

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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APPEAL NOS. 30689, 30690, 30691

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STATE OF SOUTH DAKOTA,  
Plaintiff and Appellee,  
v.  
HYMAN LEE JACK  
Defendant and Appellant.

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APPEAL FROM THE CIRCUIT COURT  
SECOND JUDICIAL CIRCUIT  
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE SUSAN SABERS  
Circuit Court Judge

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APPELLANT'S KORTH BRIEF

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ATTORNEY FOR APPELLANT

Kristi Jones  
Dakota Law Firm, Prof. L.L.C.  
795 E. Kevin Dr.  
Tea, SD 57064  
Telephone: 605-838-5873  
kristi@dakotalawfirm.com

ATTORNEYS FOR APPELLEE

Jason Ravnsborg  
Erin Handke  
Office of the Attorney General  
1302 E. Hwy. 1 Ste.1  
Pierre, SD 57501  
Telephone: 605-773-3215  
atgservice@state.sd.us

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Notice of Appeal filed on the April 22, 2024

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## PRELIMINARY STATEMENT

Citations to the certified record will be referred to as “CR” followed by the page number. The specific appeal number for which certified record is being referenced will precede the citation.

## JURISDICTIONAL STATEMENT

Hyman Lee Jack (“Jack”) requests a review of the Judgment and Sentences filed in three cases on March 21, 2024 by the circuit court; namely case number 49CRI22-5842 (Appeal No. 30689), 49CRI23-1010 (Appeal No. 30690), and 49CRI23-1593 (Appeal No. 30691). Jack filed timely Notices of Appeal for each case on April 22, 2024 and respectfully submits that this Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3, S.D.C.L. § 23A-32-2, and S.D.C.L. § 23A-32-9. On October 4, 2024, this Court Ordered these cases be consolidated for purposes of this appeal

## PART A

The following is submitted in compliance with *State v. Korth*, 650 N.W.2d 528 (S.D. 2002). I certify that I have: (1) thoroughly reviewed the records of all prior proceedings herein, including the court file, the transcripts, and the defense attorney’s file; (2) discussed this case with the Appellant through telephonic communication; (3) discussed this case with Appellant’s trial counsel; and (4) noted that no substantive motions had been filed in the Appellant’s trial court file other than motions for delay and

motion to withdraw plea. By signing this Brief, I certify that I have not identified any arguably meritorious issue to justify appeal.

#### STATEMENT OF THE CASE

Jack was charged in three separate files as follows:

- Appeal No. 30689 – charged in Count 2 (Burglary 1st Degree); Count 3 (Burglary 3rd Degree); Count 4 (Grand Theft); Count 5 (Possession of Stolen Vehicle); Count 6 (DWI); Count 7 (DWI Ingesting); Count 9 (Possession of Marijuana); Count 11 (Petty Theft 2nd). Additionally, a Part II Information was filed alleging two prior DUI 3rds in Minnehaha County, South Dakota.
- Appeal No. 30690 – Count 1 (Burglary 1st Degree); Count 2 (Robbery 2nd Degree).
- Appeal No. 30691 – Count 1 (Burglary 2nd Degree); Count 2 (Grand Theft).

Appeal No. 30689 CR 9-12; Appeal No. 30690 CR 10; Appeal No. 30691 CR 12.

In the first file, Appeal No. 30689, on November 1, 2023, Jack sent a letter to the judge requesting new counsel be appointed due to a breakdown in the attorney/client relationship. Appeal No. 30689 CR 20. There is no record in any of the files that a hearing was held on this request.

A plea and sentencing hearing was held for all three cases on January 10, 2024. Jack plead to and was sentenced as follows:

- Appeal No. 30689: Count 3 (Burglary 3rd Degree) – four years in the South Dakota State Penitentiary, suspended; Count 6 (DWI 3rd) – 91 days in the Minnehaha County Jail, credit for 91 days. CR 23.
- Appeal No. 30690: Count 2 (Robbery 2nd) – eight years in the South Dakota State Penitentiary, four years suspended. CR 14.
- Appeal No. 30691: Count 1 (Burglary 2nd Degree) – four years in the South Dakota State Penitentiary, suspended. CR 16.

These Judgment and Sentences were filed on January 30, 2024. However, an Order appointing counsel for appeal was not signed until March 18, 2024, after the time for appeal passed. On that same day, Jack filed a Motion to Reissue Judgment and Sentence Pursuant to S.D.C.L. § 23A-27-51. The circuit court reissued all three Judgment and Sentences on March 21, 2024.

