

IN THE
SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

NO. 31307

JEREMY LUCERO,
Defendant and Appellant.

APPELLANT'S BRIEF

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Notice of Appeal was filed on November 20, 2025

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant Jeremy Lucero will be referred to as “Lucero.” Plaintiff and Appellee, the State of South Dakota, will be referred to as the “State.” References to the settled record will be referred to as “SR,” followed by the page number from the Clerk’s index. References to the transcript of the Initial Appearance will be designated as “IA.” References to the transcript of the Preliminary Hearing will be designated as “PH.” References to the transcript of the Arraignment will be designated as “ARR.” References to the transcript of the Status Hearing “SH” followed by the number of status hearings held. References to the transcript of the Change of Plea Hearing will be designated as “COP.” References to the transcript of the Sentencing Hearing will be designated as “ST.” References to the appendix hereto will be designated as “APP.” The appropriate page number will follow each reference.

JURISDICTIONAL STATEMENT

Lucero appeals from a judgment of conviction for Possession of a Controlled Drug of Substance, in violation of SDCL § 22-42-5, entered on November 7, 2025, and filed on November 10, 2025, before the Honorable Scott Roetzel, Seventh Judicial Circuit Court Judge, Hot Springs, Fall River County, South Dakota. (SR, 241). Appeal is by right pursuant to SDCL § 23A-32-2. Notice of appeal was filed on November 20, 2025. (SR, 246).

STATEMENT OF THE LEGAL ISSUES

The circuit court erred in its interpretation and application of the directives in SDCL § 22-6-11 when imposing a penitentiary sentence rather than probation because

the factors listed by the circuit court did not justify a departure from the presumptive sentence of probation and were not detailed in the written findings.

STATEMENT OF THE CASE AND FACTS

On February 5, 2025, at approximately 10:00 p.m., Deputy Schiferl initiated a traffic stop in Edgemont, South Dakota. (PH, 4:19–22). The stop was based on information that the vehicle may have been involved in narcotics trafficking, and because the vehicle's license plate was obscured. (PH, 4:23–25).

The driver of the vehicle was identified as Valentina Garcia. (PH, 5:3–6). Garcia consented to a search of the vehicle. (PH 5:7–9). While conducting the stop, Chief Deputy Belt arrived to assist. (PH, 5:10–12). Deputy Schiferl testified that when the passenger, Jeremy Lucero, was being removed from the vehicle, Chief Deputy Belt located a THC vape pen in the passenger compartment. (PH, 5:10–15). Lucero had been seated in the front passenger seat. (PH, 5:16–18).

Deputy Schiferl described the item as a THC vape cartridge with a red THC label and testified that, based on his training and experience, he believed it to be a THC vape cartridge. (PH, 5:19–25). After discovering the vape pen, officers searched the vehicle. (PH, 6:1–3).

During the search, Deputy Schiferl located a suitcase on the roof of the vehicle. (PH, 6:4–6). The suitcase contained several letters addressed to Jeremy Lucero. (PH, 6:5–7). Inside the larger compartment of the suitcase, officers located several glass pipes with burnt residue. (PH, 6:7–11). Deputy Schiferl testified that, based on his training and experience, he believed the pipes were methamphetamine pipes. (PH, 6:12–15). Deputy

Schiferl conducted a field test on one of the pipes, which yielded a presumptive positive result for methamphetamine. (PH, 6:16–20).

Deputy Schiferl identified Jeremy Lucero in the courtroom as the passenger in the vehicle and the individual arrested during the traffic stop. (PH 7:5–13). Lucero was arrested for possession of a controlled substance and drug paraphernalia and was transported to the Fall River County Jail. (PH, 7:14–20).

Later, officers conducted a further search of the vehicle at the Highway Shop in Hot Springs, South Dakota. (PH, 12:4–7). During that search, officers located a bundle of methamphetamine weighing approximately five ounces, along with additional drug paraphernalia. (PH, 12:8–14). The methamphetamine was sent to the Rapid City Police Department for testing. (PH, 12:15–19).

