

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30954, 30955, 30956, 30957, 30958, & 30959

KOLTEN B. WARE
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE AND MEADE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE COMER, CIRCUIT COURT JUDGE
HONORABLE JOHN FITZGERALD, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal was filed on January 3, 2025.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,
vs.

NO. 30954, 30955, 30956,
30957, 30958, & 30959

KOLTEN B. WARE,

Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this Brief, Kolten Ware, will be referred to as "Mr. Ware." The State of South Dakota will be referred to as "State." References to documents in this record will be designated as follows:

- Initial Appearance Hearing TranscriptIA
- Arraignment/Change of Plea Hearing Transcript.....COP
- Sentencing Hearing Transcript.....SENT

JURISDICTIONAL STATEMENT

Mr. Ware appeals from the Judgment entered by the Honorable Michelle Comer in the Fourth Judicial Circuit, on December 5, 2024, appeals 30954 of 40CRI23-1501, 30955 of 40CRI23-1501, 30956 of 40CRI24-206, 30957 of 40CRI24-243, and 30958 of 40CRI24-908. Notice of Appeal was timely filed on January 3, 2025. This Court has jurisdiction over these matters under SDCL § 23A-32-2.

Mr. Ware also appeals from the Judgment entered by the Honorable John Fitzgerald in the Fourth Judicial Circuit, on December 11, 2024, appeal 30959 of 46CRI24-1006. Notice of Appeal was timely filed on January 3, 2025. This Court has jurisdiction over this matter under SDCL § 23A-32-2.

STATEMENT OF THE CASES

30954

On January 17, 2024, the State of South Dakota charged Mr. Ware by Indictment with Count I: Grand Theft Value more than five thousand dollars but less than one-hundred-thousand dollars alleging that on or about the 28th day of December 2023, in the County of Lawrence, State of South Dakota Mr. Ware did take or exercise control over property of another whose value exceeds five thousand dollars but was less than one-hundred-thousand dollars in value with the intent to deprive owner of said property contrary to SDCL § 22-30A-1 and 22-30A-17. Count II Aggravated Assault Against Law Enforcement Officer in that on or about the 28th day of December 2023, in the County of Lawrence, State of South Dakota, Mr. Ware did attempt to cause or knowingly cause bodily injury to-wit: Officer Patrick Kaiser, with a dangerous weapon contrary to SDCL § 22-18-1.1(2) and SDCL § 22-18-1.05. Count IIIA: Aggravated Assault in that on or about the 28th day of December 2023, in the County of Lawrence, State of South Dakota, Mr. Ware, did attempt by physical menace with a deadly weapon, to put another in fear of imminent serious bodily harm contrary to SDCL § 22-18-1.1(5). Count IV Intentional Damage to Property in an amount of more than Two-Thousand-Five Hundred Dollars but less than Five-Thousand Dollars in that on the 28th day of December 2023, in the County of Lawrence, State of South Dakota, Mr. Ware did intentionally injure, damage or destroy private property in which others have an interest, other than by arson, without the consent

of the other persons, and the damage was more than two-thousand-five-hundred dollars but less than five-thousand dollars contrary to SCDL § 22-34-1. Count V: Aggravated Eluding in that on the 28th day of December 2023, in the County of Lawrence, State of South Dakota, Mr. Ware, the driver of a vehicle, did flee from a law enforcement officer, and at any time during the flight or pursuit, did operate the vehicle in a manner that constitutes an inherent risk of death or serious bodily injury to any third party contrary to SDCL § 32-33-18.2

Mr. Ware pled guilty to Count I Grand Theft, Count II Aggravated Assault on Law Enforcement, and Count V Aggravated Assault pursuant to a plea agreement that encompassed this file and four other pending Lawrence County circuit court files. In exchange for Mr. Ware's guilty pleas, in this file, Counts IIIA and IV as well as the Part II Information were dismissed. On December 5, 2024, Mr. Ware was sentenced to ten years in the penitentiary for Count I Grand Theft, twenty years with ten suspended for Count II Aggravated Assault on Law Enforcement Officer, and two years in the penitentiary for Count VI Aggravated Eluding. The sentences in Counts I, II, and VI were ran concurrently with one another.

30955

On March 13, 2024, Mr. Ware was indicted for the following alleged violations of the law: Count I Aggravated Assault in violation of SDCL § 22-18-1.1(8); Count II Aggravated Eluding in violation of SDCL § 32-33-18.2; and Count IV Violation of a No Contact Order as a Felony in violation of SDCL § 25-10-13. The State filed a Part II Information on March 21, 2024. Mr. Ware was arraigned on these allegations and the Part II Information on March 21, 2024. The State filed an amended Part II Information on April 8, 2024, that removed an allegation of a felony conviction from October 2, 2017, for Possession of a Controlled

Substance in Meade County, South Dakota. The amended Part II Information reduced the number of prior felonies on the Part II from seven to six.

Mr. Ware pled guilty to Count II Aggravated Eluding and Count III Violation of a Protection Order or No Contact Order as a Felony and admitted to the Part II Information on September 12, 2024. *COP 12:12-17* The pleas in this file were part of a plea agreement that included files 40CRI23-1501, 40CRI24-206, 40CRI24-243, and 40CRI24-908. Mr. Ware was sentenced to ten years in the penitentiary for both counts. *SENT 19:12-14 & 21-24*. The sentences were ran concurrent with one another and with sentences in files 40CRI23-1501, 40CRI24-206, 40CRI24-243, and 40CRI24-908. *SENT 20:17-18*.

30956

On March 13, 2024, Mr. Ware was indicted for the following alleged violations of the law: Count I Possession of a Controlled Drug or Substance (Methamphetamine) in violation of SDCL § 22-42-5 and SDCL § 34-20B. Mr. Ware was also charged by Information with Violation of a No Contact Order in violation of SDCL § 25-10-13. The State filed a Part II Information alleging that Mr. Ware was a habitual offender. Mr. Ware was arraigned on Count I and the Part II Information on March 21, 2024. The State filed an amended Part II Information on April 8, 2024, that removed an allegation of a felony conviction from October 2, 2017, for Possession of a Controlled Substance in Meade County, South Dakota. The amended Part II Information reduced the number of prior felonies on the Part II from seven to six.

Mr. Ware pled guilty to Count I Possession of a Controlled Drug or Substance (Methamphetamine) and admitted to the Part II Information on September 12, 2024. *COP 14:17-19*. Mr. Ware was sentenced to ten years in the penitentiary on Count I. *SENT 20:3-5*.

The sentences were ran concurrent with one another and with sentences in files 40CRI23-1501, 40CRI24-171, 40CRI24-243, and 40CRI24-908. *SENT* 20:17-18.

30957

On March 13, 2024, Mr. Ware was indicted for Count I Failure to Appear on a Felony in violation of SDCL § 23A-43-31. The State filed a Part II Information on March 14, 2024. Mr. Ware was arraigned on Count I and the Part II Information on March 21, 2024. The State filed an amended Part II Information on April 8, 2024, that removed an allegation of a felony conviction from October 2, 2017, for Possession of a Controlled Substance in Meade County, South Dakota. The amended Part II Information reduced the number of prior felonies on the Part II from seven to six.

