probative value." SB 24-25. It likewise contends the proposed cross-examination "would have attacked Graham's character in an impermissible manner," thereby violating Rule 404. SB 25-26.

Notably, the trial court did not undertake an analysis as to the admissibility of Graham's parole status under Rules 403 or 404. Instead, it excluded the evidence strictly on relevancy grounds. TrV1 94; TrV2 140. Thus, the State should not be permitted to advance theories of inadmissibility that were not contemplated by the trial court. To hold otherwise

would allow the State to supplement the record with additional evidence. Accordingly, Ronny asks the Court to confine its analysis of Graham's parole status to: (1) whether the trial court erred in excluding this evidence under Rule 401; and (2) whether the exclusion denied him the right to present a complete defense.

## III. (a) THE PROSECUTOR'S DISCLOSURE OF ROSS'S GUILTY PLEA CONSTITUTES REVERSIBLE ERROR; (b) THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY NOT TO CONSIDER ROSS'S GUILTY PLEA AS EVIDENCE OF RONNY'S GUILT VIOLATED RONNY'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

### A. *The State's "legitimate interest" argument is unpersuasive.*

The State initially argues the trial court did not plainly err in failing to intervene during Ms. Roetzel's voir dire examination because "the State has a legitimate interest in determining how the venire felt about *a person* testifying as part of a plea agreement." SB 29. (emphasis added). Ronny agrees the State has such an interest. But to imply that's what happened in this case is to compare apples to oranges.

Ms. Roetzel didn't just ask the venire how it felt about "a person" testifying as part of a plea agreement. Instead, she explicitly identified Ross by name and explained he was with Ronny the night of the shooting. SR 1419. More incredibly, she told the venire Ross "was charged in this case with the same crime that Ronald Black Cloud is charged with and he has since pled guilty and he's going to be a testifying witness … So he's testifying. He's pled guilty and been sentenced. But he was asked as part of his plea agreement to testify in this case. So he is testifying as part of a plea agreement[.]" SR 1420. Worse still, she told the venire that Ross had "admitted responsibility for being part of a crime." SR 1423. *See State v. Aubuchon*, 381 S.W.2d 807, 815 (Mo. 1964) ("We have held that it is error to show in evidence

or to tell the jury that a jointly accused defendant has been convicted or pleaded guilty"). This inquiry went far beyond simply probing the minds of prospective jurors to uncover latent biases or prejudgments. The prejudicial impact of Ms. Roetzel's disclosure deprived Ronny of his right to a fair and impartial jury. And the trial court's failure to intervene was plain and obvious error.

B. *The State's cited case law is distinguishable.*

To further illustrate why the trial court did not plainly err, the State cites *State v. Scott*, 2013 S.D. 31, 829 N.W.2d 458. SB 29, as standing for the proposition that questions regarding domestic violence and who is responsible for bringing charges against a defendant is within the scope of voir dire. *Id.* Ronny contends this case is so unlike the present case as to be of little help here.

Ronny agrees this Court held in *Scott* that the prosecutor's comments during voir dire regarding why a domestic violence victim might elect not to testify "touched a fine line" because the prosecutor knew in advance no such evidence would be offered at trial. *Id.* at ¶ 14. In finding no abuse of discretion occurred, this Court held "[t]hese questions did not evince an attempt to entrap, influence, commit, or obtain a pledge from prospective jurors." *Id.* But that's not what's at issue here. Rather, the issue here is whether Ms. Roetzel's disclosure of Ross's guilty plea so seriously undermined the fairness and integrity of the entire proceeding as to deprive Ronny of his right to be tried on his own. Ronny believes the answer is clear: it absolutely did. Ronny further argues this conduct is far more egregious than the prosecutor's behavior in *Scott*, which, again, this Court held "touched a fine line." *Id.* Ms. Roetzel's disclosure didn't merely "touc[h] a fine line" – it jumped all the way over.