A complaint was filed against Lucero on February 7, 2025, charging him with two counts of violations of the law. Count 1 charged Lucero with a violation of SDCL § 22-42-5, Possession of a Controlled Drug or Substance, namely Methamphetamine, a schedule II Controlled Drug/Substance (Class 5 felony), and Count 2 charged Lucero with a violation of SDCL § 22-42A-3, Possession of Drug Paraphernalia (Class 2 misdemeanor). (SR, 14). Lucero requested a Preliminary Hearing at his Initial Appearance held on February 26, 2025, in front of Magistrate Court Judge Janki Sharma, in Fall River County, SD, after he was advised of all his rights and maximum penalties. (IA, 1-7).

On April 2, 2025, the Magistrate Court for the Seventh Judicial Circuit, Fall River County, South Dakota, held a preliminary hearing to determine whether probable cause existed to move the case forward. (PH, 3:1–8). After hearing the testimony and reviewing

the exhibits admitted for purposes of the probable cause determination, the court found that the State had established probable cause and ordered the case bound over to the circuit court. (PH, 17:13–20).

An Information was filed on April 2, 2025 charging Lucero with 3 counts of violations of the law. (SR, 47). Count 1 charged Lucero with a violation of SDCL § 22-42-5, Possession of a Controlled Drug or Substance, namely Methamphetamine, a schedule II Controlled Drug/Substance (Class 5 felony), Count 2 charged Lucero with a violation of SDCL § 22-42A-5.1, Unauthorized Ingestion of a Controlled Drug or Substance, Methamphetamine, a Schedule II drug/substance (Class 5 felony), and Count 3 charged Lucero with a violation of SDCL § 22-42A-3, Possession of Drug Paraphernalia (Class 2 misdemeanor). (SR, 47).

Lucero pleaded Not Guilty at his Arraignment held on June 6, 2025, in front of Circuit Court Judge Scott Roetzel in Fall River County, SD, after having been advised again of his right and maximum penalties. (ARR, 1) (ARR, 3-7) (ARR, 10:17-25 and 11:1-2).

A Non-Evidentiary Motions hearing was held on August 8, 2025, where the Court addressed the parties' standard discovery and pretrial motions, as well as discovery deadlines. The court sustained the State's objection to the defense's requirement of descriptions of the video and audio evidence but granted the remaining defense discovery motions. (MH, 3:14–16). The court also granted the State's motions and established the standard discovery deadlines. (MH, 3:17–21). A trial date was set for November 20, 2025, at 8:30 a.m. (MH, 5:2-4).

The trial date was subsequently cancelled, and a change of plea hearing took place on September 26, 2025, where Lucero entered a guilty plea to Count 1 pursuant to a plea offer from the State. The plea offer contemplated Lucero pleading guilty to Count 1 in file CRI25-38. In exchange, the State would dismiss Count 2, the Part 2, as well as file CRI25-183 in its entirety. At the time of sentencing, both sides would be free to comment, with the State being able to ask for costs. (COP, 3). Lucero entered a guilty plea pursuant to this agreement. (COP, 6:13-14). After the plea, a PSI was ordered. (COP, 7:4-5). Sentencing was set for November 7, 2025. (COP, 7:22-23).

On November, 7, 2025, Lucero appeared in court for sentencing. At Sentencing, the State argued for a penitentiary sentence, citing Lucero's eighth felony conviction, a high LSI score, prior burglaries and theft convictions out of Colorado, and the fact that he picked up a second drug charge while on bond. (ST, 4:21-25; 5:1-11).

Defense counsel emphasized that this was a presumptive probation case and that the facts indicated a person who uses drugs primarily to his own detriment. She requested a probationary sentence with counseling, random UAs, and transfer of supervision to Colorado, Lucero's home state. (ST, 5:18-25; 6-7). Lucero's attorney further argued that the presumptive probation statute does not carve out an exception for defendants with criminal history, that the legislature intentionally made the presumption applicable regardless of prior record. (ST, 5:20-22; ST, 6: 25 -7:1-2). She argued that while the Court *can* consider criminal history, it should not be the ultimate factor to "rob a person from the opportunity that the legislature intended." (ST, 6: 22-25). Lastly, Defense counsel stressed that the case before the Court was just a person caught with drugs for his own use, distinguishing it from offenses that harm the broader community. (ST, 6: 3-4)

Lucero also made a statement to the court. In that statement, he acknowledged his lengthy record but noted he had never been convicted of any violent offenses. He expressed motivation to change, citing his parents' move to a rural area as a positive environmental shift, and asked the Court to take his word that he would comply with probation "not for the courts, but for myself." (ST, 7:17–25; ST, 8:1–16).