Mr. Ware pled guilty to Count I Count I Failure to Appear on a Felony. *COP* 15:22-24. Mr. Ware was sentenced to two years in the penitentiary on Count I. *SENT* 20:8-9. The sentences were ran with sentences in files 40CRI23-1501, 40CRI24-171, 40CRI24-206, and 40CRI24-908. *SENT* 20:17-18

30958

On August 28, 2024, Mr. Ware was indicted for the following alleged violations of the law: Count I Grand Theft Value more than Two-Thousand-Five Hundred but less than Five Thousand in violation of SDCL § 22-30A-1 and 22-30A-17(1) or in the alternative Count IA Possession of Stolen Vehicle in violation of SDCL § 32-4-5.

Mr. Ware pled guilty to Count I Grand Theft Value more than Two-Thousand-Five Hundred but less than Five Thousand. *COP* 16:13-14. Mr. Ware was sentenced to five years in the penitentiary for both counts. *SENT* 20:11-13. The sentences were ran concurrent with one another and with sentences in files 40CRI23-1501, 40CRI24-171, 40CRI24-206, and 40CRI24-243. *SENT* 20:17-18.

30959

On September 11, 2024, the State of South Dakota charged Mr. Ware by Information with Conspiracy to Commit Possession of a Controlled Drug or Substance with Intent to Distribute – Fentanyl in that he did, with at least one other person, conspire to commit the public offense of Possession of a Controlled Drug or Substance with Intent to Distribute, with one or more of the parties, doing any act to effect the object of the conspiracy, to-wit: 1. Mr. Ware received proceeds to buy illegal controlled substance, and 2. Transferred information via electronic media to consummate the distribution of a controlled substance, in violation of SDCL § 22-42-2.4, SDCL § 22-42-2, SDCL 22-42-5, and SDCL § 22-3-8.

Mr. Ware waived his right to a preliminary hearing through counsel orally on the record at his arraignment and change of plea hearing on October 16, 2024. Mr. Ware pled guilty to the only count in the file, count one, Conspiracy to Commit Possession of a Controlled Drug or Substance with Intent to Distribute – Fentanyl on October 16, 2024, pursuant to a global plea agreement that encompassed a number of Lawrence County files, this Meade County file, and a Pennington County file. He was sentenced to ten years in the penitentiary on December 11, 2024. The circuit court ran this sentence consecutive to sentences Mr. Ware received in Lawrence County December 5, 2024.

STATEMENT OF FACTS

30954

On December 28, 2023, an assault was reported to the police. *COP 11:7-9.* Mr. Ware was identified as the possible assailant and a description of the vehicle he was driving was reported to local police. *COP 11:9-10.* Deadwood Police Officer Patrick Kiaser located Mr. Ware's vehicle and identified him as the driver. *COP 11:11-14.* Officer Kiaser asked Mr.

Ware to exit the vehicle, but he refused to do so. *COP 11:14-15.* The mirror of Mr. Ware's vehicle struck Officer Kiaser's bicep before Mr. Ware crashed into Officer Kiaser's patrol vehicle. *COP 11:16-18.* Mr. Ware then fled the area with other officers in pursuit. *COP 11:18-19.* The other officers called off the pursuit due to the excessive speeds. *COP 11:20-21.* Mr. Ware's vehicle was later discovered near the location of a report for a stolen vehicle. *COP 11:21-23 & 12:1-3.*

30955

In the morning hours of February 1, 2024, police were notified of a fight and found evidence of the aftermath of a fight in the McMasters area. *COP 12:20-23.* A.P. reported that Mr. Ware had grabbed her and choked her during an argument. *COP 12:23-25.* There was a protection order in place on that date preventing Mr. Ware from having contact with A.P. *COP 13:2-4.* Officers stopped Mr. Ware in A.P.'s van shortly after this reported incident. *COP 13:7-10.* Mr. Ware fled from the officers going seventy to eighty miles per hour in a thirty-five mile per hour zone on icy road conditions. *COP 13:11-13.* Mr. Ware passed several other vehicles while fleeing from the police. *COP 13:14-15.*

30956

On March 1, 2024, Mr. Ware was searched incident to an arrest on outstanding warrants. *COP 14:22-24.* A needle containing methamphetamine was located on his person during this search. *COP 14:25 & 15:1-2.* The needle was tested in a laboratory and confirmed to contain methamphetamine. *COP 15:2-3.*

30957

On February 29, 2024, at 9:00 am Mr. Ware failed to appear in court for a non-evidentiary motion hearing for file 40CRI23-1501. *COP 16:6-7.* Mr. Ware was present in the court with counsel when this court date was set on January 25, 2024. *COP 16:2-5.*

30958

On February 2, 2024, a green 1998 Chevrolet pickup truck was reported stolen. *COP 16:18 & 17:2-3.* The truck was recovered the next day in Denver Colorado. Mr. Ware's DNA was found on the steering wheel. *COP 17:4-7.*

30959

Between October 1, 2023, and December 31, 2023, Mr. Ware participated in a conspiracy to distribute fentanyl. *COP 11:22-25 & 12: 1-2.* Mr. Ware's participation in this conspiracy was receiving funds to buy fentanyl and communicating via electronic media to consummate the purchase of fentanyl. *COP 12:3-8.* The State noted that E.G. died of a drug overdose as a result of ingesting the fentanyl that Mr. Ware provided her, and as a result Mr. Ware was receiving a benefit of the bargain in that he was not being charged with a class two felony conspiracy to distribute enhanced by a death. *Sent 5:24-25 & 6:1-3.* E.G. was an employee of the Fourth Judicial Circuit before her death. *LA 7:21-22.*

STATEMENT OF LEGAL ISSUES

Whether Mr. Ware knowingly entered into a plea agreement, specifically in appeal 30954 of 40CRI23-1501 to Count II Aggravated Assault on Law Enforcement given the application of the truth in sentencing act to this particular count.

Whether the sentences in appeals 30955 of 40CRI24-171, 30956 of 40CRI24-206, 30957 of 40CRI24-243, 30958 of 40CRI24-908, and 30959 of 40CRI24-1006 should be vacated along with the sentence in 30954 of 40CRI23-1501 since they are all part of a global plea agreement.

STANDARD OF REVIEW

Whether a plea agreement was knowing and voluntarily entered into is examined on the totality of the circumstances. *State v. Outka*, 844 N.W.2d 598, 608 (SD 2014). The following factors are used to evaluate the totality of the circumstances: 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.

ARGUMENT

Mr. Ware did not knowingly and voluntarily enter into the plea agreement because he did not know how the truth in sentencing act would impact his sentence for the conviction on the Aggravated Assault on Law Enforcement count.

Mr. Ware was thirty-one years old at the time of his sentencing and had previously been convicted of seven felonies. *SENT* 4:5-6. Mr. Ware was represented by counsel throughout the pendency of this case from the arraignment through the change of plea and at sentencing. Mr. Ware had a number of files pending in Lawrence County, one in Meade County, and another in Pennington County. Mr. Ware's Lawrence County files were being handled by the Lawrence County State's Attorney's Office and his Meade and Pennington County files were being handled by the Attorney General's office. He had two written plea agreements for his cases, one from the Lawrence County State's Attorney's office that covered all his pending matters in Lawrence County and one from the Attorney General's Office that covered his Meade and Pennington County matters. Mr. Ware was advised of his rights at his initial appearance on January 3, 2024, and his arraignment on January 25, 2024. *LA* 2-8 & *ARR* 2-7. The circuit court judge went over Mr. Ware's rights again at the

change of plea and went over the maximum sentences for each plea in accordance with the written plea agreement. COP 5-10.