*C. The State failed to address Ronny's cited case law.*

The State next complains that Ronny failed to identify any controlling authority where the complained of conduct "has been resolved beyond debate." SB 31. But yet it also acknowledges this Court has not previously addressed the issue of whether the State asking the venire how it felt about "a person" who was charged with the same crime as the Defendant testifying as part of a plea agreement constitutes clear and obvious error. *Id.* Ronny again takes umbrage with the State's choice of the generic phrase "a person" in framing this issue.

Ronny agrees this issue, irrespective of framing, is a matter of first impression for the Court. And this is precisely why he cited out-of-state decisions from courts who have actually considered the same issue. Although these decisions are not binding, they can provide guidance to any degree the Court deems them useful. *See State v. Pickett*, 466 N.J. Super. 270, 316, 246 A.3d 279, 307 (App. Div. 2021) ("Published out-of-state judicial decisions, although persuasive rather than binding, carry great weight, especially after they are cited by other courts"). Ronny again relies upon the authorities set forth in his initial brief and urges the Court to consider these holdings.

The State's brief is devoid of any meaningful analysis as to these out-of-state decisions. Instead, the State simply concludes these decisions are not binding on the Court. It bears emphasis that this issue is a matter of first impression for the Court. Thus, there is no binding authority available.

Ronny contends that by failing to adequately respond, the State has implicitly conceded these points. *See Oliver v. Baity*, 208 F.Supp.3d 681, 690 (M.D.N.C. 2016) ("Courts have recognized that a party's failure to address an issue in its opposition

brief concedes the issue"); *see also Inst. For Pol'y Stud. V. C.I.A.*, 885 F.Supp.2d 120, 150 (D.D.C. 2012) ("[W]hen a party does not address arguments raised by a movant, the court may treat those arguments as conceded").[1]

D. *The State misconstrues Ronny's jury instruction argument.*

The State asserts that "a court has no discretion to give incorrect or misleading instructions," and that Ronny argued "the jury should have been instructed that it heard evidence that Ross testified and that the jury heard evidence that Ross pled guilty to a crime." SB 32. Ronny agrees the former is an accurate recitation of the law with regard to jury instructions. But he cannot agree with the balance of the State's argument.

The jury instruction at issue was drafted pre-trial so as to comply with the court's scheduling order. Thus, at the time it was submitted, Ronny reasonably anticipated Ross would testify. During the settling of final instructions, the trial court noted the discrepancy and held the instruction, as written, was unnecessary because Ross did not testify. Ms. Regalado asked the court to modify the language, but it refused to do so.

Semantic quibbles aside, the crux of Ronny's argument regarding this issue is that Ross's guilty plea was known to the venire, courtesy of the very prosecutor who negotiated the extraordinarily favorable plea agreement. What Ms. Roetzel knew and when she knew it as far as Ross's refusal to testify is a red herring that detracts from the key point: because Ross didn't honor his end of the bargain and testify at trial,

[1] The State did not address *at all* Ronny's argument that the trial court compounded the prejudice of Ms. Roetzel's disclosure further by not allowing him to cross-examine Sgt. Harris about the details of Ross's proffer interview or to question Mr. Skinner about Ross's plea agreement. Ronny argues the State has also waived these issues. *See* Appellant's Brief 23.

Ronny was never permitted to cross-examine him regarding the terms of the agreement. Thus, the venire was left with the misapprehension that Ross pleaded guilty to second-degree murder. To un-ring the bell of prejudice caused by Ms. Roetzel's remarkable disclosure, the trial court, *at a minimum*, should have instructed the jury that it could not use Ross's guilty plea as evidence of Ronny' guilt. It didn't. This failure was erroneous and deprived Ronny of his right to be tried on his own. Accordingly, reversal is warranted.

## IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT TRANSFERRED RONNY'S CASE TO ADULT COURT.

The State contends the Court lacks jurisdiction to rule on the merits of this argument because the juvenile court transfer order is not part of the settled record. SB 33. Ronny would simply stress he made this argument in the good faith belief this Court could consider the same and that he did not deliberately intend to sidestep the rules of civil procedure or seek to place the State at an unfair disadvantage. *See State v. Rurup*, 272 N.W.2d 821 n.1 (S.D. 1978) ("An order of transfer is not appealable as of right; however, the proceeding will be reviewed following a guilty verdict in the circuit court"). Nonetheless, Ronny agrees that a notice of appeal and docketing statement was not submitted for filing and service in Pennington County juvenile file number 51JUV18-000793. Accordingly, Ronny resigns that this issue should be resolved in the manner the Court deems most appropriate.

## V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED RONNY TO A TERM OF FORTY-YEARS.

Ronny acknowledges the trial court analyzed the *Miller* factors and found that he displayed the characteristics of youth that mitigate culpability and weaken

the rationales for harsh punishment. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012).

What Ronny argues, and what the State fails to respond to in its brief, is that following that analysis, the trial court then inexplicably cited to the *dissent* in *Miller* in fashioning its sentence. Concluding that Ronny has "an unpayable debt," the court sentenced Ronny to 40 years despite a finding that he could be rehabilitated. SH 76-77. The trial court failed to acknowledge that *Miller* found youth undermines retribution as a justification for punishment. "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Miller at* 472 (internal citations and quotation marks omitted).

The State also did not respond to the significant disparity between Ross's sentence of 20 years and Ronny's sentence of 40 years, despite Ross being older and a central figure of both the trial and at sentencing. That disparity between co-defendants, along with the misapplication of *Miller*, amounts to abuse of discretion.

## VI. THE TRIAL COURT'S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

"[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) (citations omitted). 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).

*Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), are Eighth Amendment cases. They place limits on when the harshest adult sentences can be imposed on children and reinforce "that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471.

Given Ronny's young age and the circumstances surrounding the offense, including the lack of pre-meditation, the presence of peer pressure, the great distance between Ronny and the victim on the dark street, and the demonstration of recklessness and immaturity involved would all point to the gravity of the offense being less than other homicide cases. However, the sentence of 40 years is an unduly harsh one, rather than one graduated and proportioned to the offense.

This disproportionality is further illustrated by comparing Ronny's sentence to those of other children in South Dakota who have been convicted of similar offenses. While he argues he has met the threshold test, which requires the Court to review for gross disproportionality between the crime a defendant committed and the sentence imposed before examining other factors, he notes it is adopted from the U.S. Supreme Court decision of *Harmelin v. Michigan*. 501 U.S. 957, 1005 (1991) ("intrajurisdictional ... analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."); *see, e.g. State v. Chipps*, 2016 S.D. 8, ¶¶ 33-34, 874 N.W.2d 475, 486–87.

Post-*Miller*, the Court's strict reliance on *Harmelin* in analyzing the constitutionality of a discretionary sentence imposed on a child seems illogical. "*Harmelin* had nothing to

do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Miller*, 567 U.S. at 481.

*Miller* requires that a punishment for a child must be "graduated and proportioned." *Id.* at 469. The State does not argue that Ronny's sentence is disproportional to other youth, especially when examining age, race, and the circumstances surrounding the offenses.

For these reasons and those outlined in his initial brief, Ronny's sentence of 40 years violated his right to be protected from cruel and unusual punishment under the U.S. and state constitutions.

## CONCLUSION

For the reasons stated herein and those outlined in his initial brief, Ronny asks the Court to reverse the judgment of the trial court and remand for a new trial.

SIGNED this 13th day of February, 2023.

Respectfully submitted,
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## CERTIFICATE OF COMPLIANCE

I certify that Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Reply Brief contains approximately 4823 words and is 16 pages in length.

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

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th of February, 2023, a true and correct copy of Appellant's Reply Brief in the matter of *The State of South Dakota v. Ronald Manuel Myron Black Cloud*, was served via electronic mail upon the individuals listed below:

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