In fashioning the sentence, the Court acknowledged mitigating factors such as his cooperation with the PSI and the apparent remorse but found the following aggravating factors on the record: eighth felony conviction, criminal history dating back to 1996, 15+ adult convictions, LSI score of 33, and admitted methamphetamine use while on bond, three days before the PSI. (ST, 9:7–15). The Court deviated from the presumption of probation, finding Lucero a significant danger to the community, and sentenced him to 5 years in the South Dakota State Penitentiary, with 3 years suspended; credit for 3 days time served, as well as \$190 (one hundred ninety) in court costs. (ST, 11: 4–8). A review of the judgment reveals the following written findings in support of the trial court deviating from probation and finding Lucero a high risk to the public: Defendant has a lengthy criminal history, this is Defendant's 8th felony conviction, Defendant admitted to using methamphetamine 3 days prior to completing the PSI, and his LSI score is high at 33. (SR, 242).

Lucero appeals the sentence imposed on him.

STANDARD OF REVIEW

Whether the circuit court misinterpreted or misapplied a statute involves a question of statutory interpretation, which is reviewed de novo, with no deference given to the circuit court's legal conclusions. State v. Kurtz, 2024 S.D. 13, 4 N.W.3d 1.

ARGUMENT

South Dakota Codified Law § 22-6-11 requires that a defendant convicted of a Class 5 or Class 6 felony be sentenced to probation. The court may depart from that presumption only upon a specific finding that aggravating circumstances exist that pose a significant risk to the public and require departure. Strict compliance with the provisions of the statute governing presumptive sentences of probation is necessary. State v. Feucht, 2024 S.D. 16, 5 N.W.3d 561. If no aggravating circumstances are found that pose a significant risk to the public, then departure from presumptive probation for someone convicted of a Class 5 or Class 6 felony is not allowed. (State v. Kurtz, 2024 S.D. 13, 18; 4 N.W.3d 1, 5).

The South Dakota Supreme Court has consistently held that departure from presumptive probation demands a particularized finding of significant public risk, not merely reliance upon prior convictions. Lucero submits that the following decisions are specifically important in this analysis.

First, in State v. Kurtz, 2024 S.D. 13, this Court vacated a penitentiary sentence imposed on a defendant convicted of possession of a controlled substance. The circuit court in Kurtz identified aggravating circumstances but expressly declined to find that the defendant posed a significant risk to the public. This Court held that both findings are independently required before a court may depart from presumptive probation: aggravating circumstances alone are not enough.

The circuit court in this matter relied primarily on Mr. Lucero's criminal history to justify departure from probation. That history, while potentially an aggravating circumstance, does not, standing alone, establish that a defendant who possesses

methamphetamine poses a significant risk to the public. Lucero's attorney put it best at sentencing when she told the court "...and while I understand that the Court can certainly consider criminal history, I don't think it's a factor that should ever be in and of itself enough to rob a person from the opportunity that the legislature intended with presumptive probation for these types of charges." (ST, 6:22-7:2).

Second, in State v. Underwood, 2017 S.D. 3, 890 N.W. 2d 240 this Court reinforced that not every unfavorable factor rises to the level of a significant public risk. The court rejected reliance on only factors that, while negative, lacked a direct connection to public safety. That principle applies directly here. Lucero's criminal record is predominantly nonviolent. As he stated at sentencing, he has never been convicted of any crime involving physical violence. (ST, 7:19-21.) The conduct involving possessing drugs for personal use poses harm primarily to himself. While delivering the sentence on the record, the circuit court heavily relied on Lucero's criminal history, some of it over 24 years old, and use of drugs while on bond. (ST, 10:11-23, SR, 223). The Court also mentioned the high LSI score of 33, but as the LSI score table shows, it was his financial situation as well as his leisure/recreation that scored in the highest categories. (ST, 9:13; SR, 172). Under Underwood, the Court must connect the specific circumstances to an articulable public safety risk, not merely point to the existence of prior convictions and personal use of illegal drugs without any further connection as to how that amounts to Lucero being a public safety risk. There is no mention that Lucero put anyone but himself at risk by having relapses while on bond.

