IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA *Appellee,* vs. CORY CARLISLE YELLOWBOY, *Appellant.*	No. 31210

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

HONORABLE JOSHUA HENDRICKSON
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on September 8, 2025

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs. No. 31210

CORY CARLISLE YELLOWBOY,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR" and will be followed by the appropriate page number. Exhibits are referred to as "Ex." followed by the exhibit number or letter. All references are followed by the appropriate page number. The transcripts are referred to as follows:

Initial Appearance (March 31, 2025) ..... IA

Arraignment (April 14, 2025) ..... ARR

Motions Hearing (May 5, 2025) ..... MH

Pretrial Conference (June 2, 2025) ..... PTC

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Defendant and Appellant will be referred to as "Yellow Boy"

JURISDICTIONAL STATEMENT

Yellow Boy appeals the Judgment of Conviction entered August 25, 2025, by the Honorable Joshua Hendrickson, Circuit Court Judge of the Seventh Judicial Circuit. SR 137. Yellow Boy's Notice of Appeal was filed, and served on the Appellee, on September 8, 2025. SR 143-44. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED UNDER SDCL 23A-7.

The circuit court advised Yellow Boy of his rights at the Change of Plea Hearing when considering the proffered plea agreement but did not advise Yellow Boy of probation ineligibility or allow an opportunity to move to withdraw his guilty plea at the Sentencing Hearing.

State v. Scott, 2024 S.D. 27, 7 N.W.3d 320

State v. Wright, 2008 S.D. 118, 759 N.W.2d 275

SDCL 23A-7-11

II. WHETHER YELLOW BOY'S GUILTY PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT.

The circuit court found at the Change of Plea Hearing that Yellow Boy's guilty plea was entered knowingly and voluntarily.

Boykin v. Alabama, 395 U.S. 238 (1969)

Brady v. United States, 397 U.S. 742 (1970)

State v. Moran, 2015 S.D. 14, 862 N.W.2d 107

III. WHETHER YELLOW BOY WAS DENIED DUE PROCESS.

The State offered Yellow Boy a plea agreement promising to recommend probation, Yellow Boy accepted the agreement and pleaded guilty through counsel, and at the Sentencing Hearing the circuit court advised Yellow Boy was ineligible for probation without findings or canvassing.

State v. Guziak, 2021 S.D. 68, 968 N.W.2d 196

Santobello v. New York, 404 U.S. 257 (1971)

Lafler v. Cooper, 566 U.S. 156 (2012)

STATEMENT OF CASE AND FACTS

On April 8, 2025, the Pennington County Grand Jury returned an Indictment charging Yellow Boy with Aggravated Assault (Domestic Abuse) in violation of SDCL 22-18-1.1(8). SR 13-14. The Indictment was filed on April 9, 2025. *Id.* The State filed a Part II Information on April 9, 2025 under SDCL 22-7-8.1, alleging Yellow Boy had been convicted of six prior felonies. SR 15.

On April 14, 2025, Yellow Boy was arraigned on the Indictment and Part II Information. *See generally* ARR. At the Arraignment Hearing, Yellow Boy was also arraigned on a separate felony file.[1] The Part II was "identical as far as the felony convictions," the circuit court advised. ARR 5. The circuit court noted "the heading in the Part II filed in 25-1382" was "incorrect." ARR 8. The circuit court advised Yellow Boy that "given the nature of the felonies underlying," the effect of the Part II would mean "potentially up to life in prison," and "no minimum,"

[1] 51CRI25-1458. ARR 5.

but "zero to life is the range on that." *Id.* At the conclusion of the hearing, the circuit court asked the State "to file just an amended Part II – or motion to amend the heading on that as a clerical error." *Id.* at 9. The State filed an Amended Part II Information under SDCL 22-7-8 on the same date. SR 17-18.

Law enforcement reports made part of the record state that on March 26, 2025, Alayna Elliott reported that Yellow Boy would not leave her apartment in Rapid City, South Dakota. SR 5. Elliott stated that she and Yellow Boy had been in a relationship for about one month. *Id.* She further reported that on the night prior, Yellow Boy had "put both hands around her neck," rendering her unable to breath or talk. *Id.* Yellow Boy was arrested on March 29, 2025, when law enforcement arrived for a report that he was causing a disturbance, attempting to have Elliott leave with him. SR 6-7.

At the Motions Hearing on May 5, 2025, the circuit court granted both parties' pretrial motions and a trial date was set to begin June 17, 2025. MH 2-3. At the Pretrial Conference on June 2, 2025, neither party identified issues for the circuit court's consideration and the trial date remained set. PTC 2. On June 10, 2025, defense counsel emailed the court advising of "an agreement with the state," under which the State "will be recommending a local jail and probation sentence." SR 50. Further, defense counsel noted, "the agreement includes a plea

to a Simple Assault" in a separate file.[2] *Id.* Defense counsel also indicated Yellow Boy would seek to have bond lowered. *Id.*

At the Change of Plea Hearing, defense counsel stated, "Yellowboy is going to plead guilty to aggravated assault to Count 1," and to simple assault at a later time. COP 2. Counsel continued, "[a]t the time of sentencing, the State would recommend local jail with probation." *Id.* The State agreed with the recitation. *Id.* Yellow Boy agreed. *Id.* The circuit court advised of rights to be given up with the plea, and asked, "[d]o you understand the plea agreement is essentially a recommendation by the State. The Court's not bound by it and could sentence you up to the maximum which in this case could be up to 15 years in prison…" *Id.* at 3-4. The circuit court took a factual basis statement from Yellow Boy, asking, "[a]t some point did you essentially try to choke her?" *Id.* at 4. Yellow Boy responded in the affirmative, and the circuit court took notice of "law enforcement reports attached to the file," with no objection. *Id.* at 4-5. The circuit court found Yellow Boy's plea was made knowingly and voluntarily. *Id.* at 5. The circuit court ordered a presentence investigation report (PSI). *Id.*

At the conclusion of the Change of Plea Hearing, Yellow Boy requested to be released on bond, "based on the recommendation for local jail and probation." *Id.* The State objected to release, stating "it is a local jail and probation recommendation. However, the State is concerned about him being released

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[2] 51CRI 25-1446. SR 50.

without the structure of probation already in place." *Id.* The circuit court denied the request. *Id.*

The PSI is dated July 30, 2025 and was filed on August 6, 2025. SR 51. The cover page cites the "plea agreement letter" and "plea offer." SR 51. It also contains a definition of "Crime of Violence," and cites SDCL 23A-27-12 to conclude Yellow Boy was "not eligible for probation due to a prior rape conviction." *Id.* The PSI contains the plea offer letter sent from the Pennington County State's Attorney's Office, which reads:

> The plea offer is as follows:
> Your client would plead guilty to Aggravated Assault (DV) in CRI 25-1382. He would plead guilty to one count of Simple Assault in CRI 25-1446. In addition, he would be responsible for all costs of the prosecution and restitution, if any, as ordered by the Court. In exchange, the State would dismiss CRI 25-1458 in its entirety. At the time of sentencing, the State would recommend local jail with probation in both files. Otherwise, both sides would be free to comment.

SR 87.

At the Sentencing Hearing on August 4, 2025, the circuit court asked Yellow Boy, "[i]s it your intention to let your plea stand and proceed to sentencing today?" SENT 2. Yellow Boy replied, "Yeah." *Id.* The circuit court then advised:

> All right. I do want to note that it appears that the plea agreement in this case was the State's recommending local jail and probation. At the time I wasn't aware of it, it had become – well, it's been made clear that probation is not an option per state statute given his prior criminal history. Knowing that, do you still wish to proceed to sentencing at this time?

SENT 2. Yellow Boy's counsel responded, "Yes." *Id.* The circuit court then asked whether the parties had reviewed the PSI. *Id.* The State confirmed, stating "[n]o additions or corrections." *Id.* Yellow Boy's counsel responded "[w]e have. No additions or corrections." *Id.* The circuit court then invited argument and the State asked the court to consider a statement from Cheradan Cummings, "the victim in a recent matter that was also resolved with this plea agreement." *Id.* at 2-3. The circuit court took a statement from Cummings. *Id.* The State argued:

> as this Court notated originally, the plea agreement was for local jail and probation. However, statutorily that's not a sentence this Court can impose. That being said, the State's recommendation is as follows: We do still wish, of course, to abide by our plea agreement. Our recommendation today is 15 years in the penitentiary, fully suspended, and 360-day jail sentence, applying any credit for time served.

Id. at 3-4.

Defense counsel asked the circuit court "to go along with that fully suspended sentence," and requested jail credit and authorization for work release on any jail sentence. *Id.* at 5. Counsel concluded:

> like he said in the comments in the PSI, he prepared an apology letter. I don't know if he did to the person that came in today, but he would certainly correct that if he needs to. But otherwise he's willing at this point to do what he needs to do to be successful.

Id. Yellow Boy gave an allocution statement and accepted responsibility, stating he would seek treatment, and concluded with "thank you for

considering probation and giving me a chance to not only prove to myself but others as well." *Id.*

The circuit court noted Yellow Boy's history as "an extremely violent person," and pronounced sentence:

> I appreciate the State's recommendation. I don't feel it's appropriate. I'm not allowed to do a probationary sentence and I don't think the supervision of a local sentence where there's no supervision on that, and I do believe that with your history the only thing to do is impose a prison sentence.

Id. at 6. The circuit court imposed seven years in the penitentiary. *Id.*

ARGUMENT

I. THE CIRCUIT COURT ERRED UNDER SDCL 23A-7.

A. *Standard of Review*

Yellow Boy did not object to the imposition of sentence or move to withdraw his plea for a violation of SDCL 23A-7. *See generally* SENT. Plain error review is applied and "a defendant seeking reversal of a conviction after a guilty plea on the grounds of plain error under Rule 11 must show prejudice." *State v. Wright*, 2008 S.D. 118, ¶ 14, 759 N.W.2d 275, 279 (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).[3] To establish reversible plain error, Yellow Boy 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

[3] In *Wright*, this Court uses "Rule 11" and "SDCL 23A-7-4" synonymously. 2008 S.D. 118, ¶ 9, 759 N.W.2d 275, 277.

affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Scott*, 2024 S.D. 27, ¶ 16, 7 N.W.3d 320, 327.

B. SDCL 23A-7 and Plea Agreement Procedure

SDCL 23A-7 governs "Arraignment and Pleas." Before a defendant enters a guilty plea, a circuit court must provide an advisement of rights and must explain to the defendant, "[t]he nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." SDCL 23A-7-4(1).[4] Plea bargaining is governed by SDCL 23A-7-8 and a prosecutor may make certain concessions in plea discussions:

> A prosecuting attorney and an attorney for a defendant or a defendant when acting pro se may engage in discussions, with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecuting attorney will do any one or more of the following:
> (1) Move for dismissal of other charges or not file additional charges arising out of a different occurrence;
> (2) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court;
> (3) Agree that a specific sentence is the appropriate disposition of the case; or
> (4) Perform other specified acts to be made a part of the agreement.

SDCL 23A-7-8. Upon reaching a plea agreement, the circuit court must "require the disclosure of the agreement in open court, or on a showing of

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[4] This Court notes SDCL 23A-7-4 is "South Dakota's version of Rule 11 of the Federal Rules of Criminal Procedure." *State v. Anderson*, 2013 S.D. 36, ¶ 13, 831 N.W.2d 54, 57.

good cause, in chambers, at the time the plea is offered." SDCL 23A-7-9. After disclosure, the circuit court "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." *Id.* Then, SDCL 23A-7-11 requires:

> If a court rejects the plea agreement, it shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in chambers, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, if a plea has been entered, and advise him that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to him than that contemplated by the plea agreement.

Finally, SDCL 23A-7-15 requires:

> A verbatim record of the proceedings at which a defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the factual basis of a guilty plea. A verbatim record of a proceeding at which a defendant enters a plea to a misdemeanor need not be taken unless requested by the prosecuting attorney or the defendant.

Yellow Boy asserts the circuit court erred because it did not properly advise him under SDCL 23A-7-11 and SDCL 23A-7-4. Additionally, Yellow Boy argues the circuit court erred when it did not require disclosure of updated terms of the plea agreement under SDCL 23A-7-9 and did not conduct inquiry into the voluntariness of the plea under SDCL 23A-7-15.