Mr. Ware was sentenced to twenty years in the South Dakota State Penitentiary with ten years suspended on Count II Aggravated Assault on Law Enforcement. *SENT* 19:1-4. Aggravated Assault on Law Enforcement is a Class Two felony. SDCL § 22-18-1.05. A Class Two felony is punishable by twenty-five years imprisonment and a fifty-thousand dollar fine. SDCL § 22-6-1(5).

Mr. Ware's sentence is within the statutory limits of SDCL § 22-6-1(5) and is actually five years less than the maximum. Additionally, ten of the twenty years imposed are suspended so Mr. Ware's initial prison sentence is ten years, which is fifteen years lower than the maximum.

Mr. Ware informed appellant counsel that he was advised that he would only have to serve fifty percent of the sentence imposed by his trial counsel and court services via his presentence investigation report (PSI). He learned upon his arrival in prison that due to the truth in sentencing act he would have to serve one hundred percent of the sentence on the Aggravated Assault on Law Enforcement charge. Senate Bill 146 amended SDCL § 24-15-4 by adding subsection 4.1, which states that an inmate sentenced to a term of imprisonment for aggravated assault against law enforcement in violation of SDCL § 22-18-1.05 is ineligible for parole except as provided in SDCL § 24-15A-55 and § 24-15A-68.

The potential length of incarceration a prisoner exposes himself to by pleading guilty is a direct consequence of a guilty plea. *Dalton v. Battaglia*, 402 F.3d 729, 733 (7th Cir. 2018). Inaccurate advice of counsel about the likely punishment does not make a defendant's decision to plead guilty involuntary as long as the defendant is informed of the maximum sentence permitted by statute and the court's ability to sentence within that range. *U.S. v.*

Quiroga, 554 F.3d 1150, (8th Cir. 2009). The issue in Mr. Ware's case is not that he received inaccurate information about the overall length of his sentence. He was informed of this accurately at his initial appearance, arraignment, and change of plea hearings. Mr. Ware knew the maximum potential length he would be exposed to at sentencing.

The issue is the role his parole eligibility played in his decision to enter into the plea agreement. The South Dakota Unified Judicial System has parole unlike the Federal Court System. There are also differences between the role of a PSI in state court and a Presentence Report (PSR) in federal court. A federal PSR includes a calculation of the "guidelines range" used by the District Court Judge to fashion a sentence. The sentence in federal court is the time the defendant will spend incarcerated because there is no parole in the federal system. Page twenty of Mr. Ware's PSI states that he will have to serve seventy-five percent of any sentence the Circuit Court imposes on him. This calculation fails to consider the changes the Truth in Sentencing Act has on the amount of time Mr. Ware will serve before being eligible for parole. The time incarcerated prior to parole eligibility is a significant factor in a defendant's decision to enter into a plea agreement, when there is not an adequate understanding on the defendant's part of what percentage of a sentence he will be incarcerated the guilty plea is not knowingly and voluntarily entered.

The State will likely argue that a misunderstanding of the percentage of a sentence a defendant will have to serve is irrelevant so long as the defendant is informed of the maximum sentence he faces. This argument minimizes the difficult decision that a criminal defendant makes when he decides to enter into a plea agreement when he will be giving up his liberty for a specified period of time. Criminal defendants often take solace in the fact that they will only have to serve a percentage of the time they are sentenced to. Mr. Ware's solace was taken from him when he learned that he would have to serve one hundred

percent of his sentence for Aggravated Assault on Law Enforcement upon his arrival at the South Dakota Department of Corrections.

Mr. Ware asks this Court to vacate the judgment on Count II Aggravated Assault on Law Enforcement in file 40CRI23-1501 and remand to the circuit court for further proceedings.

The sentences in all the Lawrence County files should be vacated to comply with the sentence package doctrine.

Contract law principles are applicable to disputes over plea agreements as long as the defendant is also afforded due process protections. *McKeever v. Warden, SCI-Graterford*, 486 F.3d 81, 86 (3rd Cir. 2007). The “sentence package doctrine,” that interdependent sentences create a coherent sentencing package, may render the underlying sentence package voidable when reversal of one count is reversed on appeal. *U.S. v. Sprenger*, 14 F.4th 785, 794 (7th Cir. 2021). The “sentencing package doctrine generally applies to sentences with interdependent, consecutive counts, and not to concurrent sentences.” *McKeever v. Warden, SCI-Graterford*, 486 F.3d 81, 87 (3rd Cir. 2007).

Both plea agreements state that all the sentences were to be ran concurrent to one another. The sentences in the Lawrence County cases were all ran concurrent by the one judge and all of the sentences in the other Lawrence County cases as well as the additional charge in 40CRI23-1501 should all be vacated to comply with the “sentence package doctrine.” The Meade County sentence was issued by a different judge and ran consecutive to the Lawrence County sentences and should therefore not be vacated under the “sentence package doctrine.”²²

Mr. Ware asks this Court to vacate the judgment on Count I and Count VI in file 40CRI23-1501 and remand to the circuit court for further proceedings. He additionally asks

that the judgements in 40CRI24-171, 40CRI24-206, 40CRI24-243, and 40CRI24-908 be vacated in their entirety and remanded to the circuit court for further proceedings. He asks this Court to take no action on Meade County file 46CRI24-1006.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Brief contains about 4,103 words and 17 pages. I certify that the word processing software used to prepare this brief is Microsoft Word (Version 16.100.4).

By: */s/ L. Adam Bryson*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 9, 2025, a true and correct copy of Appellant's Brief in the matter of The State of South Dakota v. Kolten B. Ware, was served via electronic mail upon the individuals listed below:

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SIGNED AND DATED this 9th day of October, 2025.

Respectfully submitted,
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By: */s/ L. Adam Bryson*
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Attorney for Appellant

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, *
Plaintiff, * CRI 23-1501
*
VS. * JUDGMENT OF CONVICTION
*
*
KOLTEN BRADFORD WARE, *
Defendant. *

An Indictment was filed with this Court on the 17th day of January, 2024 charging the Defendant with the crime of Count I: Grand Theft Value More Than \$5,000.00 But Less Than \$100,000.00 (SDCL 22-30A-1 and 22-30A-17), Count II: Aggravated Assault Against Law Enforcement Officer (SDCL 22-18-1.1(2) and 22-18-1.05), Count IIIA: Aggravated Assault (SDCL 22-18-1.1(5), Count IV: Intentional Damage To Property In An Amount Of More Than \$2,500.00 But Less Than \$5,000.00 (SDCL 22-34-1), Count V: Aggravated Eluding (SDCL 32-33-18.2) and a Part II Information was filed with this Court on the 17th day of January, 2024.

The Defendant was arraigned on said Indictment and Part II Information on the 25th day of January, 2024. The Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of not guilty to the charges.