Third, in State v. Flowers, 2016 S.D. 63, 885 N.W. 2d 783, this Court established the procedural requirements that accompany any departure: the aggravating

circumstances must be stated on the record at sentencing *and* included in the written dispositional order. A departure unsupported by both is reversible error. In this case, the written findings are sparse as to why the factors listed by the Court to justify departure from presumptive probation amount to Lucero being a risk to the public. This lack of adequate written findings goes beyond a clerical error. A general reference to criminal history, relapse while on bond, and a high LSI score are insufficient to satisfy SDCL § 22-6-11.

Appellant anticipates that the State may rely on State v. Whitfield, 2015 S.D. 17, 862 N.W.2d 133, where this Court upheld a departure from presumptive probation for a defendant who had three prior felonies, including a prior drug offense, a history of parole violations, and significant supervision difficulties. However, Whitfield is meaningfully distinguishable.

Unlike the defendant in Whitfield, Lucero has not demonstrated an unwillingness to engage with supervision. In contrast, at Sentencing, Lucero expressly acknowledged his addiction, identified the need for structure and a positive environment, and specifically requested probation conditions including counseling and random urinalysis as tools for personal accountability. (ST 6: 8–16). He has the support of his parents, who recently relocated to a rural environment conducive to his recovery. (ST, 7: 24–25; 8:1–2.) And he had a concrete plan for supervision transfer to Colorado. His action plan is detailed in page 3 of his PSI. (SR, 170). These facts indicate Lucero’s desire to abide by the structured, supervised opportunity the legislature intended when it enacted presumptive probation.

CONCLUSION

Based on the foregoing, Lucero submits that the circuit court violated SDCL § 22-6-11 in sentencing him to 3 years. Therefore, Lucero respectfully requests that his sentence be reversed and the matter be remanded for a new sentencing hearing.

REQUEST FOR ORAL ARGUMENT

Lucero respectfully requests that he be allowed to present oral argument on these issues.

Dated this 26th day of March 2026.

Respectfully Submitted,

/s/ Ilisja Duffy

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CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 12614 words and is 10 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word Version 16.44.

/s/ Ilisja Duffy
Ilisja Duffy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of March 2026, a true and correct copy of the foregoing Appellant's Brief was served via Odyssey File and Serve, at the e-mail addresses listed below, upon these individuals:

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/s/ Ilisja Duffy
Ilisja Duffy

APPENDIX

APPENDIX

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF FALL RIVER/OGLALA LAKOTA	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	
v.	)	23CRI 25-38
	)	
JEREMY LUCERO,	)	
D.O.B. 08.18.1979	)	
	)	
Defendant.	)	

JUDGMENT OF CONVICTION

An Information was filed in this Court on April 2, 2025, charging the Defendant with the crimes of

COUNT 1: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5, (Cl. 5 felony);

COUNT 2: INGESTION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5.1, (Cl. 5 felony);

COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3, (Cl. 2 misd.);

The Defendant was arraigned on said Information by the Court and received a copy thereof in a Change of Plea hearing in open Court on September 26, 2025. The Defendant, the Defendant's attorney, Angela Colbath, and the Fall River County State's Attorney, Lance S. Russell, appeared at the Defendant's arraignment/change of plea hearing. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to, the right against self-incrimination, the right of confrontation, the right to be represented by counsel, and the right to a jury trial. On the 26th day of September, 2023, in open Court at Hot Springs, Fall River County, South Dakota, the Defendant, accompanied by his attorney, plead guilty to the charge of ***COUNT 1:*** POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5, (Cl. 5 felony) and the State agreed to dismiss the remaining charges and also dismiss file 23CRI25-183.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing and intelligent; and that a factual basis existed for the plea; that the Defendant was represented by competent counsel. It is, therefore, the Judgment of this Court that the Defendant is guilty of POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5, (Cl. 5 felony).

SENTENCE

The Court, specifically having found aggravating factors pursuant to SDCL 22-6-11 that warrant deviation from a presumptive probation. Those factors were stated on the record by the Honorable Scott A. Roetzel and include that this is the Defendant has a lengthy criminal history and this is the Defendant's eighth (8th) felony conviction, the Defendant admitted to using methamphetamine 3 days prior to completing his PSI (pre-sentence interview) with court services in this file and his LSI score was high at 33. The Defendant has been found to be a high risk to the public.