On April 7, 2024, Jack filed a Motion to Withdraw his plea in all three files; and hearing was held on April 10, 2024. The circuit court denied this motion and signed Finds of Fact and Conclusions of Law on April 17, 2024. Jack timely filed his appeal in all three files on April 22, 2024

#### **STATEMENT OF THE FACTS**

On January 10, 2024, Jack plead to the above referenced criminal files in Minnehaha County, South Dakota. According to the factual basis given at

the plea hearing in each file, the facts provided by the state, and agreed to by Jack, are as follows:

49 CRI 22-1010 (Appeal No. 30689 CR 75 -77): On August 24, 2022, a guest at the Phillip's Hotel in downtown Sioux Falls, Robert Rowe, heard his door open while he was in bed, and an unknown male entered the room. The male told Robert Rowe "I don't want to hurt you but give me your wallet." A scuffle ensued, and eventually the unknown man left the room with Mr. Rowe's shirt. Through still photographs from the hotel's security system, law enforcement identified Jack as the person who entered Mr. Rowe's room. At the hearing, Jack stated there was a short struggle, he was drunk, he did not take the man's wallet, that he knocked on the door, but it turned out to be the wrong person. The judge clarified "So you entered a room you had no business being in, you had a physical struggle with a man and ended up with his shirt?" Jack responded. "Yes, ma'am." The court found a factual basis.

49 CRI 23-1593 (Appeal No. 30689 CR 77-80): On August 30, 2022, Augustana student Jenna Jones was returning to her room in a residential dormitory located on the campus. As she was walking down the hall, she saw a girl running away from her room. She approached her room, where the door was open, and she saw a man come from behind the open door and flee. She saw her laptop computer and charging cord in the man's possession. Upon further search, it was discovered her roommate's laptop was also missing, both with an approximate value of \$1,000. In a review of the

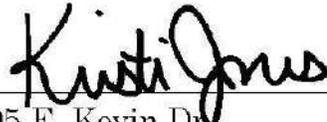
surveillance videos, law enforcement were able to identify Jack as the one who went into the room and left when the laptops were taken. Jack admitted that he did take them, but they were given to him by his co-defendant. He said he thought the co-defendant knew the girls, and that this was a trumped-up charge. The court asked, "You had two laptops that did not belong to you that you took out of a dorm room that you were not invited into?" Jack said, "Yes ma'am." The court found a factual basis.

49 CRI 22-5842 (Appeal No. 30689 CR 80-83): On August 24, 2022, Carter Benson was working in the kitchen area at Boss' Pizza on West Russell in Sioux Falls. A door into the kitchen area which is usually secured was left ajar, and Mr. Benson discovered his backpack, which contained his wallet and keys, went missing from the kitchen. He also noticed his mother's car was taken from the parking lot. Five days later, law enforcement made a traffic stop on a stolen car they identified as Carter's mom's car. Jack was driving the vehicle, and law enforcement noticed the odor of alcohol coming from him. Subsequent to arrest, Jack's blood was obtained, and contained a 0.117 blood alcohol content. Jack admitted to these facts, and the court found a factual basis.

After sentencing, Jack filed a Motion to Withdraw his plea, and a hearing was held on this motion on April 10, 2024. The court denied this motion. (Appeal No. 30689 CR 142).

Dated this 25th day of November, 2024.

Respectfully submitted,  
DAKOTA LAW FIRM, PROF. L.L.C.  
KRISTI L. JONES



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795 E. Kevin Dr  
Tea, SD 57064  
Telephone: 605-838-5873  
kristi@dakotalawfirm.com

**PART B**

Part B, as required by *Korth*, is meant to include Appellant's submission, unedited by counsel. I have informed Appellant via telephonic communications that I could not find or present a non-frivolous issues, and have also asked Appellant to provide me with information regarding his case. I have received the following from Appellant:

THE COURT FAILED TO STATE AGGRAVATING CIRCUMSTANCES IN IMPOSING A PENITENTIARY SENTENCE INSTEAD OF PROBATION. ATTORNEY LYNDEE KAMRATH WAS AWARE OF MY STATE OF DIMINISHED CAPACITY AND INABILITY TO KNOWINGLY AND INTELLIGENTLY AGREE TO THE CHARGES IMPOSED UPON ME AND SUBSEQUENT PLEA DEAL AS I MAINTANED MY PRESUMPTION OF INNOCENCE THROUGHOUT THE ENTIRE JAIL INCARCERATION AND COURT PROCEEDINGS STATING ON SEVERAL OCCASIONS "I AM NOT GUILTY OF COMMITTING THESE CRIMES;