C. *The Circuit Court Erred in Not Allowing Yellow Boy the Opportunity to Withdraw His Plea Under SDCL 23A-7-11.*

Not complying with a statute constitutes error. *See Scott*, 2024 S.D. 27, ¶ 34, 7 N.W.3d at 330-31 (vacating and remanding for noncompliance with SDCL 22-6-11).[5] Here, noncompliance with SDCL 23A-7-11 was error. Although this Court has stated SDCL 23A-7-11 "only applies to subsection (3) plea agreements," it should apply to the agreement here. *Scott*, 2024 S.D. 27, ¶ 20, 7 N.W.3d at 328. SDCL 23A-7-8 is "almost word for word the same" as the relevant portion of Fed. R. Crim. P. 11. *State v. Rich*, 305 N.W.2d 390, 392 (1981). Fed. R. Crim. P. 11(c)(1) provides the government may specify in a plea agreement that it will:

> (A) not bring, or will move to dismiss, other charges;
> (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

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[5] In *Scott*, this Court observed that a defendant must object to a circuit court's failure to comply with the presumptive probation statute. 2024 S.D. 27, ¶ 31, 7 N.W.3d at 330. However, Scott avoided plain error review because the holding in *State v. Feucht*, 2024 S.D. 16, 5 N.W.3d 561, prescribing plain error review, was prospective and was decided after Scott's sentencing. *Id.* at ¶ 32, 330. This Court nevertheless found error where the circuit court did not comply with the statute. *Id.* at ¶ 34, 331.

Under Fed. R. Crim. P. 11(c)(3)(A), "[t]o the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Notably, however, Fed. R. Crim. P. 11(c)(3)(B) requires a court "advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request." This advisement safeguard is not afforded under SDCL 23A-7-9, where a court is authorized to either accept or reject a plea agreement, or in SDCL 23A-7-11, which requires an advisement upon rejection.

Unlike Fed. R. Crim. P. 11(c), SDCL 23A-7-11 does not specify its application to only certain subsections of SDCL 23A-7-8. Whether the requirements of SDCL 23A-7-11 should apply has been analyzed in the decisional law from this Court under the circumstances of each case.

Case law suggests a circuit court may "accept" a plea agreement under SDCL 23A-7-8(2). *See State v. Shumaker*, 2010 S.D. 95, ¶ 6 n.1, 792 N.W.2d 174, 175 n.1 (stating "if the court *accepts* a non-binding (SDCL 23A-7-8(2)) agreement, but does not follow the recommendation, the defendant has no right to withdraw his or her plea") (emphasis added); *State v. Ledbetter*, 2018 S.D. 79, ¶ 20, 920 N.W.2d 760, 765 (explaining "[a] circuit court can accept a plea agreement made under subsection (2) and not accept the sentencing recommendation"). It follows that a court likewise may "reject" a non-binding plea agreement when the State cannot perform its offered concession under SDCL. *See State v. Lee*, 1997 S.D. 26, ¶ 7, 560

N.W.2d 552, 554 (stating "[n]onacceptance of a recommended sentence does not constitute a rejection of a plea bargain under certain circumstances"); *Rich*, 305 N.W.2d at 393 (stating "nonacceptance of the recommended maximum five to six years' sentence did not constitute a rejection of appellant's plea bargain with the State").

The statute itself indicates a court may accept or reject any plea agreement. Under SDCL 23A-7-9, a circuit court "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." SDCL 23A-7-9 does not distinguish between types of plea agreements authorized by SDCL 23A-7-8. Here, the circuit court rejected the plea bargain terms. Effectively, the circuit court had "defer[red] its decision as to the acceptance or rejection" until after the presentence report. SDCL 23A-7-9. Therefore, SDCL 23A-7-11 should require an advisement.

At the outset of the Sentencing Hearing, the circuit court rejected the proffered plea agreement terms. SENT 2. This is distinguishable from previous cases where this Court has decided whether an advisement under SDCL 23A-7-11 was required. In *Rich* and *Scott*, the circuit courts decided against a recommendation actually submitted by the State. *Rich*, 305 N.W.2d at 391-392; *Scott*, 2024 S.D. 27, ¶¶ 6-14, 7 N.W.3d at 326. This sequence is a critical distinction in Yellow Boy's case. While not following a recommendation may not be a

rejection, revealing the State's recommendation cannot be followed prior to sentencing is a rejection of the plea.

The circuit court did advise Yellow Boy at the Change of Plea hearing that the State's recommendation was not binding. COP 3-4. However, Yellow Boy was not advised that the State's recommendation was "not an option." SENT 2. The circuit court and parties seemingly discovered Yellow Boy's probation ineligibility through the presentence report. *See* SR 51. A presentence report should not supplant an advisement on the record under SDCL 23A-7-11. *See United States v. Goins*, 51 F.3d 400, 404 (4th Cir. 1995) (stating "[v]iolations of Rule 11, however, cannot be cured by the presentence report").[6] Such a rejection of the plea bargain terms should require a specific advisement. Under SDCL 23A-7-11, the circuit court committed plain error when it did not advise Yellow Boy of the status of his plea and impending sentencing, or adequately allow the opportunity to withdraw the plea. *See United States v. Dunlap*, 104 F.4th 544, 550 (4th Cir. 2024) (holding "when the record is ambiguous as to whether the district court accepted or rejected the parties' plea agreement, we construe that ambiguity in the defendant's favor. This approach places the onus of clarity on the district court, the actor that 'possessed control over clarity'") (quoting *United States v. Holman*, 728 F.2d 809, 812 (6th Cir. 1984)).

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[6] In *Goins*, the Fourth Circuit vacated and remanded the defendant's sentence for an opportunity to withdraw his plea because the district court had not advised him of the mandatory minimum penalty which was only revealed in the presentence report and at sentencing. 51 F.3d at 402.

D. *The Circuit Court Erred in Not Advising Yellow Boy of a Mandatory Minimum Sentence Under SDCL 23A-7-4.*

Here, probation ineligibility effectively raised the minimum sentence Yellow Boy could receive. *See Jenkins v. United States*, 420 F.2d 433, 437 (10th Cir. 1970) (considering "[t]he practical effect of the loss of probation and parole" as a "consequence" which is "to be carefully considered"). As this case demonstrates, the practical effect of probation ineligibility was required imprisonment. *State v. Anderson*, 2015 S.D. 60, ¶ 13, 867 N.W.2d 718, 723 (describing probation as "an innovative alternative to incarceration" which "allows an offender an opportunity to rehabilitate and protects the public 'through supervision by a probation officer and the continuing jurisdiction of the [circuit] court to revoke probation [.]'") (quoting *State v. Marshall*, 247 N.W.2d 484, 487 (S.D. 1976)) (alterations in original). The circuit court committed plain error because it did not advise Yellow Boy under SDCL 23A-7-4 that he was ineligible for probation before allowing him to enter the plea.

E. *The Circuit Court Erred by Failing to Require Disclosure of the Plea Agreement under SDCL 23A-7-9 and Failing to Conduct Inquiry into the Voluntariness of the Plea at the Sentencing Hearing Under SDCL 23A-7-15.*

The terms of the plea agreement ostensibly changed at the Sentencing Hearing. However, the circuit court did not require disclosure of updated terms. Under these circumstances, this is error under SDCL 23A-7-9. Additionally, after revealing the changed status, the circuit court did not inquire into the voluntariness of Yellow Boy's plea at the Sentencing Hearing. This is error under

SDCL 23A-7-15. *See State v. Miller*, 2006 S.D. 54, ¶ 19, 717 N.W.2d 614, 621 (stating "SDCL 23A-7-15 requires the circuit court to inquire on the record into the voluntariness and the factual basis of a guilty plea").

F. Yellow Boy Suffered Prejudice.

Under the unique circumstances here, Yellow Boy asserts that the circuit court's failure to advise him under SDCL 23A-7 was plain error from which he suffered prejudice. Here, there is "a reasonable probability that, but for the error, [Yellow Boy] would not have entered the plea." *Wright*, 2008 S.D. 118, ¶ 14, 759 N.W.2d at 279 (quoting *Dominguez Benitez*, 542 U.S. at 83).

In *Wright*, the appellant disputed the validity of his guilty plea when he was not advised of a mandatory minimum sentence. *Wright*, 2008 S.D. 118, ¶ 1, 759 N.W.2d at, 276. Wright had pleaded guilty to a sexual contact charge and entered an admission on a Part II Information. *Id.* at ¶ 3, 276. The State had agreed to not file additional felony charges for first degree rape and sexual contact, and "[b]oth the prosecution and defense remained free to comment at sentencing." *Id.* at ¶ 4, 276. This Court concluded that the failure to advise on the mandatory minimum "could have had no effect on [his] assessment of his strategic position." *Id.* at ¶ 15, 280. *Wright* "was not a case where [he] might reasonably have expected a suspension or sentence shorter than the ten year mandatory minimum sentence." *Id.* Rather, the State's ability to file additional charges "could have led to significantly more prison time including multiple life terms." *Id.*

Similar to *Wright*, Yellow Boy was facing lengthy imprisonment if convicted and had multiple criminal files pending. However, Yellow Boy might have proceeded to trial or attempted to re-negotiate a plea if he had been advised that the State could not recommend probation. The State had revealed its desire to settle the case in Yellow Boy's favor by offering a probation recommendation. Conversely, in *Wright*, the parties were "free to comment at sentencing." *Id.* at ¶ 4, 276. But, "[t]he point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish." *Dominguez Benitez*, 542 U.S. at 85 (2008). Rather, this Court must assess "whether the omitted warning would have made the difference required by the standard of reasonable probability." *Id.*

Had Yellow Boy been properly advised, he would have understood that his plea was, in essence, an open plea. Although Yellow Boy was advised at the Chang of Plea Hearing that the circuit court was not bound by any recommendation from the State, he was still induced into entering a guilty plea in reliance on the State's promise. Contrary to *Wright*, under the offered plea terms, Yellow Boy still may have reasonably expected a suspended sentence. *See United States v. Sarubbi*, 416 F. Supp. 633, 636 (D.N.J. 1976) (observing "[t]he fact that the request is not binding on the court in no way implies that it has no effect on sentence. The lack of opposition may persuade the court to impose a lesser custodial sentence than it might have otherwise"). The record indicates the

circuit court may have considered a probation sentence but believed it was "not allowed" and "supervision of a local sentence" was not adequate. SENT 6. Proper advisements under SDCL 23A-7 would have had an effect on Yellow Boy's assessment of his strategic position. Therefore, he suffered prejudice to his substantial rights, which affected the fairness, integrity, and public reputation of the proceedings.

II. YELLOW BOY'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT.

A. *Standard of Review*

"To satisfy due process, the circuit court must comply with certain constitutional and procedural requirements." *State v. Moran*, 2015 S.D. 14, ¶ 13, 862 N.W.2d 107, 111 (citing *Legrand v. Weber*, 2014 S.D. 71, ¶ 13, 855 N.W.2d 121, 126). The record must affirmatively show the plea was voluntary and, therefore, this Court reviews the circumstances of each plea in its entirety to determine whether a defendant "understood the consequences of pleading guilty[.]" *State v. Ceplecha*, 2020 S.D. 11, ¶ 45, 940 N.W.2d 682, 695 (quoting *Monette v. Weber*, 2009 S.D. 77, ¶ 10, 771 N.W.2d 920, 925). This Court considers "the totality of the circumstances when ascertaining whether a plea was made knowingly and voluntarily." *Moran*, 2015 S.D. 14, ¶ 15, 862 N.W.2d at 111. (citation modified). "In addition to the procedure and in-court colloquy with the defendant, we look at other factors including 'the defendant's age; his prior criminal record; whether he is represented by counsel; the existence of a plea agreement; and the time

between advisement of rights and entering a plea of guilty.'" *State v. Apple*, 2008 S.D. 120, ¶ 14, 759 N.W.2d 283, 288 (quoting *State v. Goodwin*, 2004 S.D. 75, ¶ 11, 681 N.W.2d 847, 852).