The Defendant was arraigned on said Indictment and Part II Information on the 12th day of September, 2024. The Defendant, Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of guilty to Count I: Grand Theft Value More Than \$5,000.00 But Less Than \$100,000.00 (SDCL 22-30A-1 and 22-30A-17), Count II: Aggravated Assault Against Law Enforcement Officer (SDCL 22-181.1(2) and 22-18-1.05), Count V: Aggravated Eluding (SDCL 32-33-18.2).

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of the Court that the Defendant is guilty of to Count I: Grand Theft Value More Than \$5,000.00 But Less Than \$100,000.00 (SDCL 22-30A-1 and 22-30A-17), Class 4 Felony, Count II: Aggravated Assault Against Law Enforcement Officer (SDCL 22-181.1(2) and 22-18-1.05), Class 2 Felony, and Count V: Aggravated Eluding (SDCL 32-33-18.2), Class 6 Felony.

S E N T E N C E

On the 5th day of December, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

Count I: Grand Theft Value More Than \$5,000.00 But Less Than \$100,000.00

IT IS HEREBY ORDERED that the Defendant shall serve ten (10) years in the South Dakota State Penitentiary and pay costs of \$116.50 LEOTF. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 270 days.

IT IS FURTHER ORDERED that the Defendant shall make restitution in the amount of \$150.00 to Valorie Seaman, 20811 Radio Tower Road, Sturgis, SD 57785 to be paid through the Lawrence County Clerk of Court's Office.

Count II: Aggravated Assault on Law Enforcement Officer

IT IS HEREBY ORDERED that the Defendant shall serve 20 years in the South Dakota State Penitentiary and shall pay costs of \$116.50. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 270 days. This sentence shall run concurrent with Count I.

IT IS FURTHER ORDERED that ten (10) years of the twenty (20) year sentence shall be suspended upon the following terms and conditions:

- (1) Defendant shall pay all costs.

Count V: Aggravated Eluding

IT IS HEREBY ORDERED that the Defendant shall serve 2 years in the South Dakota State Penitentiary and shall pay costs of \$116.50. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 270 days. This sentence shall run concurrent with Count I and Count II.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence County for court appointed attorney fees in the amount of \$209.25 Joe Kosel fees + \$3,660.50 to be paid through the Lawrence County Auditor's Office.

IT IS RECOMMENDED that the Defendant receive mental health and substance abuse treatment while incarcerated.

BY THE COURT: 12/6/2024 10:10:13 AM

Attest: CAROL LATUSECK, CLERK
Mund, Tonisha
Clerk/Deputy



Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: December 28, 2023

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, *
Plaintiff, * CRI 24-171
*
VS. * JUDGMENT OF CONVICTION
*
*
KOLTEN BRADFORD WARE, *
Defendant. *

An Indictment was filed with this Court on the 13th day of March, 2024 charging the Defendant with the crime of Count I: Aggravated Assault (SDCL 22-18-1.1(8)), Count II: Aggravated Eluding (SDCL 32-33-18.2), Count IV: Violation Of No Contact Order As A Felony (SDCL 25-10-13) and a Part II Information was filed with this Court on the 8th day of April, 2024.

The Defendant was arraigned on said Indictment and Part II Information on the 21st day of March, 2024. The Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of not guilty to the charges.

The Defendant was arraigned on said Indictment and Part II Information on the 12th day of September, 2024. The Defendant, Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of guilty to Count II: Aggravated Eluding (SDCL 32-33-18.2),

Count IV: Violation Of No Contact Order As A Felony (SDCL 25-10-13) and admitted to the Part II Information.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of the Court that the Defendant is guilty of to Count II: Aggravated Eluding (SDCL 32-33-18.2), maximum penalty ten years, Count IV: Violation Of No Contact Order As A Felony (SDCL 25-10-13), maximum penalty ten years.

S E N T E N C E

On the 5th day of December, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

Count II: Aggravated Eluding

IT IS HEREBY ORDERED that the Defendant shall serve ten (10) years in the South Dakota State Penitentiary and pay costs of \$116.50 LEOTF. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 251 day. This sentence shall run concurrent to file number 23-1051.

Count IV: Violation Of No Contact Order As A Felony

IT IS HEREBY ORDERED that the Defendant shall serve ten (10) years in the South Dakota State Penitentiary and pay costs of \$116.50 LEOTF. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 251 day. This sentence shall run concurrent to file number 23-1051 and to Count II: Aggravated Eluding.

BY THE COURT:

12/07/2024 10:10:42 AM

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy



Michelle Comer

Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: February 1, 2024

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, *
Plaintiff, * CRI 24-206
*
VS. * JUDGMENT OF CONVICTION
*
*
KOLTEN BRADFORD WARE,
Defendant. *

An Indictment was filed with this Court on the 13th day of March, 2024 charging the Defendant with the crime of Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B) and a Part II Information was filed with this Court on the 21st day of March, 2024.

The Defendant was arraigned on said Indictment and Part II Information on the 21st day of March, 2024. The Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of not guilty to the charge.

The Defendant was arraigned on said Indictment and Part II Information on the 12th day of September, 2024. The Defendant, Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of guilty to Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B) and admitted to the Part II Information.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of the Court that the Defendant is guilty of to Count I: Possession Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), maximum penalty fifteen years.

S E N T E N C E

On the 5th day of December, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

Count I: Possession Of A Controlled Drug Or Substance

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 251 days. This sentence is deemed to have commenced on the 5th day of December, 2024. This sentence shall run concurrent to file number 23-1501 and 24-171.

IT IS FURTHER that the Defendant pay to the Lawrence County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division Of Criminal Investigation, 1302 E Highway 14, Ste. 5, Pierre, SD 57501) for the costs of urinalysis and/or testing of the marijuana or controlled substances in this case in the amount of \$120.00.

BY THE COURT:

12/6/2024 10:16:25 AM

Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

Attest: CAROL LATUSECK, CLERK
Mund, Tonisha
Clerk/Deputy



DATE OF OFFENSE: March 1, 2024

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, *
Plaintiff, * CRI 24-243
*
VS. * JUDGMENT OF CONVICTION
*
*
KOLTEN BRADFORD WARE, *
Defendant. *

An Indictment was filed with this Court on the 13th day of March, 2024 charging the Defendant with the crime of Count I: Felony Failure To Appear (SDCL 23A-43-31) and a Part II Information was filed with this Court on the 21st day of March, 2024.

The Defendant was arraigned on said Indictment and Part II Information on the 21st day of March, 2024. The Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of not guilty to the charge.

The Defendant was arraigned on said Indictment and Amended Part II Information on the 12th day of September, 2024. The Defendant, Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of guilty to Count I: Felony Failure To Appear (SDCL 23A-43-31)

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was

voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of the Court that the Defendant is guilty of to Count I: Felony Failure To Appear (SDCL 23A-43-31), Class 6 Felony.

S E N T E N C E

On the 5th day of December, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50 LEOTF. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 251 days. This Sentence shall run concurrent to files number 23-1501, 24-171, 24-206.

BY THE COURT:

12/6/2024 10:10:19 AM

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy



Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: February 29, 2024

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, *
Plaintiff, * CRI 24-908
*
VS. * JUDGMENT OF CONVICTION
*
*
KOLTEN BRADFORD WARE, *
Defendant. *

An Indictment was filed with this Court on the 28th day of August, 2024 charging the Defendant with the crime of Count I: Grand Theft Value More Than \$2,500.00 But Less Than \$5,000.00 (SDCL 22-30A-1 and 22-30-17(1)) and a Part II Information was filed with this Court on the 6th day of September, 2024.