THESE CHARGES ARE EXTREMELY EXCESSIVE AND WITNESS TESTIMONY IN THE REPORTS ARE FABRICATED, THEREFORE NOT CREDIBLE. AND AN ILLEGAL INDICTMENT HAD SUBSEQUENTLY BEEN OBTAINED." DURING SENTENCING THE COURT FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS AS IT IS OBLIGATED UNDER STATUTE GOVERNING PRESUMPTIVE SENTENCES OF PROBATION TO EXHAUST ALL OTHER FORMS OF DISCIPLINARY ACTION, ESPECIALLY IN CIRCUMSTANCES SUCH AS THIS WHERE THE LIKELIHOOD OF REHABILITATION OR A SUSPENDED EXECUTION OR IMPOSITION WOULD HAVE BEEN SUFFICIENT; DEFENDANT'S DIMINISHED CAPACITY DID NOT JUSTIFY OR EQUATE TO POSING A SIGNIFICANT RISK TO THE PUBLIC WAS THEREFORE FULLY ELIGIBLE FOR A SUSPENDED SENTENCE. ACTUAL ACTION (CRIME COMMITTED) BY DEFEDANT DID NOT DEMONSTRATE A RISK OF VIOLENCE OR A CAREER OF CRIMINALITY, HOWEVER I WAS VILLIFIED AND AN ILLEGAL INDICTMENT WAS ACHIEVED. INDICTMENTS FOR THESE CHARGES ARE INTENDED TO INCLUDE CRIMES AS PREDICATE OFFENSES ONLY THOSE PUNISHIBLE BY A TERM OF IMPRISONMENT FOR MORE THAN A YEAR WHICH NECSESARILY INVOLVE SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO OTHER PERSONS AND ELIMINATE THOSE WHO DO NOT. MY CIRCUMSTANCE SHOULD NOT

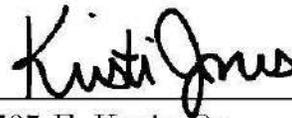
HAVE JUSTIFIED A PRISON SENTENCE BECAUSE I RECEIVED  
STOLEN PROPERTY (2 LAPTOP COMPUTERS) AND DRIVING WHILE  
INTOXICATED BOTH NON VIOLENT OFFENSES.

**CONCLUSION**

After a thorough review of the record, the Appellant's issues, and  
research, in counsel's professional opinion, there are no non-frivolous grounds  
for relief which exist.

Dated this 25th day of November, 2024.

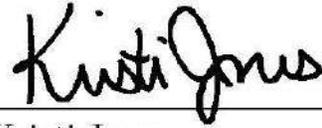
Respectfully submitted,  
**DAKOTA LAW FIRM, PROF. L.L.C.**  
**KRISTI L. JONES**

A handwritten signature in black ink that reads "Kristi Jones". The signature is written in a cursive style and is positioned above a horizontal line.

795 E. Kevin Dr.  
Tea, SD 57064  
Telephone: 605-838-5873  
kristi@dakotalawfirm.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25th day of November, 2024 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

A handwritten signature in black ink that reads "Kristi Jones". The signature is written in a cursive style with a prominent dot over the 'i' in "Jones".

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Kristi Jones  
Attorney for Appellant

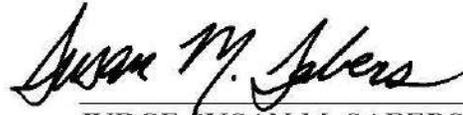




It is ordered that Counts 2, 4, 5, 7, 9 and 11 charging HYMAN LEE JACK with Burglary 1<sup>st</sup> Degree; Grand Theft (>\$1,000 to \$2,500); Possession of Stolen Vehicle; DWI-Ingesting; Possession of Marijuana-2 oz or Less; Petty Theft-2<sup>nd</sup> Degree (\$400 or Less) and the Part II Habitual Criminal Offender Information be and hereby are dismissed.

3/21/2024 2:47:00 PM

BY THE COURT:



JUDGE SUSAN M. SABERS  
Circuit Court Judge

Attest:  
DeJong, Katelyn  
Clerk/Deputy



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

---

STATE OF SOUTH DAKOTA,		PD 22-018494
Plaintiff,	+	49CRI23001010
vs.	+	JUDGMENT & SENTENCE
HYMAN LEE JACK,		
Defendant.	+	

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An Indictment was returned by the Minnehaha County Grand Jury on October 26, 2023, charging the defendant with the crimes of Count 1 Burglary 1<sup>st</sup> Degree-In Nighttime on or about August 24, 2022 and Count 2 Robbery 2<sup>nd</sup> Degree (Inj/Fear Vic) on or about August 24, 2022.