On the 7th day of November, 2025, with the Honorable Scott A. Roetzel presiding, in open Court at Hot Springs, Fall River County, South Dakota, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. As no cause was offered, the Court thereupon pronounced the following sentence:

IT IS ORDERED, that the Defendant, Jeremy Lucero, be sentenced to five (5) years in the South Dakota State Penitentiary with three (3) years being suspended and shall receive credit for time served of one hundred three (3) days and shall receive credit for time served while awaiting transport; and it is further

ORDERED, that the Defendant pay court costs of one hundred sixteen dollars and fifty cents (\$116.50), laboratory testing fees in the amount of one hundred ninety dollars (\$190.00) and court appointed attorney fees in an amount to be submitted by order and

which may be liened; and

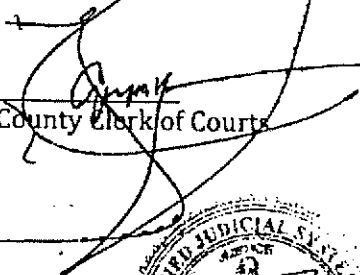
YOU ARE FURTHER ADVISED that you have only thirty (30) days from the date of this Judgment and Sentence to file an appeal with the Supreme Court.

DATED this 10 day of November, 2025.

BY THE COURT:


The Honorable **SCOTT A. ROETZEL**

ATTEST:


Fall River County Clerk of Courts
(SEAL)



FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
NOV 10 2025

By: _____

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31307

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMY LUCERO,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed November 20, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31307

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMY LUCERO,

Defendant and Appellant.

PRELIMINARY STATEMENT

Lucero pleaded guilty to a presumptive probation crime, and although he requested probation, he agreed to an open sentence. When the circuit court found aggravating circumstances rendered him a significant risk to the public, Lucero did not object. The factors and his risk to the public were also listed in the judgment of conviction. Now he wants this Court to remand his case for resentencing. Not only did he waive his appellate argument, but the circuit court did what it was supposed to do to depart from presumptive probation. The sentence should be affirmed.

In this brief, Defendant and Appellant, Jeremy Lucero, is called “Lucero.” Plaintiff and Appellee, the State of South Dakota, is “the State.” All other individuals are referred to by name. References to documents are cited as follows:

Settled Record (Fall River Co. File 23CRI25-38)	SR
Change of Plea Hearing (September 26, 2025).....	CP
Presentence Investigation Report.....	PSI
Sentencing Hearing (November 7, 2025)	ST
Appellant’s Brief.....	AB

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Lucero appeals the Judgment of Conviction filed by the Honorable Scott A. Roetzel on November 4, 2025. SR 241. Lucero’s Notice of Appeal was filed sixteen days later. SR 246. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER LUCERO WAS PROPERLY SENTENCED?

The circuit court found Lucero posed a significant risk to the public and sentenced Lucero to penitentiary time. Lucero did not object.

State v. Feucht, 2024 S.D. 16, 5 N.W.3d 561

State v. Kurtz, 2024 S.D. 13, 4 N.W.3d 1

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

SDCL 22-6-11

STATEMENT OF THE CASE AND FACTS¹

Law enforcement officers in Fall River County were conducting an ongoing active drug investigation into the trafficking of methamphetamine from Colorado. SR 2 (confidential). In that investigation, officers suspected that a white Dodge Dart bearing Colorado license plates was being used to transport the narcotics. SR 4 (confidential).

Late one evening in early February 2025, Deputy Sheriff Isnalawica Belt notified Deputy Sheriff Tanner Schiferl that the vehicle officers were tracking was traveling on Lookout Road—a back gravel road leading toward Edgemont. SR 4 (confidential). Deputy Schiferl soon observed a white Dodge Dart traveling northbound. SR 4 (confidential). After pulling in behind the vehicle, he noticed that the rear license plate was entirely unreadable because it was covered in snow and dirt. SR 4 (confidential). On that basis, he initiated a traffic stop for a violation of SDCL 32-5-98.² SR 4 (confidential).

¹ The Statement of the Case and the Statement of Facts are combined for brevity and clarity.

² SDCL 32-5-98 says, in relevant part, “no person may operate or drive a motor vehicle on the public highways of this state unless the vehicle has . . . two number plates, bearing the number conspicuously displayed . . . The plates shall at all times, as far as is reasonably possible, be kept clear and free of mud, ice, or snow so as to be clearly visible. . . . A violation of this section is a Class 2 misdemeanor.”