The Defendant was arraigned on said Indictment and Part II Information on the 12th day of September, 2024. The Defendant, Defendant's attorney, Tim Barnaud, and Brenda Harvey as prosecuting attorney appeared at the Defendant's arraignment. 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 to a jury trial. The Defendant entered a plea of guilty to Count I: Grand Theft Value More Than \$2,500.00 But Less Than \$5,000.00 (SDCL 22-30A-1 and 22-30-17(1)).

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

It is, therefore, the JUDGMENT of the Court that the Defendant is guilty of Count 1: Grand Theft Value More Than \$2,500.00 But Less Than \$5,000.00 (SDCL 22-30A-1 and 22-30-17(1)), Class 5 Felony.

S E N T E N C E

On the 5th day of December, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS HEREBY ORDERED that the Defendant shall serve five (5) years in the South Dakota State Penitentiary and pay costs of \$116.50 LEOTF. This Sentence is deemed to have commenced on the 5th day of December, 2024. The Defendant shall receive credit for time served of 64 days. This sentence shall run concurrent with file numbers 23-1501, 24-171, 24-206 and 24-243.

IT IS FURTHER ORDERED that the Defendant shall pay restitution in the amount of \$1,000.00 to Joyce and\or Mark Nelson, 12445 Misty Meadows Road, Nemo, SD 57759 to be paid through the Lawrence County Clerk of Courts Office.

12/6/2024 10:10:36 AM

BY THE COURT:

Attest: CAROL LATUSECK, CLERK
Mund, Tonisha
Clerk/Deputy



Michelle Comer

Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: February 2, 2024

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA,)	IN CIRCUIT COURT
) ss	
COUNTY OF MEADE)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,)	File No. 46CRI 24-1006
)	
Plaintiff,)	AMENDED
vs.)	JUDGMENT OF CONVICTION
KOLTEN BRADFORD WARE,)	
DOB: 5.11.93)	
CR#: 20235572)	
Defendant.)	

On the 11th day of December, 2024, the Defendant, **KOLTEN BRADFORD WARE**, being present personally and being represented by and through his attorney, Tim Barnaud; the State being represented by Assistant Attorney General, Robert Haivala; the Defendant having previously been arraigned on an Information alleging the offense of Conspiracy to Commit Possession of a Controlled Drug or Substance with Intent to Distribute - Fentanyl (CLASS 4 FELONY), committed on or between the dates of October 1st, in violation of SDCL 22-42-2; the Defendant having entered a plea of guilty on October 16th, 2024, to the Information as charged; the Court finding the plea to have been entered knowingly, freely, and voluntarily; a factual basis having been found for accepting the plea; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against **KOLTEN BRADFORD WARE** in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, **KOLTEN BRADFORD WARE**, upon your conviction for the crime of Conspiracy to Commit Possession of a Controlled

Drug or Substance with Intent to Distribute (CLASS 4 FELONY), be and you hereby are sentenced to serve 10 years in the South Dakota State Penitentiary, Sioux Falls, South Dakota; and it is further

ORDERED, that the Defendant receive credit for time already served in the Meade County Jail while awaiting transport to the South Dakota State Penitentiary; and it is further

1. That the Defendant pay through the Meade County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Fifty Dollars (\$50.00); plus the crime victims' compensation surcharge pursuant to SDCL 23A-28B-42 in the amount of Five Dollars (\$5.00); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-one Dollars and Fifty Cents (\$61.50);
2. That the Defendant reimburse the Meade County through the Meade County Clerk of Courts for the cost of the drug test(s) taken in this matter in the amount of Seventy-Five dollars (\$75.00);
3. That the Defendant pay for Dismissed Case 51CRI23-2179 through the Meade County Clerk of Courts in the amount of \$44.10 for Transcript fees to the Office of the Attorney General, 1302 E. Hwy 14, Ste. 1, Pierre, South Dakota, 57501-8501
4. That the Defendant pay for Dismissed Case 51CRI23-2179 through the Meade County Clerk of Courts in the amount of \$60.00 for the Drug Test to the Rapid City Police Department Evidence Section, Attn: Gina Steele, 625 1st Street, Rapid City, South Dakota 57701;
5. That the Defendant pay for Dismissed Case 51CRI23-2179 through the Meade County Clerk of Courts in the amount of \$150.00 for the Drug Test to the South Dakota Health Laboratory, 615 East 4th Street, Pierre, South Dakota 57501;

ORDERED, that the sentence shall run consecutive to Lawrence County Cases: 40CRI23-1501, 40CRI24-206, 40CRI24-243, and 40CRI24-908; and it is further

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

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

BY THE COURT: 12/16/2024 8:36:53 AM

Attest:
Jones, Jewel
Clerk/Deputy



The Honorable John H. Fitzgerald
Circuit Court Judge
Fourth Judicial Circuit

NOTICE OF RIGHT TO APPEAL

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

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30954 / 30955 / 30956 / 30957 / 30958 / 30959

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,
v.

KOLTEN BRADFORD WARE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE AND MEADE COUNTIES, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER, Circuit Court Judge
THE HONORABLE JOHN FITZGERALD, Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

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E-mail: adam@brysonlawoffice.com

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notices of Appeal filed January 3, 2025

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CASES CITED:

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<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S.Ct. 1709 (1969).....	15, 16
<i>Fryer v. Scurr</i> , 309 N.W.2d 441 (Iowa 1981)	23
<i>Greenholtz v. Nebraska Penal Inmates</i> , 442 U.S. 1, 99 S.Ct. 2100 (1979).....	22
<i>Gregory v. State</i> , 353 N.W.2d 777 (S.D. 1984)	23
<i>Johnson v. Dees</i> , 581 F.2d 1166 (5th Cir. 1978).....	23
<i>McKeever v. Warden SCI-Graterford</i> , 486 F.3d 81 (3d Cir. 2007)	3, 27
<i>Meachum v. Fano</i> , 427 U.S. 215, 96 S.Ct. 2532 (1976)	22
<i>Nachtigall v. Erickson</i> , 85 S.D. 122, 178 N.W.2d 198 (1970)	3, 16
<i>State v. Beckley</i> , 2007 S.D. 122, 742 N.W.2d 841	16
<i>State v. Goodwin</i> , 2004 S.D. 75, 681 N.W.2d 847	24
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30954 / 30955 / 30956 / 30957 / 30958 / 30959

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KOLTEN BRADFORD WARE,

Defendant and Appellant.