The defendant was arraigned upon the Indictment on November 9, 2023, Lyndee Kamrath appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

Defendant with counsel Lyndee Kamrath, returned to Court on January 10, 2024, the State appeared by Thomas Hensley, Chief Criminal Deputy State's Attorney. The defendant thereafter changed his plea to guilty to Count 2 Robbery 2<sup>nd</sup> Degree (Inj/Fear Vic) (SDCL 22-30-1, 22-30-3(1), 22-30-6 and 22-30-7).

Thereupon on January 10, 2024, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

#### S E N T E N C E

AS TO COUNT 2 ROBBERY 2<sup>ND</sup> DEGREE (INJ/FEAR VIC) : HYMAN LEE JACK shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for eight (8) years with credit for ninety-one (91) days served and with four (4) years of the sentence suspended; consecutive to #49CRI 23-1593 and #49CRI 22-5842.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that Count 1 charging HYMAN LEE JACK with Burglary 1<sup>st</sup> Degree-In Nighttime be and hereby is dismissed.

The defendant shall be returned to the Minnehaha County Jail following Court on the date hereof; to then be transported to the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules and discipline governing the Penitentiary.

3/21/2024 2:47:08 PM

BY THE COURT:



JUDGE SUSAN M. SABERS  
Circuit Court Judge

Attest:  
DeJong, Katelyn  
Clerk/Deputy



THE COURT FAILED TO STATE AGGRAVATING

... ATTORNEY ... TO KNOWINGLY AND ... CHARGES ...

I AM NOT GUILTY OF COMMITTING THESE ... EXCESSIVE AND ... FABRICATED, THEREFORE NOT ... AND AN ILLEGAL INDICTMENT ...

WHERE THE ... OF ... A ... NOT JUSTICE OR ...



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---

THE HONORABLE SUSAN M. SABERS  
Circuit Court Judge

---

**APPELLEE'S BRIEF**

---

MARTY J. JACKLEY  
ATTORNEY GENERAL

Erin E. Handke  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501  
Telephone: (605) 773-3215  
E-mail: [atgservice@state.sd.us](mailto:atgservice@state.sd.us)

Kristi Jones  
Dakota Law Firm, Prof. L.L.C.  
795 E. Kevin Dr.  
Tea, SD 57064  
Telephone: (605) 838-5873  
Email: [kristi@dakotalawfirm.com](mailto:kristi@dakotalawfirm.com)

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

ATTORNEY FOR DEFENDANT  
AND APPELLANT

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Notice of Appeal filed April 22, 2024

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IN THE SUPREME COURT  
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Nos. 30689, 30690, 30691

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

HYMAN LEE JACK,

*Defendant and Appellant.*

---

**PRELIMINARY STATEMENT**

In this brief, Appellant, Hyman Lee Jack, is referred to as “Jack.”  
Appellee, the State of South Dakota, is referred to as “State.”

References to documents are designated as follows:

Settled Record (Minnehaha Criminal File No. 22-5842) .. SR1  
Settled Record (Minnehaha Criminal File No. 23-1010) .. SR2  
Settled Record (Minnehaha Criminal File No. 23-1593) .. SR3  
Sentencing Transcript (January 10, 2024) .....ST  
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All document designations are followed by the appropriate page  
number(s).

**JURISDICTIONAL STATEMENT**

On January 10, 2024, the Honorable Susan M. Sabers, Circuit  
Court Judge, Second Judicial Circuit, entered an oral sentence with the

written Judgment of Conviction filed on March 21, 2024. SR1: 29-30, SR2: 20-21, SR3: 21. Jack timely filed his Notice of Appeal on April 22, 2024. SR1: 53, SR2: 44, SR3:44. This Court has jurisdiction under SDCL 23A-32-2.

**STATEMENT OF LEGAL ISSUES AND AUTHORITIES**

**PART A**

IN ACCORDANCE WITH *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2d 528, JACK'S COUNSEL DID NOT RAISE ANY ISSUES IN APPELLANT'S BRIEF.

The State concurs with Jack's counsel that there are no arguably meritorious issues based on the settled record.

*State v. Korth*, 2002 S.D. 101, 650 N.W.2d 528

**PART B**

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED JACK TO PRISON?

The circuit court sentenced Jack on three separate files. The court sentenced him to four years in prison for third-degree burglary (sentence suspended); ninety-one days in jail for driving under the influence, third offense; eight years (with four years suspended) for second-degree robbery, and four years (suspended sentence) for second-degree burglary. The court ordered that his two burglary sentences run concurrent to one another, but consecutive to his sentence for robbery. He was given 91 days credit on all his sentences.