B. *The Totality of Circumstances Demonstrate Yellow Boy's Plea was Not Entered Knowingly, Voluntarily, and Intelligently.*

Yellow Boy entered his guilty plea without knowledge of the applicable law. Upon entering his plea, for the State's recommendation of probation, Yellow Boy was not advised that he would later be determined ineligible for probation. *See generally* COP. Yellow Boy argues this was a direct consequence of his guilty plea for which the circuit court should have adequately advised him at the time of the plea to establish a knowing, voluntary, and intelligent plea. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (stating "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

This Court has held that "collateral consequences" of a plea do not require advisement. *State v. Wika*, 464 N.W.2d 630, 634 (S.D. 1991). However, "[t]he distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* (citation modified). Probation eligibility had a direct effect on the consequences of the plea.

It is indisputable that the circuit court did not advise Yellow Boy of probation ineligibility at the time of the plea. *See generally* COP. In fact, Yellow Boy requested release on bond and the State objected, citing a concern "about him being released without the structure of probation already in place." COP 5. Yellow Boy left the Change of Plea Hearing believing that not only would the State recommend probation, but that the circuit court would consider it. *Id.* The circuit court did advise Yellow Boy that the recommendation for probation was not binding and the sentence was ultimately in the discretion of the court. COP 3-4. However, given the comments at the conclusion of the Change of Plea Hearing, Yellow Boy reasonably believed he may receive a probation sentence. The plea was not knowing, voluntary, and intelligent at the Change of Plea Hearing because Yellow Boy did not know he would be deemed ineligible for probation.

Furthermore, the plea was not knowing, voluntary, and intelligent at the Sentencing Hearing. Rather than ensure an intelligent waiver of rights with an awareness of consequences, which had still not yet occurred, the circuit court "abbreviated the proceeding significantly." *Goodwin*, 2004 S.D. 75, ¶ 8, 681 N.W.2d at 850-51. The circuit court asked Yellow Boy if he would "let [his] plea stand," but went no further in personally advising him. SENT 2. Yellow Boy's counsel, rather than Yellow Boy, confirmed an intention to proceed with sentencing. *Id.* The circuit court never asked Yellow Boy if he had consulted with

counsel regarding the meaning and consequences of the newly invalidated plea agreement.

As the United States Supreme Court has noted, "courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). At the Sentencing Hearing, the status of Yellow Boy's plea agreement and potential sentence had apparently changed. There was no canvassing of Yellow Boy himself. *See Brady*, 397 U.S. at 748 (explaining "the minimum requirement that his plea be the voluntary expression of his own choice"). The circuit did not ensure that Yellow Boy understood the consequences of his earlier plea, but nevertheless proceeded to assume its validity. *See McCarthy v. United States*, 394 U.S. 459, 466 (stating "[b]y personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack").

The record demonstrates that Yellow Boy did not understand the relevant, direct consequences of his plea. At the conclusion of the Sentencing Hearing, Yellow Boy even thanked the circuit court for considering probation. SENT 5. The facts in this case are unique, revealing an improper, casual approach to Yellow Boy's plea. *See Brady*, 397 U.S. at 748 (stating "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized"). It is the circuit court's duty to advise the defendant of the

consequences of his plea. *State v. Wika*, 464 N.W.2d 630, 633 (S.D. 1990). Under the totality of the circumstances, and factors previously considered by this Court, the procedure and plea colloquy here are significant. Likewise, the existence of the plea agreement and the time between the advisement of rights and the confirmation that sentencing would proceed weighs in favor of Yellow Boy's argument. At the time Yellow Boy was asked whether he would "let [his] plea stand," the circuit court should have taken the care to properly canvass Yellow Boy. SENT 2. Under the circumstances, Yellow Boy did not enter or proceed on his plea knowingly, voluntarily, and intelligently. He believed in entering his plea he had bargained for a potential probation sentence. Because of the shortcomings in the record, this Court should find Yellow Boy's guilty plea was not entered voluntarily, knowingly, and intelligently.

III. YELLOW BOY WAS DENIED DUE PROCESS.

A. Standard of Review

When entering a guilty plea, a defendant waives several constitutional rights. *Boykin*, 395 U.S. at 243. Among them are the "right against self-incrimination, the right to confront witnesses, and the right to a trial by jury." *Moran*, 2015 S.D. 14, ¶ 13, 862 N.W.2d at 111 (citing *Boykin*, 395 U.S. at 243). This Court has stated "*Boykin* requires that before a defendant pleads guilty, he be advised of his federal constitutional rights relating to self-incrimination, trial by jury, and confrontation, and that he intentionally relinquish or abandon his

known rights." *State v. Bilben*, 2014 S.D. 24, ¶ 5, 846 N.W.2d 336, 338 (citation modified).

In *Santobello v. New York*, the Supreme Court found that due process applies to the plea bargaining process, stating:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. 257, 262 (1971). This Court has likewise stated that "[a] criminal defendant has a constitutional right to the enforcement of a plea bargain." *State v. Bracht*, 1997 S.D. 136, ¶ 12 n.1, 573 N.W.2d 176, 180 n.1 (citing *Mabry v. Johnson*, 467 U.S. 504 (1984). Further, "[d]ue process requires that a guilty plea be voluntary and knowing and if it is induced by broken promises, the plea cannot stand." *Bracht*, 1997 S.D. 136, ¶ 12 n.1, 573 N.W.2d at 180 n.1.

In *Lafler v. Cooper*, the Supreme Court held that "[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." 566 U.S. 156, 162 (2012). Defendants are entitled to effective assistance of counsel during plea negotiations. *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

"Appeals asserting an infringement of a constitutional right are reviewed under the de novo standard of review." *Miller*, 2006 S.D. 54, ¶ 11, 717 N.W.2d at 618 (citing *State v. Dillon*, 2001 S.D. 97, ¶ 12, 632 N.W.2d 37, 43). "A direct appeal

from a conviction must be afforded greater scrutiny than a collateral challenge by a habeas corpus action." *Id.* (citing *State v. Moeller*, 511 N.W.2d 803, 809 (S.D. 1994)). "Thus, on a direct appeal from a conviction the defendant is entitled to all presumptions and protections possible under our constitution." *Id.*

B. The Circuit Court Violated Yellow Boy's Due Process Rights by Not Ensuring a Valid Waiver Under Boykin.

The circuit court failed to advise Yellow Boy of the circumstances of his waiver of rights at the Sentencing Hearing because it did not ensure he had "a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244. At the Change of Plea Hearing, Yellow Boy entered his guilty plea and believed the circuit court had accepted the terms of his plea agreement, at least insofar as it required the State to recommend probation. *See generally* COP. *See also State v. Hale*, 2018 S.D. 9, ¶¶ 16-17, 907 N.W.2d 56, 61 (observing a circuit court may implicitly accept a plea agreement at a change of plea hearing). At the Sentencing Hearing, the PSI revealed the promise the State made to induce the plea was "not an option." SENT 2. Thereafter, the circuit court did not ensure a valid waiver under *Boykin*. As noted, at this critical stage, the circuit court "abbreviated the proceeding significantly." *Goodwin*, 2004 S.D. 75, ¶ 8, 681 N.W.2d at 850-51. The circuit court glossed over the implications of proceeding on the previously entered plea in violation of Yellow Boy's due process rights. *See Miller*, 2006 S.D. 54, ¶ 13, 717 N.W.2d at 618 (stating "[t]he Due Process Clause serves to safeguard against an unintentional or coerced relinquishment of

known rights and privileges") (citing *Boykin* 395 U.S. at 243 n.5). At the Sentencing Hearing, the circuit court should have canvassed Yellow Boy to ensure a valid, continuing waiver under the apparently altered terms of the plea. *See Boykin*, 395 U.S. at 244 (stating "[w]e cannot presume a waiver of these three important federal rights from a silent record"). The circuit court denied Yellow Boy due process in failing to ensure a valid waiver of rights prior to sentencing.

C. *The Circuit Court Denied Yellow Boy Due Process by Failing to Make a Finding Regarding Probation Ineligibility.*

In sentencing, any fact that increases a potential penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Supreme Court extended this Sixth Amendment protection to apply for any fact "which aggravates the legally prescribed range of allowable sentences[.]" *Alleyne v. United States*, 570 U.S. 99, 115 (2013). *See also* SDCL 27-7-12 (providing "right to a trial by jury on the issue of whether the defendant is the same person as alleged in the habitual criminal information"). Similarly, SDCL 22-6-11 requires a judicial finding of aggravating circumstances for departure from presumptive probation. *See State v. Roedder*, 2019 S.D. 9, ¶ 43, 923 N.W.2d 537, 549 (holding circuit court erred in concluding defendant was ineligible for probation under SDCL 22-6-11 where there was inadequate support in the sentencing record). *See also Anderson*, 2015 S.D. 60, ¶ 15, 867 N.W.2d at 724 (observing when denying or revoking

probation, "the court is determining whether incarceration is appropriate, and it is within the court's purview to decide facts relevant to that decision").

Here, the circuit court made no finding to support the proposition that probation could not be imposed. This deprives Yellow Boy of due process. *See Gall v. United States*, 552 U.S. 38, 50 (2007) (stating a trial court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing"). Only the PSI reveals that SDCL 23A-27-12 was, seemingly, the basis for probation ineligibility. SR 51. SDCL 23A-27-12 provides:

> After conviction of an offense not punishable by death or life imprisonment, a defendant may be placed on probation. No person who has been previously convicted for a crime of violence as defined in subdivision § 22-1-2(9) may be placed on probation if his second or subsequent felony conviction is for a crime of violence as defined in subdivision § 22-1-2(9).[7]

At a minimum, a circuit court should be required to make a finding on the record as to the application of 23A-27-12.

D. The State Did Not Negotiate in Good Faith and Breached the Plea Agreement.

The State offered a reportedly unenforceable promise to induce Yellow Boy's guilty plea and did not fulfill its promise to request probation. This case

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[7] SDCL 22-1-2(9) defines "Crime of violence," as: "any of the following crimes or an attempt to commit, or a conspiracy to commit, or a solicitation to commit any of the following crimes: murder, manslaughter, rape, aggravated assault, riot, robbery, burglary in the first degree, arson, kidnapping, felony sexual contact as defined in § 22-22-7, felony child abuse as defined in § 26-10-1, or any other felony in the commission of which the perpetrator used force, or was armed with a dangerous weapon, or used any explosive or destructive device[.]

presents unique circumstances in relation to due process concerns in the plea-bargaining process. *See State v. Guziak*, 2021 S.D. 68, ¶ 24, 968 N.W.2d 196, 203 (stating "[w]e acknowledge the due process concerns attached to the plea-bargaining process"). Yellow Boy should be able to presume fairness and rely on promises the State makes in securing his guilty plea. *See Santobello*, 404 U.S. at 261 (stating the reasons justifying plea-bargaining "presuppose fairness in securing agreement between an accused and a prosecutor"). At the time the circuit court asked Yellow Boy whether he would proceed with his plea, he had already relied on the State's promise to his detriment. *See State v. Lewandowski*, 2019 S.D. 2, ¶ 36, 921 N.W.2d 915, 924 (stating "once a defendant has given up his 'bargaining chip' by pleading guilty, due process requires the defendant's expectations arising from a plea agreement or promise of the state to be fulfilled") (quoting *State v. Morrison*, 2008 S.D. 116, ¶ 5, 759 N.W. 2d 118, 120).

Here, the State breached the plea agreement by not recommending probation and by impliedly arguing for a harsher sentence than agreed for recommendation. *See Guziak*, 2021 S.D. 68, ¶ 15, 968 N.W.2d at 201 (holding "[t]he State cannot fulfill its duty of good faith by merely mentioning the plea agreement when its rhetoric amounted to an impermissible effort to influence the circuit court to impose a harsher sentence"). Although the State recommended a "fully suspended" sentence, it requested 15 years and emphasized factors justifying a harsh sentence. SENT 4. This argument resembles the State's sentencing argument in *Guziak*, where "the State made a winking

recommendation for a suspended sentence accompanied by an extensive argument justifying the opposite." *Guziak*, 2021 S.D. 68, ¶ 31, 968 N.W.2d at 205 (Myren, J., dissenting).