PRELIMINARY STATEMENT

This Court entered an order on September 15, 2025, to consolidate appeal numbers 30954, 30955, 30956, 30957, 30958, and 30959 for purposes of briefing and submission to the Court. In this brief, Defendant and Appellant, Kolten Bradford Ware, is referred to as “Appellant” or “Ware.” Plaintiff and Appellee, the State of South Dakota, is referred to as “State.” Ware’s girlfriend, who was the alleged victim in some of his charges, is referred to by her initials, A.P. The deceased individual in case number 46CRI24-1006 / 30959 is referred to by her initials, E.G. All other individuals are referred to by name. References to documents are designated as follows:

Appellant’s Brief.....AB

Lawrence County Cases

Settled Record (Lawrence County File 40CRI23-1501).. SR1

Settled Record (Lawrence County File 40CRI24-171)....	SR2
Settled Record (Lawrence County File 40CRI24-206)....	SR3
Settled Record (Lawrence County File 40CRI24-243)....	SR4
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Sentencing Hearing (December 5, 2024) in all Lawrence County cases.....	SENT1

Meade County Case

Settled Record (Meade County File 46CRI24-1006)	SR6
Plea Hearing (October 16, 2024)	PH2
Sentencing Hearing (December 11, 2024)	SENT2

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

JURISDICTIONAL STATEMENT

On December 6, 2024, the Honorable Michelle Comer, Circuit Court Judge, Fourth Judicial Circuit, entered Judgments of Conviction in *State v. Kolten Bradford Ware*, Lawrence County Criminal File Numbers 40CRI23-1501, 40CRI24-171, 40CRI24-206, 40CRI24-243, and 40CRI24-908. SR1 260-63; SR2 255-57; SR3 214-16; SR4 206-07; SR5 203-04. On December 13, 2024, the Honorable John Fitzgerald, Circuit Court Judge, Fourth Judicial Circuit, entered an Amended Judgment of Conviction in *State v. Kolten Bradford Ware*, Meade County Criminal File Number 46CRI24-1006. SR6 104-06. Ware filed his

Notices of Appeal in each file on January 3, 2025. SR1 265; SR2 259; SR3 218; SR4 209; SR5 206; SR6 107. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER WARE KNOWINGLY AND VOLUNTARILY ENTERED GUILTY PLEAS IN EACH CASE?

Both circuit courts found that Ware knowingly and voluntarily entered guilty pleas in each case.

Nachtigall v. Erickson, 85 S.D. 122, 178 N.W.2d 198 (1970).

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

State v. Semrad, 2011 S.D. 7, 794 N.W.2d 760.

SDCL 23A-7-4

II

WHETHER THE SENTENCES IN THE LAWRENCE COUNTY CASES SHOULD BE VACATED?

Neither circuit court ruled on this issue.

McKeever v. Warden SCI-Graterford, 486 F.3d 81 (3d Cir. 2007).

State v. Sieler, 1996 S.D. 114, 554 N.W.2d 477.

SDCL 22-6-6.1

STATEMENT OF THE CASE AND STATEMENT OF FACTS¹

30954 - Lawrence County Case No. 40CRI23-1501²

¹ The Statement of the Case and the Statement of Facts are combined for brevity and clarity. In each part of this section, the State will cite to the Settled Record for the respective case.

On December 28, 2023, at approximately 12:04 p.m., the Lawrence County Sheriff's Office was advised that Ware had been involved in an alleged domestic assault at a residence in Lead, South Dakota. SR1 125, 127, 128, 129. Prior to law enforcement arriving, however, Ware left the residence in a red Jeep Commander. SR1 125, 127.

At approximately 12:27 p.m., Deadwood Police Department Officer Patrick Kaiser observed the Jeep Commander in the Cadillac Jack's parking lot in Deadwood, South Dakota. SR1 126, 127, 129. Officer Kaiser had contact with the driver of the vehicle and confirmed that he was Ware. SR1 126. Ware refused to exit the vehicle upon Officer Kaiser's command; rather, he quickly accelerated in reverse, hitting Officer Kaiser on the arm with the side mirror and rear-ending Officer Kaiser's patrol vehicle on the passenger side. SR1 126, 129. Ware then sped out of the parking lot, heading northbound on Highway 14A toward Sturgis, South Dakota. SR1 126.

Several Lawrence County Sheriff's Office deputies attempted to locate Ware's vehicle in the area. SR1 126, 127, 128, 129. Deputy Marina Cleveland and Deputy Brent McNeil observed the vehicle traveling at a high rate of speed on Highway 14A. SR1 126, 128. They attempted a pursuit, but lost sight of the vehicle. SR1 126, 128. At

² The facts for each case come from the law enforcement reports attached to the Presentence Investigation report, which is a sealed document.

approximately 1:36 p.m., Valorie Seaman advised Lawrence County Dispatch that a red Jeep Commander was parked in her driveway, and her blue Dodge Ram was missing. SR1 126, 127, 128, 129. Seaman also advised that a welding helmet had fallen off the Dodge Ram and was run over and damaged when the Dodge Ram was stolen. SR1 126.

At approximately 2:11 p.m., Rapid City Police Department Sergeant Warren Poches attempted a traffic stop on a different stolen vehicle (tan Honda Accord) near the hospital in Rapid City, South Dakota. SR1 126, 128, 129, 136, 138, 139, 140, 141. The male driver, later identified as Ware, jumped out of the vehicle and ran. SR1 126, 128, 136, 138, 139, 140, 141. He was located a short distance away and arrested. SR1 126, 130, 136-37, 139, 140, 141. The stolen Dodge Ram was found nearby in a McDonald's parking lot. SR1 127, 128, 129, 130, 137, 143.

On January 17, 2024, the Lawrence County Grand Jury indicted Ware on the following charges:

- Count I: Grand Theft Value More Than \$5,000.00 but Less Than \$100,000.00 in violation of SDCL 22-30A-1 and 22-30A-17, a Class 4 felony;
- Count II: Aggravated Assault Against Law Enforcement Officer in violation of SDCL 22-18-1.1(2) and 22-18-1.05, a Class 2 felony;
- Count IIIA: Aggravated Assault in violation of SDCL 22-18-1.1(5), a Class 3 felony;³

³ The grand jury did not return a True Bill on an alternative charge of Aggravated Assault Against Law Enforcement Officer in Count III. SR1 43.

- Count IV: Intentional Damage to Property in an Amount of More Than \$2,500.00 but Less Than \$5,000.00 in violation of SDCL 22-34-1, a Class 5 felony; and
- Count V: Aggravated Eluding in violation of SDCL 32-33-18.2, a Class 6 felony.

SR1 43-44. The State filed a Part II Information on January 18, 2024, alleging that Ware had seven prior felony convictions. SR1 45-46. An Amended Part II Information alleging six prior felony convictions was filed on April 9, 2024. SR1 59-60.

Ware and the State reached a plea agreement to resolve all Lawrence County files. SR1 116-17. On September 12, 2024, Ware entered guilty pleas to Counts I (Grand Theft), II (Aggravated Assault Against Law Enforcement Officer), and V (Aggravated Eluding). SR1 412-13; PH1 10. Counts IIIA (Aggravated Assault) and IV (Intentional Damage to Property) were dismissed pursuant to the plea agreement, as was the Amended Part II Information. SR1 69. At the sentencing hearing on December 5, 2024, the circuit court imposed penitentiary sentences of ten years on Count I, twenty years with ten years suspended on Count II, and two years on Count V, all concurrent to each other. SR1 261-62, 315-17, 318, 441-43, 444; SENT1 16-18, 19.