*State v. Orr*, 2015 S.D. 89, 871 N.W.2d 834

SDCL 22-6-11

SDCL 23A-27-18.4

II. WHETHER JACK'S GUILTY PLEAS WERE MADE KNOWINGLY AND VOLUNTARILY?

After Jack was sentenced, he filed a motion to withdraw his guilty pleas. The circuit court held a hearing and determined Jack knowingly and voluntarily entered his guilty pleas.

*State v. King*, 2014 S.D. 19, 845 N.W.2d 908

*State v. Trueblood*, 2024 S.D. 17, 5 N.W.3d 571

### III. WHETHER THE STATE'S ATTORNEY FILED A VALID INDICTMENT?

This issue is being raised for the first time on appeal.

*State v. Outka*, 2014 S.D. 11, 844 N.W.2d 598

SDCL 23A-6-7

SDCL 23A-8-3

### STATEMENT OF THE CASE

Jack had three criminal files in Minnehaha County. In appeal 30689, the Minnehaha Grand Jury indicted Jack on:

- First-Degree Burglary, a Class 2 felony, contrary to SDCL 22-32-1(3);
- Third-Degree Burglary, a Class 5 felony, contrary to SDCL 22-32-8;
- Grand Theft (more than \$1,000, less than \$2,500), a Class 6 felony, contrary to SDCL 22-30A-1 and SDCL 22-30A-17(1));
- Possession of a Stolen Vehicle, a Class 5 felony, contrary to SDCL 32-4-5;
- Driving Under the Influence, a Class 1 misdemeanor, contrary to SDCL 32-23-1 (2);
- Driving Under the Influence, a Class 1 misdemeanor, contrary to SDCL 32-23-1 (5);
- Possession of Marijuana (two ounces or less), a Class 1 misdemeanor, contrary to SDCL 22-42-6; and
- Second-Degree Petty Theft, a Class 2 misdemeanor, contrary to SDCL 22-30A-1 and 22-30A-17.3).

SR1: 9-11. The State also filed two Part II Informations, one for habitual offender status, and the other for Driving Under the Influence, Third

Offense. SR1: 12-13. In appeal 30690, the Minnehaha Grand Jury indicted Jack on:

- First-Degree Burglary, a Class 2 felony, contrary to SDCL 22-32-1(1); and
- Second-Degree Robbery, a Class 4 felony, contrary to SDCL 22-30-1, 22-30-3(1), 22-30-6, and 22-30-7.

SR2: 10. In appeal 30691, the Minnehaha Grand Jury indicted Jack on:

- Second-Degree Burglary, a Class 3 felony, contrary to SDCL 22-23-3; and
- Grand Theft (more than \$1,000 and less than \$2,500), a Class 6 felony, contrary to SDCL 22-30A-1 and 22-30A-17(1).

SR3: 12.

The circuit court held a change of plea hearing on all three of Jack's cases where he plead guilty to Third-Degree Burglary and Driving Under the Influence, Third Offense in appeal 30689; Second-Degree Robbery in appeal 30690; and Second-Degree Burglary in appeal 30691.

SR1: 23, SR2: 20, SR3: 21. The court sentenced him to four years in prison, suspended, for each burglary charge. SR1: 23, SR3: 21. The sentences for burglary were ordered to run concurrent to one another.

SR1: 23, SR3: 21. Jack received a 91-day jail sentence for driving under the influence, third offense. SR1: 23. He was given 91 days credit for time previously served on both counts. *Id.* The court sentenced Jack to eight years in prison, with four years suspended for the robbery offense.

SR2: 20. Which the court ordered to run consecutive to the two burglary sentences. SR2: 20.

## **STATEMENT OF FACTS**

### *Appeal 30689*

On August 24, 2022, Cater Benson was working at Boss' Pizza, in Sioux Falls, South Dakota, in the kitchen. ST 14. The kitchen area was not open to the public and was for staff only. ST 14. While the kitchen door is typically secured, on this day it was left ajar. ST 14. Benson noticed his backpack that contained his wallet and the keys to his mother's vehicle were missing from the kitchen. ST 14. He then discovered his mother's car had been taken from the parking lot. ST 14-15.

Five days later, law enforcement conducted a traffic stop of the stolen vehicle. ST 15. Officers identified the driver as Jack. ST 15. He smelled of alcohol and a later blood test showed his blood alcohol content to be .117. ST 15. He also had a slight amount of delta 9 THC in his system. ST 15.

### *Appeal 30690*

On August 24, 2022, Robert Rowe was staying at the Phillips Hotel in Sioux Falls, South Dakota. ST 8-9. After he had gone to bed, he heard the door open and discovered an unknown man in his room. ST 9. The man, later identified as Jack, told Rowe, "I don't want to hurt you but give me your wallet." ST 9. Jack grabbed Rowe's pants, searching for his wallet. ST 9. Jack didn't find Rowe's wallet, so he took his shirt

and left. ST 9. Jack admitted there was a physical struggle between himself and Rowe. ST 10.