Lucero was riding in the passenger seat. SR 4 (confidential). When Deputy Schiferl requested identification, Lucero voluntarily provided his ID. SR 4 (confidential). The driver—who owned the vehicle—spoke with Deputy Schiferl and consented to a search. SR 5 (confidential). During that search, Deputy Belt immediately located a THC vape pen, which is illegal in South Dakota. SR 5 (confidential). Officers then placed both the driver and Lucero in handcuffs. SR 5 (confidential).

The search continued. Deputy Schiferl removed a suitcase from the vehicle. SR 5 (confidential). Inside were letters addressed to Lucero, men's clothing, and several glass pipes containing burnt residue in them. SR 5 (confidential). The residue later tested positive for methamphetamine. SR 5 (confidential). The driver confirmed that the suitcase belonged to Lucero. SR 5 (confidential). Officers also discovered approximately 160 grams of white crystalline substance packaged in individual baggies, a scale, several glass pipes, marijuana, ledgers, and other paraphernalia. SR 3, 5 (confidential). A later urinalysis showed Lucero tested positive for cannabinoids, amine, amphetamine, and 17,642 ng/mL of methamphetamine. SR 42.

The State charged Lucero by information with possession of a methamphetamine, a class five felony in violation of SDCL 22-42-5; ingestion of methamphetamine, a class five felony in violation of SDCL

22-42-5.1; and possession of drug paraphernalia, a class two misdemeanor in violation of SDCL 22-42A-3. SR 47.

Lucero and the State entered into a plea agreement. CP 3. Under the agreement, Lucero pleaded guilty to possession of methamphetamine, and the State dismissed the remaining charges, as well as those in another Fall River County case.³ CP 3. The parties left sentencing open to the court. CP 3.

A presentence investigation report followed. It showed that Lucero had twenty prior criminal cases, including seven prior felony convictions. PSI 3-5 (sealed). The report also assessed Lucero as “high” risk on the Level of Service Inventory (LSI), indicating significant risk and needs. PSI 5 (sealed).

At sentencing, Lucero’s counsel asked for a probationary sentence, while the State asked for a penitentiary sentence. ST 5, 7. When the parties assented to the pronouncement of a sentence, the court said it “reviewed the PSI in its entirety.” ST 9. The court first identified mitigating factors, noting that Lucero cooperated with the PSI process and expressed remorse. ST 9. Then the court turned to several aggravating factors:

This is your eighth felony. It started back in 1996. It does show there was 17 felonies, some were dismissed; that you have 15 plus adult convictions, not necessarily felonies; the LSI is a 33, which is high; and you did admit to using

³ Lucero was on his way to court for this case when he acquired two additional possession charges—one for hashish and another for methamphetamine. ST 4. *See also* 23CRI25-183.

methamphetamine while on bond and that you used three days before your PSI was conducted.

ST 9. The court continued:

The factors the [c]ourt has to look at for presumptive probation as well as risks to the community, whether it's a danger to the community, whether you failed to follow the terms of probation, poor performance on bond, escalating behavior, failure to accept responsibility, criminal history or multiple files.

. . .

The [c]ourt doesn't feel probation is an adequate sentence. The [c]ourt is going to, given the criminal history, given that you used meth on bond, admittedly, *we do feel that you're a danger to the community, you pose a significant risk to the community*, so the [c]ourt will impose five years in the South Dakota State Penitentiary with three years suspended . . .

ST 9-11 (emphasis added). Neither Lucero nor his counsel objected to the sentence pronounced by the court. ST 11.

Lucero's final disposition reflected the court's findings. In Lucero's judgment of conviction, the court wrote:

The [c]ourt, specifically having found aggravating factors pursuant to SDCL 22-6-11 that warrant deviation from a presumptive probation. Those factors were stated on the record by the Honorable Scott A. Roetzel and include that this is [sic] the Defendant has a lengthy criminal history and this is the Defendant's eighth (8th) felony conviction, the Defendant admitted to using methamphetamine 3 days prior to completing his PSI (pre-sentence interview) with court services in this file and his LSI score was high at 33. *The defendant has been found to be a high risk to the public.*

SR 242 (emphasis added). Lucero appealed ten days later. SR 246.

ARGUMENT

LUCERO WAS PROPERLY SENTENCED.