Under *Santobello*, the Supreme Court envisioned state courts deciding the appropriate remedy when the State breaches the terms of a plea agreement. *See Santobello*, 404 U.S. at 263 (holding state courts should have discretion to order either specific performance or the opportunity to withdraw the plea). *See also Bracht*, 1997, S.D. 136, ¶ 6, 573 N.W.2d at 178 (stating "[w]hen the government fails to fulfill a material term of a plea agreement, the defendant may seek specific performance or may seek to withdraw his plea") (quoting *U.S. v. Barresse*, 115 F.3d 610, 612 (8th Cir. 1997)). In this case, as noted, Yellow Boy seeks the opportunity to withdraw his plea. This request is based on the due process violation the State committed in breaching the plea agreement and failing to negotiate the plea in good faith. Even if the State mistakenly believed it could offer and perform the probation recommendation, Yellow Boy suffered a violation of due process from the State's inadvertence. *See State v. Slotsky*, 2016 S.D. 54, ¶ 7, 883 N.W.2d 738, 741 (stating "it does not matter if the State breaches the plea agreement inadvertently; 'the defendant is still entitled to a remedy for the breach'") (quoting *Morrison*, 2008 S.D. 116, ¶ 5, 759 N.W.2d at 120).

Although Yellow Boy did not move to withdraw his plea or object to the State's sentencing argument, he asserts he is entitled to relief under the circumstances. *See Guziak*, 2021 S.D. 68, ¶ 35 n.7, 968 N.W.2d 196, 207 n.7 (Myren,

J., dissenting) (stating "these unique facts, coupled with the importance of maintaining trust between defendants and prosecutors outweigh the rule of contemporaneous objection and justify a narrow exception to the prejudice prong").

E. Yellow Boy Received Ineffective Assistance of Counsel.

Yellow Boy's counsel deficiently guided him through the plea-bargaining and sentencing processes. Yellow Boy acknowledges that "[a]bsent exceptional circumstances, [this Court] will not address an ineffective assistance claim on direct appeal." *State v. Dillon*, 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48 (citing *State v. Hays*, 1999 S.D. 89, ¶ 14, 598 N.W.2d 200, 203)). An exception may apply where "counsel was so ineffective and counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights." *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 121 (quoting *State v. Golliher-Weyer*, 2016 S.D. 10, ¶ 8, 875 N.W.2d 28, 31). These circumstances are exceptional.

Here, counsel allowed Yellow Boy to accept a plea agreement that was later determined to be unenforceable against the State under statutory law. Further, Yellow Boy's counsel did not object to the proceedings, seek additional time for consultation, or move to withdraw the plea. Meanwhile, Yellow Boy appeared to still be under the belief that the circuit court was considering probation. SENT 5. The PSI and the circuit court's comments at the outset of the Sentencing Hearing materially altered the plea agreement. *See generally* SENT. At this critical stage, where the plea agreement was in question, counsel did not

provide advocacy for Yellow Boy but allowed him to proceed on what, in essence, became an open plea. Counsel did not contradict the State's comments that "this Court should consider imposing a longer – suspended prison sentence and a longer jail sentence." SENT 4-5. Counsel did not advocate for a clarification of the State's obligations under the plea agreement. Here, there is a reasonable probability that Yellow Boy would have received a different sentence if counsel had advocated for him when the plea agreement was questioned and sentencing proceeded. The State was amenable to recommending probation. Under the Sixth Amendment, Yellow Boy had a right to effective assistance of counsel during plea negotiations. *Lafler*, 566 U.S. at 162. Counsel also failed in his duty to advocate for Yellow Boy in sentencing. *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 25, 4 N.W.3d 436, 443. Yellow Boy was deprived of his Sixth Amendment right to the effective assistance of counsel.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court vacate and remand for the opportunity to withdraw his guilty plea.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Cory Yellow Boy, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 18th day of November, 2025.

/s/ Derek D. Friese
Derek D. Friese
South Dakota Office of Indigent Legal Services
PO Box 88237
Sioux Falls, SD 57109
(605) 220-4132

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 7,773 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 18th day of November, 2025.

/s/ Derek D. Friese
Derek D. Friese
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

MARTY JACKLEY
atgservice@state.sd.us
South Dakota Attorney General

LARA ROETZEL
Pennington County State's Attorney
larar@pennco.org
Attorney for Appellee, State of South Dakota

Dated this 18th day of November, 2025.

/s/ Derek D. Friese
Derek D. Friese
South Dakota Office
of Indigent Legal Services
PO Box 88237
Sioux Falls, SD 57109
(605) 220-4132

APPENDIX

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	File No. CRI25-1382
vs.	)	**JUDGMENT**
CORY CARLISLE YELLOWBOY, DOB: 2-24-90 Defendant.	)	

Appearance at sentencing:
Prosecutor: RACHEL LINDSAY Defense attorney: BRYAN ANDERSEN

Date of sentence: AUGUST 4, 2025
Date of offense: MARCH 26, 2025
Charge: AGGRAVATED ASSAULT
Class: 3 Felony SDCL: 22-18-1.1(8)
Plea of GUILTY entered on JUNE 30, 2025

CRIME QUALIFIER: (CHECK IF APPLICABLE):
☐ Accessory 22-3-5 ☐ Aiding or Abetting 22-3-3 ☐ Attempt 22-4-1
☐ Conspiracy 22-3-8 ☐ Solicitation 22-4A-1

Habitual offender admitted on: _____
☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

Part 2 Information (DUI) admitted on _____
☐ Third Offense; SDCL 32-23-4 ☐ Fourth Offense; SDCL 32-23-4.6
☐ Fifth Offense; SDCL 32-23-4.7 ☐ Sixth or Subsequent Offense; SDCL 32-23-4.9

Part 2 Information (ASSAULT) admitted on _____
☐ SDCL 22-18-1

Part 2 Information (VPO DV/ VNCO DV) admitted on _____
☐ SDCL 25-10-13

☒ The Defendant having pled guilty and the Court finding the plea was made knowingly and voluntarily, and with a sufficient factual basis for the entry of the plea and having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT the Defendant is sentenced to serve:
7 years in the South Dakota State Penitentiarry with 0 suspended and 128 days credit plus each day served in the Pennington County jail.
☐ Fully Suspended Pen

Check if applicable:

☐ The sentence shall run concurrent with ____.
☐ The sentence shall run consecutive to ____.

☒ That Defendant pay court costs of $116.50.
☒ That Defendant's attorney's fees in the amount of $540.00 will be a civil lien pursuant to SDCL 23A-40-11.
☒ That Defendant pay prosecution costs: UA $___, Drug Test $___, Blood $___, SART Bill $___; Transcript $29.40.
☒ That Defendant pay prosecution costs from dismissed file CRI25-1458: UA $___, Drug Test $60.00, SART Bill $___; Blood $___, Transcript $44.10.
☐ That Defendant pay the statutory fee of $___ DUI, $___ DV.
☐ That Defendant pay fines imposed in the amount of $___.
☒ That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of $75.00 to ECO ATM in dismissed file MAG25-2039.

Other Conditions:
☐ _____
☐ _____

☐ Pursuant to SDCL 22-6-11, a Court shall sentence a Defendant convicted of a Class 5 or Class 6 felony to a term of probation unless the Court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation; and the Court having found the following aggravating factors exist justifying a deviation, to-wit:

☐ Failure to comply with terms of probation
☐ Poor performance on bond
☐ Escalating behavior
☐ Failure to accept responsibility
☐ _____
☐ Criminal history
☐ Multiple files
☐ Picking up new files while on bond
☐ On Parole when committed offense

Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any Part II information, if applicable.

8/25/2025 8:21:50 AM

Attest:
Greenamyre, Kylie
Clerk/Deputy

BY THE COURT:

HON. JOSHUA K. HENDRICKSON CIRCUIT JUDGE

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this Judgment is filed.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31210

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CORY CARLISLE YELLOW BOY,

Defendant and Appellant.

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

THE HONORABLE JOSHUA HENDRICKSON
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed September 8, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31210

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CORY CARLISLE YELLOW BOY,

Defendant and Appellant.

PRELIMINARY STATEMENT

At Yellow Boy's change of plea hearing, the circuit court advised him of his constitutional and statutory rights but not of his probation ineligibility. At his sentencing the circuit court informed him he was ineligible for probation and asked if he still wished to continue to sentencing; Yellow Boy's counsel confirmed he wished to proceed.

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence entered on August 25, 2025. SR:136-37. Yellow Boy timely filed a Notice of Appeal on September 8, 2025. SR:143; SDCL 23A-32-15. On September 16, 2025, an amended judgment was filed. SR:159-60. This Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY ADVISED YELLOW BOY PRIOR TO ACCEPTING HIS GUILTY PLEA?

The circuit court did not rule on this issue.

- *State v. Miller*, 2006 S.D. 54, 717 N.W.2d 614
- *State v. Scott*, 2024 S.D. 27, 7 N.W.3d 320

II.

WHETHER YELLOW BOY'S PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE?

The circuit court held Yellow Boy's plea was knowingly, and voluntarily made.

- *State v. Ceplecha*, 2020 S.D. 11, 940 N.W.2d 682
- *State v. Smith*, 2013 S.D. 79, 840 N.W.2d 117

III.

WHETHER THE STATE BREACHED THE PLEA AGREEMENT?

The circuit court did not rule on this issue.

- *State v. Guziak*, 2021 S.D. 68, 968 N.W.2d 196
- *State v. Olvera*, 2012 S.D. 84, 824 N.W.2d 112

IV.

WHETHER YELLOW BOY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL?

The circuit court did not rule on this issue.

- *State v. Alvarez*, 2022 S.D. 66, 982 N.W.2d
- *State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d

STATEMENT OF THE CASE

On March 26, 2025, the State filed an Indictment charging Yellow Boy with aggravated assault (domestic abuse) in violation of SDCL 22-18-1.1(8). SR:13. The State filed a Part II Information, as defined in SDCL 22-7-8, alleging Yellow Boy had been convicted of six prior felonies.[1] SR:15. At Yellow Boy's arraignment,[2] he was informed he was entitled to certain constitutional and statutory rights. SR:162-64. The circuit court advised Yellow Boy "given the nature of the felonies underlying," the effect of the Part II would mean "potentially up to life in prison," and "no minimum" sentence. SR:167-68.

Yellow Boy's counsel emailed the court advising that the parties reached a plea agreement. SR:50. The plea agreement stated Yellow Boy

> would plead guilty to Aggravated Assault (DV) in CRI25-1382. He would plead guilty to one count of Simple Assault in CR125-1446. . . . In exchange, the State would dismiss CRI25-1458 in its entirety. At the time of sentencing, the State would recommend local jail with probation in both files. Otherwise, both sides would be free to comment.

SR:50, 87. During Yellow Boy's change of plea hearing, the circuit court informed him of the rights he would forfeit by entering the plea and asked, "[d]o you understand the plea agreement is essentially a

---

[1] Yellow Boy's prior felonies included fourth degree rape, failure to register, second degree escape, and possession of a controlled substance. SR:15.

[2] Yellow Boy was also arraigned on 51CRI25-1458, which charged him with possession of a methamphetamine, in violation of SDCL 22-42-5. SR:166-68. The file contained a Part II information identical to the one in the present case. SR:165.

recommendation by the State. The Court's not bound by it and could sentence you up to the maximum which in this case could be up to 15 years in prison[.]" SR:188-89. The circuit court took a factual basis statement from Yellow Boy, asking, "[a]t some point did you essentially try to choke her?" SR:189. Yellow Boy responded in the affirmative. SR:189.

At Yellow Boy's sentencing, the circuit court noted "probation is not an option per state statute given his prior criminal history." SR:196. The circuit court asked Yellow Boy, if he "still wish[ed] to proceed to sentencing at this time" and Yellow Boy confirmed he did. SR:196.

The circuit court told Yellow Boy he has

> a horrendous criminal history and it demonstrates you to be an extremely violent person. I find you to be a danger to the community and to the people around you, women in particular.
>
> I appreciate the State's recommendation. I don't feel it's appropriate. I'm not allowed to do a probationary sentence and . . . I do believe that with your history the only thing to do is impose a prison sentence.