30955 - Lawrence County Case No. 40CRI24-171

On February 1, 2024, at approximately 11:05 p.m., Officer Austine Wilson and Officer Tanner Tadra with the Lead Police Department responded to a residence in Lead, South Dakota, on a report of two males fighting. SR2 171. The officers did not locate the

males, but had contact with Ware's girlfriend, A.P., who reported that Ware had attempted to choke her during an argument. SR2 171, 175. A.P. also reported that Ware grabbed her arm and pushed her when he thought she was going to call the police, hit A.P.'s young daughter, and charged at A.P.'s teenage son and pushed him. SR2 171, 172, 174, 175. There was an active no contact order prohibiting Ware from having contact with A.P. SR 174-75. Finally, A.P. reported that another male showed up at the residence and assaulted Ware outside. SR2 171, 172, 174, 175. Several officers attempted to locate Ware and the other male, without success. SR2 171-72.

The following day, A.P. reported that her Toyota Sienna was missing from her garage, and she believed Ware took it. SR 173. Officer Tadra and Deadwood Police Department Officer Trevor Houska observed the Toyota Sienna traveling on Highway 85 and attempted a traffic stop. SR2 172, 173. The driver took off at a high rate of speed, and the officers initiated a pursuit, with the Toyota Sienna traveling at speeds of 70-80 miles per hour in a 35-mile-per-hour zone. SR2 172, 173, 174. The pursuit was terminated due to slick and icy conditions. SR2 172, 173, 174.

Later in the day on February 2, 2024, A.P. advised law enforcement that Ware contacted her and indicated he had left the Toyota Sienna on a trail road. SR2 173. The vehicle was located

abandoned off the trail road by Lawrence County Sheriff's Office deputies. SR2 173.

On March 13, 2024, the Lawrence County Grand Jury indicted Ware on the following charges:

- Count I: Aggravated Assault in violation of SDCL 22-18-1.1(8), a Class 3 felony;
- Count II: Aggravated Eluding in violation of SDCL 32-33-18.2, a Class 6 felony; and
- Count IV: Violation of No Contact Order as a Felony in violation of SDCL 25-10-13, a Class 6 felony.⁴

SR2 50-51. The State also filed an Information on March 15, 2024, for the following misdemeanor charges:

- Count I: Simple Assault Domestic Violence in violation of SDCL 22-18-1(5), a Class 1 misdemeanor;
- Count II: Simple Assault Domestic Violence in violation of SDCL 22-18-1(5), a Class 1 misdemeanor;
- Count III: Reckless Driving in violation of SDCL 32-24-1, a Class 1 misdemeanor; and
- Count VI [sic]: Interference with Emergency Communication in violation of SDCL 49-31-29.2, a Class 1 misdemeanor.

SR2 52-53. Finally, the State filed the same Part II Information and Amended Part II Information as was filed in 40CRI23-1501, on March 21, 2024, and April 8, 2024, respectively. SR2 55-56, 57-58.

Pursuant to the plea agreement, on September 12, 2024, Ware entered guilty pleas to Count II (Aggravated Eluding) and Count IV (Violation of No Contact Order as a Felony) of the Indictment and admitted to the Amended Part II Information. SR2 370-72; PH1 12-14.

⁴ The grand jury did not return a True Bill on the State's proposed Count III for grand theft. SR2 50.

Count I (Aggravated Assault) of the Indictment and all counts in the Information were dismissed. SR2 64. On December 5, 2024, the circuit court sentenced Ware to ten years in the state penitentiary on Count II and ten years in the state penitentiary on Count IV, concurrent to each other and to the sentences in 40CRI23-1501. SR2 255-57, 293-94, 399-400; SENT1 18-19.

30956 - Lawrence County Case No. 40CRI24-206

On March 1, 2024, Lead Police Department Sergeant Joshua Bridenstein was notified by the Lawrence County Sheriff's Office that Ware was at the residence of his girlfriend, A.P., in Lead, South Dakota. SR3 151, 156. Ware had several warrants and there was an active no contact order in place, prohibiting Ware from having contact with A.P. SR3 151, 156. Both Ware and A.P. were located at the residence. SR3 151, 156.

Ware was arrested on his warrants and searched incident to arrest by Lawrence County Sheriff's Office Deputy Tyler Sonne. SR3 151, 156. Deputy Sonne located a loaded needle on Ware's person, which field-tested presumably positive for methamphetamine. SR3 151, 156. Laboratory tests later confirmed that the substance in the needle was methamphetamine. SR3 147-49.

On March 13, 2024, the Lawrence County Grand Jury indicted Ware on one count of Possession of a Controlled Drug or Substance in violation of SDCL 22-42-5, a Class 5 felony. SR3 13. The State filed an

Information on March 14, 2024, for one count of Violation of a No Contact Order in violation of SDCL 25-10-13, a Class 1 misdemeanor. SR3 14. As in 40CRI23-1501 and 40CRI24-171, the State filed the same Part II Information and Amended Part II Information on March 21, 2024, and April 8, 2024, respectively. SR3 16-17, 18-19.

On September 12, 2024, pursuant to the plea agreement, Ware pled guilty to the charge in the Indictment for Possession of a Controlled Drug or Substance and admitted to the Amended Part II Information. SR3 331-32; PH1 14-15. The Violation of No Contact Order charge in the Information was dismissed. SR3 25. At the sentencing hearing on December 5, 2024, Ware was sentenced to ten years in the state penitentiary, concurrent to the sentences in 40CRI23-1501 and 40CRI24-171. SR3 214-16, 253, 359; SENT1 19.

30957 - Lawrence County Case No. 40CRI24-243

A status hearing was scheduled for February 29, 2024, in Ware's Lawrence County case 40CRI23-1501. SR1 447; SR4 1. Ware failed to appear for that hearing. SR1 448; SR4 1.

On March 13, 2024, the Lawrence Count Grand Jury indicted Ware for one count of Failure to Appear on a Felony in violation of SDCL 23A-43-31, a Class 6 felony. SR4 1. On March 21, 2024, and April 8, 2024, respectively, the State filed the same Part II Information and Amended Part II Information as were filed in 40CRI23-1501, 40CRI24-171, and 40CRI24-206. SR4 3-4, 10-11.

Ware pled guilty to the Failure to Appear on a Felony charge in this file on September 12, 2024. SR4 319-20; PH1 15-16. Under the plea agreement, the Amended Part II Information was dismissed. SR4 17. The circuit court sentenced him on December 5, 2024, to two years in the state penitentiary, concurrent to the sentences in 40CRI23-1501, 40CRI24-171, and 40CRI24-206. SR4 206-07, 243, 346; SENT1 19.

30958 - Lawrence County Case No. 40CRI24-908

After the events of February 1 and 2, 2024 (related to case 40CRI24-171 set out above) and the recovery of A.P.'s Toyota Sienna off the trail road, Lawrence County Sheriff's Office deputies checked with residents in the area to ensure that no other vehicles had been stolen. SR5 163, 164, 165. Sergeant Dustin Schumacher had contact with Mark and Joyce Nelson at their nearby residence, and they reported their green Chevrolet pickup had been stolen at approximately 8:55 a.m. on February 2, 2024. SR5 163, 164, 165. Joyce also advised that two other vehicles parked near their residence had been ransacked, with a wallet and approximately \$17 stolen from one of the vehicles. SR5 163.