Lucero claims the circuit court did not connect Lucero's aggravating circumstances to a risk to the public. AB 8. He also argues a "lack of adequate written findings" justifying departure from presumptive probation. AB 9. But the record shows the opposite is true. At sentencing, the court said to Lucero, "you pose a significant risk to the community," and Lucero did not object. ST 11. In Lucero's judgment of conviction, the court wrote "[t]he defendant has been found to be a high risk to the public." SR 242. Both statements came after a long list of aggravating circumstances appropriate under SDCL 22-6-11. There was no error and Lucero's sentence should be affirmed.

A. Lucero waived his sentencing challenge.

The State agrees with Lucero that SDCL 22-6-11 affords offenders convicted of certain Class 5 and Class 6 felonies the opportunity to be sentenced to probation. Yet a sentencing court can depart from presumptive probation "if the court finds aggravating circumstances exist that pose a significant risk to the public." SDCL 22-6-11. Then "the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order." *Id.*

Here, the circuit court found aggravating circumstances that make Lucero a significant risk to the public. ST 9-11. Then the court wrote

the same in its final judgment of conviction, specifying Lucero “has been found to be a high risk to the public.” SR 242.

This Court has “recently held that a defendant must object to a circuit court’s failure to comply with the presumptive sentencing provisions of [SDCL 22-6-11].” *State v. Scott*, 2024 S.D. 27, ¶ 31, 7 N.W.3d 320, 330 (citing *State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d 561, 569). Indeed, this Court made the explicit prospective requirement that “parties must first raise the issue to the circuit court to preserve the error for appeal and avoid plain error review.” *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569. “In the absence of such an objection, we held that the error was forfeited and subject to review under the plain error doctrine.” *Scott*, 2024 S.D. 27, ¶ 31, 7 N.W.3d at 330.

Lucero did not object to the circuit court’s departure from presumptive probation, so his issues on appeal are waived. *Id.* Lucero’s sentence can be affirmed on this basis alone.

B. If this Court reviews Lucero’s complaints, it will find no error.

Lucero suggests his claims should be reviewed de novo. AB 6. But because he failed to preserve his issue for appellate review, this Court has the discretion to review his case for plain error. *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569. Indeed, “when ‘an issue has not been preserved by objection at trial,’ this Court *may* conduct a limited review to consider ‘whether the circuit court committed plain error.’” *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338 (quoting *State v.*

Buchhold, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821) (emphasis added).

This Court invokes its discretion to review a case for plain error

“cautiously and only in ‘exceptional circumstances.’” *State v. Clemensen*, 2025 S.D. 68, ¶ 48, 28 N.W.3d 902, 918, *reh'g denied* (Jan. 15, 2026) (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729).

This is not a case needing plain error review. It is obvious on the face of the record that the circuit court complied with SDCL 22-6-11. Even if this were an exceptional circumstance, Lucero must show that there was “(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 affect[s] the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Richter*, 2025 S.D. 58, ¶ 18, 27 N.W.3d 777, 785 (quoting *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206).

In addition, Lucero must show prejudice under the third prong. “Without prejudice, the error does not ‘affect substantial rights’ under the third prong of plain error review and ‘[an appellate court] ha[s] no authority to correct it.’” *Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d at 206 (quoting *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)). “‘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. Fifteen Impounded Cats*,

2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283 (quoting *United States v. Rush-Richardson*, 574 F.3d 906, 911 (8th Cir. 2009)).

Even if this Court finds the decision to deviate from presumptive probation under SDCL 22-6-11, without objection, is reviewed for an abuse of discretion, Lucero cannot meet this burden. *State v. Underwood*, 2017 S.D. 3, ¶ 13, 890 N.W.2d 240, 243. “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.” *People in Int. of J.A.D.*, 2026 S.D. 11, ¶ 28, 32 N.W.3d 673, 682 (internal citations omitted).

If that standard applies, “a sentence within the statutory maximum generally will not be disturbed on appeal.” *State v. Miles*, 2021 S.D. 13, ¶ 17, 956 N.W.2d 61, 67 (cleaned up) (quoting *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406). “Before imposing a sentence, however, the court must become thoroughly acquainted with the character and history of the defendant by considering the ‘general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record[,] as well as the rehabilitative prospects of the defendant.’” *Id.* (quoting *State v. Yeager*, 2019 S.D. 12, ¶ 12, 925 N.W.2d 105, 110). And while SDCL 22-6-1(8) allows for a five-year penitentiary sentence, Lucero was subject to SDCL 22-6-11. That statute permits the sentencing court to impose a sentence other than probation “if the court

finds aggravating circumstances exist that pose a significant risk to the public” and “ [i]f a departure is made, the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” SDCL 22-6-11.