SR:200. The circuit court sentenced Yellow Boy to seven years imprisonment. SR:136.

STATEMENT OF THE FACTS

On March 25, 2025, Yellow Boy and Alayna Elliott, his girlfriend of approximately one month, were partying and using methamphetamine. SR:6. Around 2:00 a.m., the couple were laying on a bean bag in the

living room. SR:6. Suddenly, Yellow Boy grabbed Elliot in the stomach; in response, Elliot turned towards Yellow Boy. SR:5.

Yellow Boy put his hands around her neck and stated he knew she was "looking at him" throughout the night. SR:5. Yellow Boy applied pressure to Elliott's throat; Elliott was unable to breathe due to the strangulation. SR:6. Elliot started to cry and Yellow Boy put his hand over her mouth and told her to "shut the fuck up" because he did not want to alarm the others in the residence. SR:5-6. Law enforcement was called, but Yellow Boy fled prior to their arrival. SR:7.

On March 29, 2025, Yellow Boy arrived at Elliott's mother's residence and attempted to get Elliott to leave with him, but she refused. SR:5, 7. When bystanders confronted Yellow Boy, he attempted to fight them. SR:7. Law enforcement was called to the scene; Officer Swets arrived and observed bruising and redness on Elliot's neck. SR:41.

Yellow Boy waived his rights to remain silent and spoke with Officer Swets. SR:6. Yellow Boy stated he and Elliott were at a party when they engaged in a verbal argument regarding allegations that she had cheated on him or was communicating with another male. SR:42. Yellow Boy admitted he put his hand around her throat and applied pressure. SR:42. He said that she likely was unable to breathe for about two to three seconds. SR:42.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY ADVISED YELLOW BOY PRIOR TO ACCEPTING HIS GUILTY PLEA

Yellow Boy asserts he was denied due process because of the circuit court's failure to properly advise him under SDCL 23A-7 and *Boykin*.[3] *See* AB:8-18, 24-25. "Yellow Boy did not object to the imposition of sentence or move to withdraw his plea[.]" AB:8.

Because Yellow Boy is asserting that his plea "is defective for the first time on appeal, this argument is waived so long as his guilty plea is knowing and voluntary." *State v. Outka*, 2014 S.D. 11, ¶ 22, 844 N.W.2d 598, 605. Because Yellow Boy waived the issue by consenting to the circuit court's actions, the analysis of this issue should end here.

Should this Court conclude that Yellow Boy did not waive his claim, his appeal must still be rejected, as the circuit court's ruling was free from plain error. To establish 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." *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729-30. "An error is 'plain' when it is clear or obvious." *State v. Guziak*,

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[3] *Boykin's* three required advisements are codified at SDCL 23A-7-4(3). *Boykin v. Alabama*, 395 U.S. 238 (1969); *see* Section I.A, infra.

2021 S.D. 68, ¶ 16, 968 N.W.2d 196, 201 (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). This requirement means that circuit court "decisions that are questionable but not plainly wrong . . . fall outside the Rule's scope." *Id.*

To prevail on the prejudice prong, the defendant must show that the error "affected the outcome of the proceedings[.]" *Id.* ¶ 12, 968 N.W.2d at 202 (citation omitted). " 'Prejudice' in the context of plain error requires a showing of a 'reasonable probability' that, but for the error, the result of the proceeding would have been different." *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763 (quoting *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283).

A. The circuit court complied with SDCL 23A-7-4 by properly advising Yellow Boy of his rights.

Yellow Boy asserts "[t]he circuit court committed plain error because it did not advise [him] under SDCL 23A-7-4 that he was ineligible for probation before allowing him to enter the plea." SR:15. The record does not support this assertion. *See* SR:196.

"SDCL 23A-7-4 (Rule 11(c)) establishes a procedure for the judge to follow to ensure that a guilty plea is knowing and voluntary." *State v. Goodwin*, 2004 S.D. 75, ¶ 7, 681 N.W.2d 847, 850. SDCL 23A-7-4 requires the circuit court to "address the defendant personally in open court . . . and inform him of[] and determine that he understands[]" the following before accepting a plea of guilty:

> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law;
> (2) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceedings against him and, if necessary, one will be appointed to represent him;
> (3) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself;
> (4) That if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
> (5) That if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury.

SDCL 23A-7-4 is merely a "procedural safeguard[;]" therefore, "failure to advise a defendant of all constitutional and statutory rights does not necessarily vitiate a guilty plea." *Outka*, 2014 S.D. 11, ¶ 33, 844 N.W.2d at 608 (quoting *State v. Beckley*, 2007 S.D. 122, ¶ 10, 742 N.W.2d 841, 844).

First, at Yellow Boy's change of plea hearing, the plea agreement, which included the nature of the charge, was read by the defense counsel and Yellow Boy confirmed he understood the plea. SR:186. The circuit court stated, as a result of the plea agreement, the maximum possible penalty was 15 years in prison, a $30,000 fine, or both. SR:188-89. At Yellow Boy's sentencing, the circuit court advised Yellow Boy of his ineligibly for probation due to his criminal history and allowed

him to withdraw his plea. SR:196; *see* SR:51.[4] Yellow Boy's counsel indicated he wished to proceed with sentencing. SR:196.

Yellow Boy was represented by an attorney; therefore, the second category did not apply. Nonetheless, at Yellow Boy's arraignment, he was advised he had the right to be represented by an attorney at all stages of the proceedings and if he could not afford one, one could be appointed. SR:162.

The third and fourth categories safeguard against an involuntary and unknowing waiver of three important constitutional rights, known as the *Boykin* rights. *State v. Miller*, 2006 S.D. 54, ¶ 14, 717 N.W.2d 614, 618 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969)). A "deficiency in explaining the defendant's rights at the time the defendant enters a guilty plea may be overcome with proof that the same judge had adequately explained the rights at an earlier arraignment." *State v. Apple*, 2008 S.D. 120, ¶ 16, 759 N.W.2d 283, 289 (citations omitted); *see State v. Smith*, 2013 S.D. 79, ¶ 12, 840 N.W.2d 117, 122 (quoting *Monette v. Weber*, 2009 S.D. 77, ¶ 11, 771 N.W.2d 920, 925) ("[I]n advising defendants of their rights, the sentencing court is not required to recite a specific formula by rote or 'spell[ ] out every detail[.]' ").

---

[4] Under SDCL 23A-27-12, no person who has been previously convicted for a crime of violence as defined in subdivision 22-1-2(9) may be placed on probation if his second or subsequent felony conviction is for a crime of violence as defined in subdivision 22-1-2(9).

The record indicates at Yellow Boy's arraignment he was advised of his constitutional rights, including his *Boykin* rights, and the effects of pleading guilty. Yellow Boy was asked if he understood his rights, to which he responded affirmatively. At his change of plea hearing, again, Yellow Boy was advised he could "plead not guilty" and was "presumed innocent until the State [] established guilt beyond a reasonable doubt." SR:162-63. Yellow Boy was advised he had "the right to remain silent" and was "not required and cannot be compelled to testify or give evidence against [him]self." SR:163. Finally, the circuit court informed Yellow Boy he had "a right to confront and cross-examine witnesses the State may call to give evidence against" himself and "a right to subpoena witnesses to come to court and testify on [his] behalf." SR:163.

Yellow Boy was advised of his *Boykin* rights at numerous stages of the proceedings. Yellow Boy indicated he understood he was waiving those rights. SR:188. The record shows an appropriate canvassing took place, and Yellow Boy entered his plea knowingly and voluntarily.

Any alleged deficiencies at Yellow Boy's sentencing were rendered harmless by his voluntary waiver of rights during the change of plea hearing. Both hearings were in front of the same judge, approximately one month apart. Before sentencing Yellow Boy, the circuit court advised Yellow Boy of his ineligibly for probation. The circuit court then asked if Yellow Boy wished to continue with sentencing. In viewing the entirety of

the hearings, it is clear Yellow Boy was properly advised of and waived his *Boykin* rights.

The fifth subsection was inapplicable as Yellow Boy was not prosecuted for perjury in relation to this case. *See State v. Thin Elk*, 2005 S.D. 106, ¶ 13, 705 N.W.2d 613, 617. The circuit court failed to ensure that Yellow Boy understood that his answers may be later used against him in a prosecution for perjury. The circuit court's failure to comply with the statute constituted error; however, no plain error occurred because Yellow Boy suffered no prejudice.

The circuit court asked Yellow Boy to describe in his own words what happened that led him to believe he committed aggravated assault (domestic abuse) in violation of SDCL 22-18-1.1(8). SR:189. Yellow Boy told the court he and Elliott got "into altercations" which led to him choking her. SR:189. The circuit court asked if there were any objections to the circuit court relying on the transcripts and law enforcement reports attached to the file for purposes of the factual basis; no objection was raised. SR:189-90. Yellow Boy's statements aligned with the rest of the settled record; therefore, he did not commit perjury. Thus, he was not prejudiced by the circuit court's failure to advise him of a possible perjury prosecution for lying under oath.

In conclusion, the circuit court properly advised Yellow Boy under SDCL 23A-7-4 before allowing him to enter the plea. Specifically, the circuit court advised Yellow Boy he was ineligible for probation and asked if

he still wished to continue to sentencing. *See* SR:196. The circuit court did not error in advising Yellow Boy of his rights.

B. Proper plea-bargaining procedures were followed.

Yellow Boy argues the circuit court advised him that the State's recommendation was not binding but failed to inform him that the State's recommendation was "not an option." AB:14. Yellow Boy further contends, pursuant to "SDCL 23A-7-11, the circuit court committed plain error when it did not advise Yellow Boy of the status of his plea and impending sentencing[] or adequately allow the opportunity to withdraw the plea." AB:14. These assertions are contrary to the record. *See* SR:196.

Plea negotiations between the State and a defendant are contemplated by SDCL 23A-7-8 which authorizes a prosecutor to agree to do any of the following:

> (1) Move for dismissal of other charges or not file additional charges arising out of a different occurrence;
> (2) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court;
> (3) Agree that a specific sentence is the appropriate disposition of the case; or
> (4) Perform other specified acts to be made a part of the agreement.

Courts are not ordinarily obligated to follow plea agreements; however, under SDCL 23A-7-8(3), a court may expressly or implicitly agree to be bound by the terms negotiated by the parties. *State v. Scott*, 2024 S.D. 27, ¶ 18, 7 N.W.3d 320, 327 (citing *State v. Shumaker*, 2010

S.D. 95, ¶ 6, 792 N.W.2d 174, 175; *State v. Ledbetter*, 2018 S.D. 79, ¶ 19, 920 N.W.2d 760, 765). A court "may delay accepting or rejecting a plea agreement under subsection three until after the guilty plea is entered." *Id.* ¶ 18, 7 N.W.3d at 328 (citation omitted). But if the court defers its decision and ultimately rejects the plea agreement by indicating it is unwilling to be bound by it, the court must give the defendant an opportunity to withdraw the guilty plea. *Id.* (citing SDCL 23A-7-11).

Plea agreements under SDCL 23A-7-8(2) are not binding on the court and only involve the prosecutor's agreement to provide a sentencing recommendation. *Id.* (citing *State v. Hale*, 2018 S.D. 9, ¶ 11, 907 N.W.2d 56, 59-60). When a plea agreement is made under subsection two, the circuit court's decision to sentence a defendant outside the recommended sentence is not a rejection of the plea agreement. Because there was no rejection of a plea agreement, the defendant is unable to withdraw their guilty plea. *Id.* (citation omitted).

Here, there was no effort to bind the circuit court, and the circuit court did not indicate that it would be bound by the plea agreement. The circuit court advised Yellow Boy that "the plea agreement is essentially a recommendation by the State. The Court's not bound by it and could sentence him up to the maximum which in this case could be up to 15 years in prison, a $30,000 fine or both." SR:188-89. The circuit court

explicitly indicated it was not bound by the sentencing recommendation in the plea agreement.

Because the agreement was not binding upon court, the circuit court did not reject the plea agreement; rather, the agreement constituted a nonbinding recommendation.