*Appeal 30691*

On August 30, 2022, Jenna Joens getting off the elevator on her dormitory floor at Augustana when she passed a woman running by her. ST 11. When Joens got to her dorm room, she noticed the door was open even though her roommate was not there. ST 11. Jack came from behind her open door and fled. ST 11. Joens noticed Jack was carrying a laptop charging cable. ST 11. Joens notified campus security. ST 11. When she entered her dorm room, she noticed both her and her roommate's laptops were missing. ST 11. Jack admitted to leaving the dorm room with the laptops. ST 11.

**ARGUMENTS**

**PART A**

IN ACCORDANCE WITH *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2d 528, JACK'S COUNSEL DID NOT RAISE ANY ISSUES IN APPELLANT'S BRIEF.

Jack's counsel filed a brief pursuant to *State v. Korth*, 2002 S.D. 101, 650 N.W.2d 528, after concluding no meritorious legal issues existed for appeal. JB 1-2. While Jack's appellate counsel was not trial counsel, appellate counsel did discuss the case with trial counsel and Jack. JB 2. Appellate counsel also thoroughly reviewed the record. JB 1. After an in-depth review of the record, the State concurs with Jack's counsel that no meritorious issues exist for appeal. The State,

therefore, requests that this Court affirm the circuit court's Judgment of Conviction and Sentence.

## **PART B**

### **I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED JACK TO PRISON.**

Jack argues the court should have given him presumptive probation because his crimes were not crimes of violence. But one of the crimes he committed does not qualify for presumptive probation.

#### *A. Standard of Review.*

“A circuit court's sentencing decision is generally reviewed for an abuse of discretion.” *State v. Holler*, 2020 S.D. 28, ¶ 10, 944 N.W.2d 339, 342 (citing *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486). “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable.’” *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 108. Consequently, “a sentence within the statutory maximum [generally] will not be disturbed on appeal.” *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (quoting *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406). Also, “[a]bsent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” *State v. Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d 354, 359 (quoting *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61).

*B. The Circuit Court Did Not Abuse Its Discretion When It Sentenced Jack to Prison.*

If a defendant is convicted of a Class 5 or Class 6 felony<sup>1</sup>, the circuit court shall sentence the individual to probation. SDCL 22-6-11. But if the court may deviate from probation if it finds aggravating circumstances that pose a significant risk to the public. SDCL 22-6-11. And if the defendant is being supervised by the Department of Corrections, the court must fully suspend the sentence. SDCL 22-6-11, 23A-27-18.4.

The circuit court sentenced Jack to eight years in prison with four years suspended for Second-Degree Burglary, which is a Class 4 felony. SR2: 20. Because it is a Class 4 felony, it does not meet the requirements for presumptive probation. And since he was convicted of a Class 4 felony, the circuit court was not required to state aggravating factors on the record, since it was not a presumptive probation crime. SDCL 22-6-11. In addition, the court complied with the requirements of SDCL 22-6-11 by fully suspending Jack's sentences for his two Third-Degree Burglar conviction, which are Class 5 felonies.

Additionally, Jack agreed to a four-year prison sentence when he accepted the State's plea deal. During the change of plea and sentencing the circuit court told Jack its understanding of the plea agreement. ST 4-5. The court said it understood the plea agreement allowed it to

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<sup>1</sup> SDCL 22-6-11 carves out some exceptions and specifically lists crimes that are not considered presumptive probation crimes.

impose up to four years of prison with additional time suspended. ST 4-5. Jack agreed with the court that he shared the same understanding of the plea agreement. ST 5. Jack is now complaining about a sentence that he agreed to.

Further, Jack was on parole in California. MH 23. He cannot be sentenced to probation while on parole. As this Court has explicitly stated, “probation is not available for those defendants that are incarcerated in the penitentiary or on parole.” *State v. Orr*, 2015 S.D. 89, ¶ 10, 871 N.W.2d 834, 838. So, probation was not even an option for Jack.

Because Second-Degree Robbery is not a crime for presumptive probation as detailed in SDCL 22-6-11, the circuit court did not err by not providing aggravating factors to depart from presumptive probation. Therefore, his sentences should be affirmed.

## II. JACK’S GUILTY PLEAS WERE MADE KNOWING AND VOLUNTARILY.

Jack claims his guilty pleas were not made knowingly and intelligently. JB 6-8. After the sentencing hearing, Jack filed a Motion to Withdraw his plea, making a similar argument as in the appeal. SR1: 31-36, SR2: 22-27, SR3: 22-27. The court held a hearing where Jack testified about why he felt his plea was not knowing and voluntarily made. See MH. He told the court he felt pressured to plead guilty by the severity of his charges. MH 14. He also claimed his trial counsel told

him the court would “hammer him” in sentencing should he proceed with a trial. MH 11.