The circuit court here checked every box it needed to. It “reviewed the PSI in its entirety.” ST 9. It heard sentencing arguments from both parties. ST 3-11. It found, in mitigation, that Lucero cooperated with the PSI and appeared to express remorse. ST 9. It named aggravating circumstances—including that this was Lucero’s eighth felony; he had seventeen prior felony charges; he had a high LSI score; he used meth while on bond for this case; he was a risk to the community; and he could not follow the terms of probation—that made Lucero a significant risk to the public requiring departure from presumptive probation. It named those circumstances at sentencing. ST 9-11. And it enumerated the same in the judgment of conviction. SR 242.

Lucero argues the court should have honored his request for probation because he had the support of his parents and had a plan for supervision in Colorado. AB 9. The circuit court heard Lucero’s request to “take [his] word for it that [he] would change,” but in “looking at the total picture,” the court did not believe Lucero would change his thirty-year pattern of criminal behavior, including his poor behavior while out on bond. ST 10. Its sentence was appropriate.

This is not *Kurtz*. There, the court specifically found the defendant was *not* “much of a threat to society.” *State v. Kurtz*, 2024 S.D. 13, ¶ 13, 4 N.W.3d 1, 5. Here, the court said the opposite: Kurtz *does* pose “a high risk to the public.” SR 242.

This is not *Underwood*. There, the defendant argued the only aggravating circumstances justifying departure must show “a risk of violence or career criminality.” *State v. Underwood*, 2017 S.D. 3, ¶ 6, 890 N.W.2d 240, 242. But this Court disagreed, specifying factors that pose a significant risk to the public need not show a risk of violence. *Id.* ¶ 8. Appropriate factors can include criminal history, the nature of prior crimes, parole violations, the nature of charges being dismissed, disregard for previous court orders and release terms, and the likelihood the defendant would be successful on parole. *Id.* ¶ 9. Here, the court similarly cited Lucero’s criminal history, the nature of his prior crimes, his criminal activity while on bond, his risk to the community, his failure to follow the terms of probation, his escalating behavior, the dismissal of his other files, and it concluded Lucero poses “a significant risk to the community.” ST 9-11. Because some factors may or may not show a defendant’s risk to the public, the court must postulate which side they fall on. *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d 1, 5 (specifying “it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant

risk to the public”). The court adhered to *Kurtz* because it said the “total picture” illustrated Lucero was a risk. ST 10.

And this is not *Flowers*. There, “the court did not state any aggravating circumstances on the record or in the written judgment.” *State v. Flowers*, 2016 S.D. 63, ¶ 9, 885 N.W.2d 783, 785. Here, the opposite is true on both fronts. ST 9-11; SR 242.

This isn’t a case where the circuit court failed to enumerate aggravating circumstances on the record or in the final disposition. This isn’t a case where the court made broad sweeping findings with no reasonable correlation to the defendant’s risk to the public. And this isn’t a case where the circuit court found the defendant to be a risk to the public without support. This is a case where the defendant had a truly remarkable criminal history, had numerous prior felony convictions, used meth while on bond, and posed a high risk to society. The circuit court’s finding of aggravating circumstances here was appropriate and it followed the statute perfectly. It’s sentence fell within the range of permissible choices for a class five felony with aggravating circumstances. SDCL 22-6-1(8).

CONCLUSION

Lucero made no objection at his sentencing. The appellate record reveals no error, much less plain error or an abuse of discretion, in the circuit court’s departure from presumptive probation. The court fulfilled its sentencing duty by strictly adhering SDCL 22-6-11. It found

aggravating circumstances existed that made Lucero a significant risk to the public. And it listed them at sentencing and in the judgment of conviction. Thus, the State asks that Lucero's 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 2,936 words.

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

Dated this 6th day of May, 2026.

/s/ Sarah L. Thorne

Sarah L. Thorne

Deputy Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of May, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Jeremy Lucero* was served via Odyssey File and Serve upon Ilisja Duffy at ilisja@duffylaw.us.

/s/ Sarah L. Thorne

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