Assuming arguendo, even if the plea agreement was binding and the circuit court rejected the plea by sentencing outside the recommendation, it still afforded Yellow Boy to withdraw his guilty plea; therefore, no violation of SDCL 23A-7-11 occurred. At Yellow Boy's sentencing hearing, the circuit court pointed out "that probation [was] not an option per state statute given his prior criminal history" and asked if he "still wish[ed] to proceed to sentencing[.]" SR:196. Defense counsel responded affirmatively. *Id.*

Because the circuit court did not commit any error, this Court need not consider the remaining three elements of the plain error test. *See Scott*, 2024 S.D. 27, ¶ 24, 7 N.W.3d at 329.

C. The circuit court fully complied with the plea agreement disclosure requirements.

"Yellow Boy argues the circuit court erred when it did not require disclosure of updated terms of the plea agreement under SDCL 23A-7-9." AB:10; *see* AB:15-16. When the circuit court realized probation, as recommended by the plea agreement, was not a sentencing option, it stated so on the record and asked Defense counsel if they still wanted to proceed. SR:196. In accordance with SDCL 23A-7-9, the circuit court

disclosed the updated terms of the plea agreement in open court and on the record. Accordingly, the circuit court satisfied SDCL 23A-7-9.

D. A complete record of the plea proceedings were preserved.

Yellow Boy argues the circuit court erred when it did not "conduct inquiry into the voluntariness of the plea under SDCL 23A-7-15." AB:10.

SDCL 23A-7-15 requires:

> A verbatim record[5] of the proceedings at which a defendant enters a plea shall be made and, if there is a plea of guilty [], the record shall include . . . the court[']s advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the factual basis of a guilty plea.

See Apple, 2008 S.D. 120, ¶ 13, 759 N.W.2d at 288; *United States v. Orozco-Osbaldo*, 615 F.3d 955, 959 (8th Cir. 2010). [6]

Yellow Boy does not assert that there was not a verbatim record of his hearings, instead he asserts the circuit court did not inquire into the voluntariness of his plea. As previously outlined, the transcripts of Yellow Boy's change of plea and sentencing hearings included the circuit court's advisement to Yellow Boy and the inquiry into the voluntariness of his plea. *See* SR:187-90, 196, 199-200.

E. Yellow Boy was not prejudiced by any alleged failures by the circuit court.

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[5] Here, Teresa L. Benson certified that the record contained "a true, full, and correct transcript of [her] stenotype notes." SR:191, 202; *see* SR:187-90, 196-201. Yellow Boy does not challenge the authenticity of the transcripts.

[6] SDCL 23A-7-15 is South Dakota's version of Federal Rule of Criminal Procedure 11(g).

Yellow Boy, citing to *Wright*, argues there was "a reasonable probability that, but for" "the circuit court's failure to advise him under SDCL 23A-7" he "would not have entered the plea." AB:16 (citing *State v. Wright*, 2008 S.D. 118, 759 N.W.2d 275).

In *Wright*, the defendant was not advised of the mandatory minimum sentence he faced. *Wright*, 2008 S.D. 118, ¶ 14, 759 N.W.2d at 279. This Court held due to Wright's prior felonies, his concern was avoiding the fifty-year maximum; he never anticipated less than the ten-year mandatory minimum; therefore, Wright's choice was clear: plead guilty and cap his exposure at fifty years or risk far greater penalties at trial. *Id.* This Court concluded that the missing warning about the ten-year minimum had no impact on Wright's decision to plead guilty. *Id.* ¶ 15, 759 N.W.2d at 279-80.

Here, Yellow Boy failed to establish that an additional warning about his probation ineligibility would have impacted his decision to go to trial. Similar to *Wright*, Yellow Boy's concern was avoiding the effect of the Part II, which could have resulted in a sentence of life in prison. Further, as discussed supra, prior to sentencing Yellow Boy, the circuit court informed him of his ineligibility for probation and asked if he "still wish[ed] to proceed to sentencing." SR:196. Because Yellow Boy had an opportunity to withdraw his plea and proceed to trial, he was not prejudiced by any alleged failures by the circuit court. Any additional

warning about Yellow Boy's probation ineligibility would not have impacted his decision to plead guilty.

II.

YELLOW BOY'S PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

"A plea is intelligent and voluntary when the accused has a full understanding of his constitutional rights and, having that understanding, waives those rights by a plea of guilty." *State v. Ceplecha*, 2020 S.D. 11, ¶ 45, 940 N.W.2d 682, 695 (citation omitted); *see State v. Longchase*, 2025 S.D. 61, ¶ 22, 27 N.W.3d 735, 741. After this advisement, the defendant must "intentionally relinquish or abandon [those] known rights." *Id.* (citation omitted). If, in some manner, the record demonstrates "that the defendant understood his rights" and the consequences of his guilty plea, this Court will find that the defendant's plea was "entered intelligently and voluntarily." *Id.* (citation omitted); *State v. Woodard*, 2014 S.D. 39, ¶¶ 9-10, 851 N.W.2d 188, 191.

This Court considers the totality of the circumstances to determine whether the record *in some manner* shows Yellow Boy's plea was voluntarily made. *See Smith*, 2013 S.D. 79, ¶ 15, 840 N.W.2d at 123. When considering the totality of the circumstances, in addition to the in-court colloquy and procedures discussed supra, this Court looks at other factors, such as "the defendant's age; prior criminal record; whether represented by counsel; whether a plea agreement was in place; and the

time between the advisement of rights and the guilty plea." *Id.* (citation omitted).

When viewed in totality, the record establishes Yellow Boy understood his rights so that his plea was knowingly, voluntarily, and intelligently entered into. Yellow Boy, who was 35 years old at the time he was sentenced, was familiar with the criminal justice system, as he had six prior felonies. SR:51, 72-74, 167, 187. He was represented by counsel at each stage of the proceedings. Yellow Boy entered a guilty plea as part of a plea agreement. Under this agreement, the State dismissed the Part II information in this case as well as a separate case involving a controlled substance charge. That separate case included an identical Part II enhancement, which made the offense punishable by life imprisonment. SR:161, 166-67, 195. By pleading guilty, Yellow Boy avoided the potential for two life sentences.

Yellow Boy claims he was not informed of his ineligibility for probation until after entering his guilty plea. AB:19. This is contrary to the record. As discussed, the circuit court informed Yellow Boy of his probation ineligibility then asked if he wished to continue to sentencing. Therefore, Yellow Boy still had the opportunity to withdraw his plea and proceed to trial. Instead, Yellow Boy determined to waive his right to trial and plead guilty.

Yellow Boy, relying on SDCL 22-6-11, argues the circuit court failed to find aggravating circumstances for departure from presumptive

probation. AB:25-26. This assertion is irrelevant because his conviction did not pertain to an offense that involved presumptive probation.

The record demonstrates Yellow Boy understood his rights and the consequences of his guilty plea; therefore, his plea was entered voluntarily, knowingly, and intelligently.

III.

THE STATE'S SENTENCING ARGUMENT DID NOT RESULT IN PLAIN ERROR.

To preserve the right to appeal an alleged breach of the plea agreement, a defendant must make a timely objection during sentencing. *Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d at 200 (citation omitted). Yellow Boy asserts he did not object to the State's sentencing argument and, consequently, asks this Court to review the unpreserved issue for plain error. AB:7, 8. The plain error test applied above is incorporated here by reference. *See* Section I, supra.

This Court "appl[ies] ordinary principles of contract law to determine whether the State breached a plea agreement." *Guziak*, 2021 S.D. 68, ¶ 12, 968 N.W.2d at 200 (citing *State v. Slotsky*, 2016 S.D. 54, ¶ 5, 883 N.W.2d 738, 740). "Like all contracts, plea agreements include an implied obligation of good faith and fair dealing." *Id.* (citation omitted). Finding a breach also implicates the defendant's substantial rights but does not automatically establish prejudice. *State v. Olvera*, 2012 S.D. 84, ¶ 13, 824 N.W.2d 112, 115.

Yellow Boy argues "[t]he State offered a reportedly unenforceable promise to induce Yellow Boy's guilty plea and did not fulfill its promise to request probation." AB:26. Yellow Boy further asserts the State failed to negotiate the plea in good faith because it "emphasized facts justifying a harsh sentence" and probation was not an option. AB:27-28. The State errored in offering a plea agreement with a sentence that could not be imposed; however, no plain error occurred. At sentencing, the parties were informed their plea agreement could not be followed and advised "probation is not an option per state statute given his prior criminal history." SR:196. The circuit court asked Yellow Boy if, knowing he was ineligible for probation, he wished to continue to sentencing; Yellow Boy confirmed he wished to proceed. SR:196. Because Yellow Boy had an opportunity to withdraw his plea, Yellow Boy did not face plain error.

Yellow Boy was not prejudiced because the State's sentencing recommendation did not impact the circuit court's sentence. At sentencing, the State recommended "15 years in the penitentiary, fully suspended, and a 360-day jail sentence, applying any credit for time served." SR:198. The State remarked Yellow Boy's mitigating factors included his "acceptance of responsibility both through accepting the plea deal and for his thoughtful statements in the PSI[.]" SR:198. The State opined:

> aggravating factors that this Court should consider in imposing a longer[,] suspended prison sentence and a longer jail sentence are the violent nature of this offense and the fact that this plea agreement involved

> multiple files and in particular multiple instances of violent conduct. 25-1446 was resolved with a plea to one count of assault. However, the file charged three different assaults.
>
> This is Mr. Yellowboy's eighth lifetime felony. It is his third violent conviction. The State believes that Mr. Yellowboy should be supervised for a long period of time to ensure community safety and to ensure that Mr. Yellowboy stays on good behavior for the foreseeable future.

SR:198. The circuit court informed Yellow Boy he has

> a horrendous criminal history and it demonstrates you to be an extremely violent person. I find you to be a danger to the community and to the people around you, women in particular.
> I appreciate the State's recommendation. I don't feel it's appropriate. I'm not allowed to do a probationary sentence and I don't think the supervision of a local sentence where there's no supervision on that, and I do believe that with your history the only thing to do is impose a prison sentence.

SR:200. The circuit court's statements do not show that the State's argument influenced its sentencing decision. As such, Yellow Boy's argument fails, and whether the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings need not be addressed. *See id.* ¶ 26, 968 N.W.2d at 204.

IV.

ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT RIPE FOR DIRECT APPEAL.

"[A]bsent exceptional circumstances, [this Court] will not address an ineffective assistance claim on direct appeal. This rule is a practical one, necessitated by the fact that "the record on direct appeal typically does not afford a basis to review the performance of trial counsel."

State v. Alvarez, 2022 S.D. 66, ¶ 34, 982 N.W.2d 12, 20 (quoting *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 120-21).

"[O]nly when trial counsel was 'so ineffective and counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights' " will this Court attempt to resolve his claim on direct appeal. *State v. Malcolm*, 2023 S.D. 6, ¶ 42, 985 N.W.2d 732, 742 (quoting *State v. Thomas*, 2011 S.D. 15, ¶ 23, 796 N.W.2d 706, 714). Where this standard is not met, the better course is to consider a defendant's ineffective assistance claim within the context of a habeas corpus action where the parties may develop the factual record. *Id.* (quoting *Alvarez*, 2022 S.D. 66, ¶ 35, 982 N.W.2d at 20).

Yellow Boy attributes several errors to his court-appointed counsel that, he claims, entitle him to relief at this stage. Among them are allegations claiming a failure in allowing him to accept an unenforceable plea agreement; not requesting for a continuance; and not withdrawing the plea. AB:29-30. Under the current state of the record, the accuracy of these claims cannot be determined. Further, Yellow Boy does not assert his counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights. Therefore, this Court should decline to address Yellow Boy's claim of ineffective assistance of counsel on direct review.

CONCLUSION

Because Yellow Boy's plea was knowingly, voluntarily and intelligently made; any violation of the plea agreement did not resolute in plain error; and his ineffective assistance of counsel claim is not ripe for direct appeal, the State respectfully requests that Yellow Boy's Amended Judgment 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 5,136 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 30th day of December, 2025.

/s/ Renee Stellagher
Renee Stellagher
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Cory Carlisle Yellow Boy was* served via electronic mail upon Derek D. Friese at Derek.Friese@state.sd.us.