The circuit court did not find Jack’s testimony credible. MH 21. It reiterated its position that a defendant is never penalized for exercising their right to trial. MH 21. The court also discussed how it canvassed Jack on his rights he would give up by pleading guilty. MH 21. It also pointed out that at no point during the change of plea and sentencing hearing did Jack complain about his representation. MH 21.

The court found that Jack had the burden of showing his plea was not knowing and voluntary and he had not made such showing. So, it denied his motion to withdraw his guilty plea.

A. *Standard of Review.*

Constitutional violations are reviewed de novo. *State v. Guzman*, 2022 S.D. 70, ¶ 30, 982 N.W.2d 875, 887. To determine whether Jack entered his plea knowingly, voluntarily, and intelligently, as required by due process, this Court must look at the totality of the circumstances. *State v. Moran*, 2015 S.D. 14, ¶ 15, 862 N.W.2d 107, 111 (citing *State v. Outka*, 2014 S.D. 11, ¶ 33, 844 N.W.2d 598, 608). “The record must show in some manner that the defendant understood his rights in order for the defendant’s plea to be entered intelligently and voluntarily.” *Moran*, 2015 S.D. 14, ¶ 13, 862 N.W.2d at 111 (quoting *Outka*, 2014 S.D. 11, ¶ 32, 844 N.W.2d at 607).

*B. Jack's Plea Was Knowing, Intelligent, and Voluntary.*

A plea is knowing and voluntary if the record “affirmatively show[s] a free and intelligent waiver by the defendant of his constitutional rights against self-incrimination, right to confront witnesses, right to a jury trial, and evidence that the defendant understood the nature and consequences of his guilty plea.” *State v. King*, 2014 S.D. 19, ¶ 6, 845 N.W.2d 908, 910 (citing *Monette v. Weber*, 2009 S.D. 77, ¶ 10, 771 N.W.2d 920, 925; *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969)). In making that determination, this Court considers not only the procedure and in-court colloquy, but also defendant’s age, prior criminal history, if he was represented by counsel, the plea agreement, and the time between advisement of his rights and entering his guilty plea. *Oleson v. Young*, 2015 S.D. 73, ¶ 15, 869 N.W.2d 452, 459.

At the change of plea/sentencing hearing, the circuit court made sure to properly advise Jack of his *Boykin* rights. ST 2-3. When the plea agreement was read, Jack agreed that he understood the agreement. ST 4-5. The court advised the maximum penalty Jack faced by pleading guilty to the charges. ST 5-6. Jack confirmed with the court he had ample time to speak with his attorney. ST 8. His attorney also agreed that Jack understood his rights and the charges against him. ST 8.

After the court sentenced Jack, he filed a motion to withdraw his guilty plea. SR1: 31-36, SR2: 22-27, SR3: 22-27. The court held a hearing where Jack testified as to why he felt his plea was not entered

voluntarily. See MH. Jack felt his attorney did not have his best interest at heart. MH 11-14. He made allegations that his attorney told him if he didn't plead guilty and instead had a trial, the judge would "hammer him" at sentencing. MH 12. He agreed that his plea was voluntary but did not feel like his attorney advised him correctly. MH 13. But did ultimately agree that he knew what he agreed to and that the judge explained things to him. MH 14. Jack also agreed that the pressure he felt to plead guilty came from the severity of the charges, not his attorney. MH 14.

Further, this Court has held that:

[i]f the record demonstrates "that the defendant understood his rights" and the consequences of his guilty plea, we will find that the defendant's plea was "entered intelligently and voluntarily." Because the record 'must affirmatively show the plea was voluntary,' we review the circumstances of each plea in its entirety to determine whether they each "understood the consequences of pleading guilty."

*State v. Trueblood*, 2024 S.D. 17, ¶ 15, 5 N.W.3d 571, 576 (quoting *State v. Cepelcha*, 2020 S.D. 11, ¶ 45, 940 N.W.2d 682, 695).

There is nothing in the record or in his appellate brief to suggest Jack did not understand his rights or the consequences of his guilty plea. Instead, Jack makes several self-serving statements and ultimately agreed he entered the pleas voluntarily. Jack is very familiar with the court system, seeing as he was facing his sixth driving under the influence charge, and was on parole in another state. MH 23.