/s/ Renee Stellagher
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA *Appellee,* vs. CORY CARLISLE YELLOWBOY, *Appellant.*	No. 31210

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

HONORABLE JOSHUA HENDRICKSON
Circuit Court Judge

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Notice of Appeal Filed on September 8, 2025

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs. No. 31210

CORY CARLISLE YELLOWBOY,

Defendant and Appellant.

PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Cory Yellow Boy, will limit discussion to the issues that need further development or argument. Any matter raised in Yellow Boy's initial brief, but not specifically mentioned herein, is not intended to be waived. Yellow Boy will attempt to avoid revisiting matters adequately addressed in the initial brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." All citations will be followed by the appropriate page number. Yellow Boy relies upon the Jurisdictional Statement, Statement of the Case and Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on November 18, 2025.

ARGUMENT

I. THE CIRCUIT COURT ERRED UNDER SDCL 23A-7.

The State argues that Yellow Boy "consenting to the circuit court's actions," precludes this Court from analyzing the circuit court's advisements under SDCL 23A-7. SB 6. For support, the State cites to *State v. Outka*, 2014 S.D. 11, 844 N.W.2d 598. The State quotes *Outka* for the proposition that contesting a guilty plea for the first time on appeal is waived "so long as his guilty plea is knowing and voluntary." SB 6 (quoting *Outka*, 2014 S.D. 11, ¶ 22, 844 N.W.2d 598, 605). In the passage the State cites from *Outka*, this Court was reviewing a claim of a defective information or indictment. 2014 S.D. 11, ¶ 22, 844 N.W.2d 598, 605. Yellow Boy makes no such claim here.

This Court should apply plain error review. *See State v. Wright*, 2008 S.D. 118, ¶¶ 10-15, 759 N.W.2d 275, 277-80 (reviewing for plain error a circuit court's failure to advise under SDCL 23A-7-4); *State v. Nikolaev*, 2000 S.D. 142, ¶ 5, 619 N.W.2d 244, 245 (stating "Nikolaev did not present his claim of violation of [SDCL 23A-7-5] to the trial court, however his appeal is reviewed for plain error"); SDCL 23A-44-15 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court").

A. *SDCL 23A-7 and Plea Agreement Procedures*

The circuit court erred because it did not properly advise Yellow Boy under the requirements of SDCL 23A-7. The State's brief does not address the distinction between a guilty plea and a plea agreement, and

the statutory procedural requirements due at each stage. The day after Yellow Boy filed his Appellant Brief, the Supreme Court of Idaho published *State v. McGarvey*, 579 P.3d 925 (Idaho 2025). In *McGarvey*, the court explained that "acceptance of a plea of guilty and acceptance of a plea agreement are two distinct procedures and two separate events." *Id.* at 932. This distinction is critical here.

B. *The Circuit Court Erred in Not Allowing Yellow Boy the Opportunity to Withdraw His Plea Under SDCL 23A-7-11.*

The circuit court erred under SDCL 23A-7-11 because it rejected the plea agreement without offering Yellow Boy the opportunity to withdraw his plea, and failed to advise him that the sentence may be less favorable than the sentence contemplated by the agreement. The State contends that "[b]ecause there was no rejection of a plea agreement, the defendant is unable to withdraw their guilty plea." SB 13 (citing *State v. Scott*, 2024 S.D. 27, ¶ 18, 7 N.W. 3d 320, 328). But this contention fails to recognize that the circuit court declared Yellow Boy's plea agreement to be unenforceable, thereby rejecting it. *McGarvey* demonstrates that a plea agreement deemed unenforceable by the sentencing court is tantamount to a rejection of the agreement. In other words, the circuit court did not simply decide a sentence outside the recommendations was appropriate, instead, it determined that the plea agreement did not exist. This determination was made a month *after* Yellow Boy had entered his plea, while Yellow Boy was being sentenced.

In *McGarvey*, the defendant pleaded guilty to felony possession of a controlled substance. 579 P.3d at 927. Under the plea agreement, the state agreed to dismiss other misdemeanor charges. *Id.* The court described the terms of the plea agreement:

> In exchange for his guilty plea, McGarvey agreed that the court would sentence him to no more than a determinate period of two years plus an indeterminate period of two years, but the sentence would be suspended and McGarvey would be placed on probation for four years.

Id. The agreement also contained a provision that it would be "null and void" if the defendant did not appear at the "presentence appointment" or sentencing. *Id.* The agreement stated the court could "accept or reject this Plea Agreement pursuant to Rule 11(f)(1) of the Idaho Criminal Rules." That rule provides:

> (1) *In General.* The prosecuting attorney and the attorney for the defendant or the defendant when acting without an attorney may discuss an agreement that may include a waiver of the defendant's right to appeal the judgment and sentence of the court and that, on the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:
> (A) move for dismissal of other charges;
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request is not binding on the court;
> (C) agree that a specific sentence is the appropriate disposition of the case; or
> (D) agree to any other disposition of the case.

I.C.R. 11(f).[1]

The Idaho Supreme Court held the "null and void" clause of the plea agreement rendered it "unenforceable" when McGarvey did not attend his presentence appointment or sentencing. *McGarvey*, 579 P.3d at 934. Because the agreement was unenforceable, "the court was required to reject the plea agreement." *Id.*

Yellow Boy's negotiation with the state was hardly a bargain: in exchange for his guilty plea, the State agreed to recommend a sentence the circuit court seemingly could not legally pronounce. When the presentence investigation informed the circuit court that Yellow Boy was ineligible for probation, the circuit court recognized that Yellow Boy's plea agreement was unenforceable, thereby rejecting the agreement. *Id.* at 933–34 (stating "at the time the plea is offered, the court may accept or reject the agreement or defer its decision until after considering the presentence report. Even when the court defers, it retains only two options: accept or reject the plea agreement") (citing I.C.R. 11(f)). *See*

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[1] SDCL 23A-7-8 is nearly identical to I.C.R. 11(f). The State points out that, here, there was "no effort to bind the circuit court." SB 13. Yellow Boy agrees that the parties did not indicate whether the plea agreement was offered under SDCL 23A-7-8(2) or (3). In *McGarvey*, the parties did not specify the subsection under which the agreement was offered. The State relies heavily on *State v. Scott*, 2024 S.D. 27, 7 N.W.3d 320 to argue a plea agreement under SDCL 23A-7-8(2) never requires an advisement under SDCL 23A-7-11. SB 12-14. However, in *Scott*, the circuit court did not reject an unenforceable agreement but decided against a sentencing recommendation. 2024 S.D. 27, ¶¶ 6-14, 7 N.W. 3d at 325-28. Here, the circuit court rejected an agreement *prior* to sentencing. SENT 2. The State's brief understates this critical sequence of events.

also SDCL 23A-7-9.[2] Upon its rejection of the plea agreement, SDCL 23A-7-11 required the circuit court to offer Yellow Boy the opportunity to withdraw the plea, and to advise him that proceeding may result in a less favorable sentence than bargained for. SDCL 23A-7-11. The circuit court erred because it did neither.

The State claims the circuit court offered Yellow Boy the opportunity to withdraw the plea. SB 14. In explanation, the State asserts "the circuit court advised Yellow Boy of his ineligibly [sic] for probation due to his criminal history and allowed him to withdraw his plea." SB 8-9. The State's characterization is charitable. However, the circuit court did not inform Yellow Boy that he could withdraw his guilty plea. Instead, the circuit court's language was suggestive of one option, inquiring of Yellow Boy, "[i]s it your intention to let your plea stand and proceed to sentencing today?" SENT 2. When Yellow Boy affirmed the circuit court's suggestion, the circuit court *then* referenced Yellow Boy's apparent probation ineligibility. *Id.* After informing Yellow Boy that he was ineligible for probation, the circuit court suggestively inquired "do you still wish to proceed to sentencing at this time?" *Id.* Importantly, the circuit court accepted an affirmative response from Yellow Boy's counsel, not Yellow Boy himself, and never expressly mentioned the option of withdrawal of the plea. *Id.*

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[2] In authorizing a circuit court to accept, reject, or defer its decision pending the presentence investigation, SDCL 23A-7-9 does not distinguish between types of plea agreements authorized by SDCL 23A-7-8 (i.e., a prosecutor's recommendation versus an agreed disposition). This contrasts with the federal and Idaho rule. *See* Fed. R. Crim. P. 11(c); I.C.R. 11(f).

See also SB 9 (stating "Yellow Boy's counsel indicated he wished to proceed with sentencing"). The circuit court did not advise Yellow Boy proceeding could result in a less favorable sentence, either. This was plain error.

C. *The Circuit Court Erred in Not Advising Yellow Boy of a Mandatory Minimum Sentence Under SDCL 23A-7-4.*

The circuit court erred because it failed to advise Yellow Boy of probation ineligibility at the time of the guilty plea. Under SDCL 23A-7-4, here, probation ineligibility was a "mandatory minimum penalty provided by law." In its brief, the State does not argue that probation ineligibility is not a mandatory minimum penalty but asserts "[a]ny alleged deficiencies at Yellow Boy's sentencing were rendered harmless by his voluntary waiver of rights during the change of plea hearing." SB 10. The State's position minimizes the requirements of SDCL 23A-7-4. The State also ignores the distinction between the acceptance of the guilty plea and the acceptance or rejection of the plea agreement. *See McGarvey*, 579 P.3d at 932.

Furthermore, the State's offer to recommend probation was a material term under the plea agreement. Here, "[b]efore accepting a plea of guilty," the circuit court should have advised Yellow Boy that he was not eligible for probation, especially when it induced his guilty plea. SDCL 23A-7-4. *See also State v. Wallace*, 2018 N.D. 225, ¶ 10, 918 N.W.2d 64, 67-68 (holding trial court did not "substantially comply" with requirement of advising defendants of mandatory minimum sentences when it failed to advise defendant of mandatory probation

period). Contrary to the State's assertions, the circuit court did not cure this error by briefly referencing Yellow Boy's probation ineligibility at the sentencing hearing.

D. *The Circuit Court Erred by Failing to Require Disclosure of the Plea Agreement under SDCL 23A-7-9 and Failing to Conduct Inquiry into the Voluntariness of the Plea at the Sentencing Hearing Under SDCL 23A-7-15.*

Upon disclosure of the plea agreement, the circuit court was authorized under SDCL 23A-7-9 to either accept, reject, or defer decision until after the presentence investigation. Even if the circuit court "largely followed the procedures for accepting a *guilty plea*" at the change of plea hearing, it effectively deferred its decision on whether to accept or reject the *plea agreement* until sentencing. *McGarvey*, 579 P.3d at 933 (emphasis added). *See also United States v. Hyde*, 520 U.S. 670, 674 (1997) (stating "[g]uilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time").

The circuit court was required to reject the plea agreement as unenforceable. SENT 2 (circuit court stating the "plea *agreement* in this case was the State's recommending local jail and probation[,]" but "probation is not an option . . .") (emphasis added); *See McGarvey*, 579 P.3d at 934 (holding "the court was required to reject the plea agreement" when defendant's breach "rendered the agreement unenforceable"). In sentencing remarks, the State commented that it wished "to abide by our plea *agreement*," and recommended a "fully suspended" sentence. SENT 4 (emphasis added). The record is void of any

reference to an updated plea agreement, which may have contemplated the State's recommendation for a 'fully suspended' sentence. Even if modified terms were agreed to, they are not in the record.[3]

SDCL 23A-7-9 requires that "[i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court, or on a showing of good cause, in chambers, at the time the plea is offered." On this record, the circuit court erred under SDCL 23A-7-9 when it did not require disclosure of what updated terms, if any, related to the unenforceable plea agreement. *See State v. Van Egdom*, 292 N.W.2d 586, 589 (S.D. 1980) (stating purpose of plea agreement disclosure under SDCL 23A-7-9 is "to discourage secret plea-bargaining that may adversely affect the public's interest in the thorough and effective administration of justice and, at the same time, protect the defendant's rights under the agreement and insulate the prosecution from spurious claims of breach of promise").

Furthermore, the circuit court erred because there is no record of its "inquiry into the voluntariness of the plea including any plea agreement," after terms had seemingly changed. SDCL 23A-7-15. Certainly, the procedural posture at this point was peculiar. However, the circuit court did not require disclosure of any updated plea agreement terms, nor ensure Yellow Boy's ongoing

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[3] If the circuit court addressed the matter off the record, that is also error. *See* SDCL 23A-7-8 (instructing "[a] court shall not participate in such discussions").

voluntariness of his waiver of rights or his understanding of the plea agreement. The circuit court therefore erred under both SDCL 23A-7-9 and SDCL 23A-7-15.

E. Yellow Boy Suffered Prejudice.

The State argues that Yellow Boy was not prejudiced because his "concern was avoiding the effect of the Part II, which could have resulted in a sentence of life in prison." SB 16. For authority, the State relies on *State v. Wright*, 2008 S.D. 118, 759 N.W.2d 275. However, *Wright* is readily distinguishable, and the State's argument is unsupported in the record. This Court observed that in *Wright*, "the entire focus of Wright's plea bargaining was on the maximum, not the minimum, sentence." 2008 S.D. 118, ¶ 15, 759 N.W.2d at 280. Yellow Boy's plea bargain discussions focused on the minimum sentence.

Contrary to the State's contention, there is no indication the Part II Information was contemplated in plea bargaining. The State's written plea offer did not contain any reference to the Part II Information. SR 87. Likewise, in an email advising the circuit court of a plea agreement, defense counsel did not articulate the parties' intentions regarding the Part II Information. SR 50. Furthermore, the parties did not discuss the Part II Information on the record at the change of plea hearing nor at sentencing. *See generally* COP; SENT.

The lack of consideration given to the Part II Information also contrasts with *Wright* because, here, Yellow Boy "might reasonably have expected" a probation sentence. *Wright*, 2008 S.D. 118, ¶ 15, 759 N.W.2d at 280. *See also State v. Williams*, 2000 WI 78, ¶ 37, 236 Wis. 2d 293, 313, 613 N.W.2d 132, 141

(Abrahamson, J., concurring) (observing "[a]lthough an accused is told that a prosecutor's sentencing recommendation is not binding on the circuit court, many lawyers and accuseds [sic] believe that the circuit courts will accept the recommendation. And, as best we can tell, most circuit courts do, most of the time"). Had the circuit court advised him properly, Yellow Boy would have understood the plea agreement he bargained for was unenforceable against the State. Then, he may have elected to renegotiate terms to navigate his stated probation ineligibility. Further, he may have contemplated the State's strength of evidence in view of their probation recommendation and thereby elected to proceed to trial. And this Court should not analyze whether Yellow Boy's decision to proceed to trial "may have been foolish," but, rather, it should "enquire whether the omitted warning would have made the difference required by the standard of reasonable probability." *Wright*, 2008 S.D. 118, ¶ 13, 759 N.W.2d at 279 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 85 (2004)). Under the unique circumstances here, it is more than reasonably probable that Yellow Boy would have decided not to plead guilty if the circuit court had properly advised him. Yellow Boy was prejudiced because he bargained for a probation recommendation. The circuit court explicitly stated it was rejecting a suggestion of suspending Yellow Boy's sentence "where there's no supervision" available through probation. SENT 6. Yellow Boy relied on the State's unenforceable promise without understanding his plea agreement's consequences and was not allowed an opportunity to withdraw his plea. Had the

circuit court properly advised Yellow Boy, he would not have thanked the circuit court for "considering probation[.]" *Id.* at 5. Indeed, Yellow Boy's statement at the sentencing hearing serves as a poignant reminder: he thought he was resolving his case with a plea agreement, not a shot in the dark.

II. YELLOW BOY'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT.

Yellow Boy's guilty plea, entered at the change of plea hearing, was not knowing, voluntary, or intelligent because he believed he was eligible for probation and the State would recommend that disposition. *See Ramirez v. State*, 655 S.W.2d 319, 321-22 (Tex. App. 1983) (finding plea "cannot be voluntary" where trial court failed to advise defendant of probation ineligibility and the defendant pleaded guilty "in anticipation that he had a chance of receiving probation"). Yellow Boy did not fully understand the consequences of his guilty plea. *See State v. Walsh*, 143 Wash. 2d 1, 17 P.3d 591, 595-96 (2001) (holding "given the fundamental constitutional rights of an accused which are implicated when a defendant pleads guilty, a claim that a guilty plea pursuant to a plea agreement was involuntary due to a misunderstanding about the standard range sentence is the kind of constitutional error that RAP 2.5(a)(3)[4] encompasses").

The State attempts to impute knowledge and voluntariness to Yellow Boy's guilty plea because at sentencing "Yellow Boy still had the opportunity to

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[4] Under Wash. R. App. P. 2.5(3), a defendant may raise an unpreserved argument if asserting a trial court committed a "manifest error affecting a constitutional right."

withdraw his plea and proceed to trial." SB 18. Again, the State minimizes the critical sequence of events here. Yellow Boy's *guilty plea* and the circuit court's consideration of the *plea agreement* are disconnected both temporally and in the parties' knowledge at the different stages. *See Thomas v. Commonwealth*, 303 Va. 188, 202, 901 S.E.2d 44, 51 (2024) (holding "[u]ltimately, a plea agreement which has no connection to an accepted plea exists in vapor. It only solidifies when correctly connected to the plea contemplated by the agreement itself").

The circuit court and the parties apparently discovered Yellow Boy's probation ineligibility only after he had entered his guilty plea.[5] The State also argues that Yellow Boy's plea was entered knowingly because he "was familiar with the criminal justice system, as he had six prior felonies." SB 18. This argument is unconvincing, especially here. At the change of plea hearing a prosecutor, defense attorney, and circuit court judge did not know Yellow Boy was probation ineligible. This Court should not hold Yellow Boy to a higher standard of legal knowledge than the experts in the courtroom. *See United States*

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[5] The State seems to improperly suggest that Yellow Boy should simply bear the risk of this misunderstanding, and the guilty plea was provident even after the realization. *See State v. Patience*, 944 P.2d 381, 388 (Utah Ct. App. 1997) (concluding "the State bore the risk of the mistake as to the law in effect at the time the parties entered into the plea agreement. The State is generally in the better position to know the correct law, given that the State has control over the charges in the information and final say over whether to accept a defendant's plea, and the State must be deemed to know the law it is enforcing").

v. Sura, 511 F.3d 654, 662 (7th Cir. 2007) (observing "[m]ost criminal defendants are not legal experts"); *United States v. Olson*, 880 F.3d 873, 879 (7th Cir. 2018) (stating "[w]hen we as judges cannot determine the legal consequences of Olson's plea, we decline to conclude that he could").

The State emphasizes that the record must only show "*in some manner*" that a defendant understood the consequences of his guilty plea. SB 17. (emphasis in original) (citing *State v. Smith*, 2013 S.D. 79, ¶ 15, 840 N.W.2d 117, 123). But here, most tellingly, Yellow Boy concluded his allocution by thanking the circuit court for considering probation. SENT 5. His plea was not knowing, voluntary, or intelligent.

III. YELLOW BOY WAS DENIED DUE PROCESS.

The circuit court, the State, and Yellow Boy's counsel deprived him of due process. In its brief, the State only addresses due process in reference to his statutory arguments. SB 6. *See* Section I, supra. Yellow Boy argues that the combination of errors between the circuit court, the State, and Yellow Boy's counsel resulted in a deprivation of his constitutional due process rights.

A. The Circuit Court Violated Yellow Boy's Due Process Rights by Not Ensuring a Valid Waiver Under Boykin.

As the State observes, "*Boykin*'s three required advisements are codified at SDCL 23A-7-4(3)." SB 6 n. 3. *See generally Boykin v. Alabama*, 395 U.S. 238 (1969). Yellow Boy asserts that the circuit court's errors under SDCL 23-7 deprived him of his constitutional right to a knowing and voluntary guilty plea. *See Olson*, 880

F.3d at 877 (stating "[w]hile not itself of constitutional dimension, Rule 11 helps to ensure compliance with the constitutional rule that a guilty plea must be knowing and voluntary"). The circuit court did not ensure Yellow Boy's guilty plea was knowing and voluntary after the plea agreement was retroactively modified from the change of plea hearing.

B. *The Circuit Court Denied Yellow Boy Due Process by Failing to Make a Finding Regarding Probation Ineligibility.*

Yellow Boy argues that, at a minimum, there should be a judicial finding that SDCL 23A-27-12 renders a defendant ineligible for probation. The State ignores, or misconstrues Yellow Boy's applicable citations supporting this concept. *See* SB 18 (arguing Yellow Boy's argument is "irrelevant" for "relying on SDCL 22-6-11, argu[ing] the circuit court failed to find aggravating circumstances for departure from presumptive probation"). This concept exists in South Dakota law and elsewhere. *See* SDCL 22-7-12 (providing right to trial by jury on habitual criminal information); SDCL 22-6-11 (requiring finding of aggravating circumstances for departure from presumptive probation). *See also People v. Myers*, 157 Cal. App. 3d 1162, 1167, 204 Cal. Rptr. 91, 93 (Ct. App. 1984) (stating "[t]he People concede ordinarily prior felony convictions cannot make a defendant ineligible for probation unless they are first pleaded and proved").

C. *The State Did Not Negotiate in Good Faith and Breached the Plea Agreement.*

The State concedes it "errored in offering a plea agreement with a sentence that could not be imposed." SB 20. The State also correctly observes that

contract principles apply to plea agreements and "include an implied obligation of good faith and fair dealing." SB 19 (citing *State v. Guziak*, 2021 S.D. 68, ¶ 12, 968 N.W.2d 196, 200). The State did not recommend probation, but still argued that Yellow Boy "should be supervised for a long period of time." SENT 4. This was a breach of the plea agreement when the parties were advised supervision was not an option. *See United States v. Davis*, 105 F.4th 541, 549 (3d Cir. 2024) (stating "the Government must honor the spirit, as well as the letter, of the plea agreement").

The State contends its sentencing argument did not invite a harsher sentence. In support, the State cites its reference at sentencing to mitigating factors of Yellow Boy's "acceptance of responsibility both through accepting the plea deal and for his thoughtful statements in the PSI." SB 20; SENT 4. The State's gratitude for Yellow Boy's "accepting the plea deal" is significantly outweighed by its further remarks. In addition to recommending a "longer -- fully suspended" sentence of 15 years, the State also offered a victim impact statement from a different case. SENT 2-4. The statement alleged Yellow Boy was "a threat to not just women but to society." SENT 3. This effort to influence the circuit court was a breach of the agreement. *See United States v. Johnson*, 187 F.3d 1129, 1135-36 (9th Cir. 1999) (finding prosecutor breach where government offered victim impact statement from different case). Relieved from its promise to recommend probation, and from even the possibility of probation supervision, the State's sentencing argument was "a winking recommendation for a

suspended sentence accompanied by an extensive argument justifying the opposite." *Guziak*, 2021 S.D. 68, ¶ 31, 968 N.W.2d at 205 (Myren, J., dissenting).

D. Yellow Boy Received Ineffective Assistance of Counsel.

The State incorrectly claims that "Yellow Boy does not assert his counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights." SB 22. To clarify, Yellow Boy reiterates that counsel deprived him of his Sixth Amendment right to effective counsel. Here, counsel's representation was a manifest usurpation of that right. First, in allowing Yellow Boy to plead guilty under an agreement that was unenforceable counsel did not provide competent advice. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Then, when it appeared the agreement was, in essence, a house of cards, counsel failed to clarify any modified plea agreement on the record or bind the State to any concrete promise. Counsel did not move to withdraw the plea or move for a continuance. Counsel did not object to the State's sentencing argument or the victim impact statement. Yellow Boy was left to fend for himself during critical stages of this proceeding, during both the plea negotiations and the sentencing hearing. *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 29, 4 N.W.3d 436, 445 (finding trial counsel's deficient performance left the defendant to "fend for herself" during the sentencing hearing, and but for counsel's deficient performance, "there is a reasonable probability that [the defendant] would have received a different sentence"). Counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court vacate and remand for the opportunity to withdraw his guilty plea.

Respectfully submitted this 29th day of January, 2026.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 4,434 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 29th day of January, 2026.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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