On appeal, Jack has again failed to make any signs showing his pleas were not made voluntary. The court properly advised him of his rights and what it would mean to accept the plea agreement. Jack is not a novice in court, he has several prior convictions and understood the court process and procedures. Because he failed to show his guilty pleas were not voluntary, Jack's convictions should be affirmed.

### III. THE STATE'S ATTORNEY FILED LEGAL INDICTMENTS.

#### A. *Background.*

Jack complains the indictment against him was illegal. JB 6-8. He does not specify which of his three indictments he believes are illegal. *Id.* Nonetheless, the indictments in Jack's three cases meet the necessary requirements of a proper indictment.

#### B. *Standard of Review.*

This Court reviews the sufficiency of an indictment under the de novo standard of review. *State v. Snodgrass*, 2020 S.D. 66, ¶ 20, 951 N.W.2d 792, 801 (citing *State v. Fisher*, 2013 S.D. 23, ¶ 28, 828 N.W.2d 795, 803).

#### C. *Jack Waived His Ability to Challenge the Indictment When He Plead Guilty.*

Typically, a defendant must raise issues related to the indictment prior to trial. SDCL 23A-8-3(3). This Court has held that failure to object to defects in the indictment prior to pleading guilty will render the issue waived on appeal. *State v. Outka*, 2014 S.D. 11, ¶ 19, 844 N.W.2d

at 605 (citing *State v. Lachowitz*, 314 N.W.2d 307, 309 (S.D.1982)).

Because Jack did not raise this issue below and since he plead guilty, he has waived this claim before this Court.

*D. The State Filed a Sufficient Indictment.*

If this Court finds Jack did not waive this claim, the State still filed proper indictments in his three cases. “The purpose of an Indictment or Information is to apprise a defendant of the nature of the charges against him with sufficient specificity so that he may defend against the charges and may later plead the Indictment or Information as a bar to a subsequent charge.” *Snodgrass*, 2020 S.D. 66, ¶ 21, 951 N.W.2d at 801 (quoting *State v. Satter*, 1996 S.D. 9, ¶ 12, 543 N.W.2d 249, 251).

SDCL 23A-6-7 requires an indictment to contain five things for it to be sufficient:

- (1) That it is entitled in a court having authority to receive it, although the name of the court is not stated;
- (2) That the indictment was found by a grand jury of the county in which the public offense was committed;
- (3) That the defendant is named or, if his name is unknown, that he is described by a fictitious name with a statement that his true name is unknown to the grand jury or prosecuting attorney;
- (4) That the offense charged was committed within the jurisdiction of the county; and
- (5) That the offense charged is designated in such a manner as to enable a person of common understanding to know what is intended.

SDCL 23A-6-7. Each of the three indictments against Jack were sufficient.

Each indictment contained the following information. The crimes took place in Minnehaha and that is the court in which it was filed. SR1: 9-11, SR2: 10-11, SR3: 12-13. The grand jury was also situated in Minnehaha County. *Id.* Jack's full name appeared at the top of the indictment and is also listed in each count of the indictment. *Id.* Each count specified the crime took place in Minnehaha County. *Id.* And finally, each statute Jack was alleged to have violated was cited along with a description of the statute and the alleged conduct that occurred. *Id.* Each indictment met the requirements set forth in SDCL 23A-6-7.

Further, this Court has held that typically, "an indictment is ... sufficient if it employs the language of the statute." *Fisher*, 2013 S.D. 23, ¶ 29, 828 N.W.2d at 803 (quoting *State v. Hoeft*, 1999 S.D. 24, ¶ 21, 594 N.W.2d 323, 327). All counts in the three indictments contain the language of the statutes under which he was charged. SR1: 9-11, SR2: 10-11, SR3: 12-13.

Not only did Jack waive his claim by pleading guilty, but there is also nothing to support his allegations of an illegal indictment. The indictments meet the requirements of SDCL 23A-6-7 and contain statutory language of the crimes he committed. Therefore, his convictions and sentences should be affirmed.

## CONCLUSION

Based on the foregoing arguments and authorities, the State requests that Jack's conviction and sentence be affirmed.

Respectfully submitted,

**MARTY J. JACKLEY**  
**ATTORNEY GENERAL**

/s/ Erin E. Handke  
Erin E. Handke  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501  
Telephone: (605) 773-3215  
E-mail: [atgservice@state.sd.us](mailto:atgservice@state.sd.us)

## 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 3,182 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 9th day of January 2025.

/s/ Erin E. Handke  
Erin E. Handke  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 9th, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Hyman Lee Jack* was served electronically through Odyssey File and Serve upon Kristi Jones at kristi@dakotalawfirm.com.

/s/ Erin E. Handke  
Erin E. Handke  
Assistant Attorney General