The green Chevrolet pickup was located in Denver, Colorado by the Denver Police Department on February 2, 2024, at approximately 8:18 p.m. SR5 163, 167, 168, 170, 171, 180, 181, 182. When officers attempted to make contact with the individuals in the vehicle, the male driver (identified by one of the passengers as "Cole") fled on foot. SR5

163, 167, 168, 170, 171, 180, 181, 182. The Chevrolet pickup was processed for DNA, and a DNA swab was taken from the steering wheel. SR5 163, 183, 188. Testing done at the South Dakota Forensic Laboratory confirmed that Ware's DNA was present on the steering wheel of the Chevrolet pickup. SR5 159-60, 163.

On August 28, 2024, the Lawrence County Grand Jury indicted Ware on the following charges:

- Count I: Grand Theft Value More Than \$2,500.00 but Less Than \$5000.00 in violation of SDCL 22-30A-1 and 22-30A-17(1), a Class 5 felony; or in the alternative
- Count IA: Possession of Stolen Vehicle in violation of SDCL 32-4-5, a Class 5 felony.

SR5 1. The State filed an Information on August 29, 2024, for two counts of Criminal Entry into Motor Vehicle in violation of SDCL 22-32-20, each one a Class 1 misdemeanor. SR5 2. Finally, on September 6, 2024, the State filed an Amended Part II Information⁵ with six prior felonies listed (identical to the Amended Part II Information filed in 40CRI23-1501, 40CRI24-171, 40CRI24-206, and 40CRI24-243). SR5 5-6.

As part of the plea agreement, Ware pled guilty to Count I (Grand Theft) on September 12, 2024. SR5 290-91, 313-14; PH1 16-17. The State dismissed both counts in the Information for Criminal Entry into Motor Vehicle, as well as the Amended Part II Information. SR5 8. On

⁵ The document is titled "Amended Part II Information," but is the only Part II Information that appears in the settled record for 40CRI24-908. SR 5-6.

December 5, 2024, the circuit court imposed a penitentiary sentence of five years, concurrent to 40CRI23-1501, 40CRI24-171, 40CRI24-206, and 40CRI24-243. SR5 203-04, 240; SENT1 19.

30959 - Meade County Case No. 46CRI1006

Ware met A.P and E.G. while he was in drug court. SR6 61. A.P. was his counselor at Compass Point and E.G. was the drug court coordinator. SR6 61, 67, 90. Ware began dating A.P. in the spring of 2023, after he had completed the drug court program in September 2022. SR6 61, 90.

Ware started using drugs again in July or August 2023, usually heroin or fentanyl. SR6 61. Ware was aware that E.G. had a prior history of drug use. SR6 61. Starting in October 2023, E.G. asked A.P. to get her drugs. SR6 89. A.P. asked Ware to get drugs for E.G., and although Ware initially refused, he did provide “blues” (fentanyl) to A.P. to give to E.G. on several occasions. SR6 61-62, 89. Ware estimated that E.G. paid him \$30.00 per fentanyl pill. SR6 64. Ware believed that on at least one of those occasions, E.G. sent money directly to him to purchase the fentanyl. SR6 62. In fact, she had paid him \$175.00 through CashApp on December 10, 2023. SR6 79, 80. A.P. lost the six pills of fentanyl that Ware had purchased for E.G. for the \$175.00, so Ware traded a Dewalt impact drill for more fentanyl (four and a half pills) to give to E.G. SR6 62, 63, 64, 89.

A.P. informed Ware that E.G. was sick and throwing up. SR6 62, 89. Ware believed that E.G. was overdosing. SR6 62, 89. A couple days later, on December 14, 2023, E.G.'s boyfriend contacted A.P., concerned because he could not get a hold of E.G. SR6 62, 89. A.P. drove by E.G.'s house and saw that law enforcement was there. SR6 62, 89. Unbeknownst to Ware and A.P., law enforcement had found E.G. deceased in her bathtub earlier that day. SR6 66. Drug items, including suspected fentanyl pills and paraphernalia, were located in E.G.'s residence. SR6 66. An autopsy revealed that E.G. died of fentanyl toxicity. SR6 74.

After learning about E.G.'s death a few hours later, Ware and A.P. left the state and went to Colorado for a couple weeks. SR6 62. Ware was then arrested on the charges in 40CRI23-1501 on December 28, 2023, which he claimed was because he was scared of what could happen to him related to E.G.'s death. SR6 63.

Prior to filing charges in this case, the State made an offer to Ware, stating that if he pled to a charge of conspiracy to distribute a controlled substance and debriefed, the State would not bring any further charges related to E.G.'s death, including a Part II Information, and would recommend a sentence concurrent with the Lawrence County cases. SR6 17-18. Ware agreed to the State's offer on September 13, 2024. SR6 17. On September 26, 2024, the State filed an Information for one count of Conspiracy to Commit Possession of a

Controlled Drug or Substance with Intent to Distribute - Fentanyl in violation of SDCL 22-3-8, 22-42-2, 22-42-2.4, and 22-42-5, a Class 4 felony. SR6 14-15.

On October 16, 2024, Ware pled guilty to the charge of Conspiracy to Commit Possession of a Controlled Drug or Substance with Intent to Distribute - Fentanyl. SR6 155-56; PH2 11-12. On December 11, 2024, the circuit court sentenced Ware to ten years in the state penitentiary, to run consecutive to the sentences in the five Lawrence County cases. SR6 171-72; SENT2 13-14.

ARGUMENTS

I

WARE KNOWINGLY AND VOLUNTARILY ENTERED GUILTY PLEAS IN EACH CASE.

“A guilty plea is a waiver of several trial rights guaranteed by the Fifth and Sixth Amendments; therefore, as a matter of due process, a guilty plea must be knowing and voluntary.” *State v. Outka*, 2014 S.D. 11, ¶ 32, 844 N.W.2d 598, 607 (citing *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1712 (1969)). This Court reviews the voluntariness of a guilty plea de novo. *See State v. King*, 2014 S.D. 19, ¶ 4, 845 N.W.2d 908, 910 (“An alleged violation of a defendant’s constitutional right to due process is reviewed de novo.” (citing *State v. Tiegen*, 2008 S.D. 6, ¶ 14, 744 N.W.2d 578, 585)).

A guilty plea is knowing and voluntary “when the accused has a full understanding of his constitutional rights and, having that understanding, waives these rights by a plea of guilty.” *Outka*, 2014 S.D. 11, ¶ 32, 844 N.W.2d at 607 (quoting *State v. Beckley*, 2007 S.D. 122, ¶ 8, 742 N.W.2d 841, 843). “[A] plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver of the three constitutional rights mentioned in Boykin—self-incrimination, confrontation and jury trial—and an understanding of the nature and consequences of the plea.” *Nachtigall v. Erickson*, 85 S.D. 122, 128, 178 N.W.2d 198, 201 (1970). “SDCL 23A-7-4 also contains additional requirements⁶ that must be satisfied before a court may accept a guilty plea.” *State v. Thin Elk*, 2005 S.D. 106, ¶ 4, 705 N.W.2d 613, 615.

⁶ SDCL 23A-7-4 provides:

Before accepting a plea of guilty . . . a court must address the defendant personally in open court . . . and inform him of, and determine that he understands, the following:

- (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; (continued...)

In the Lawrence County cases, the record shows that the circuit court complied with the requirements of SDCL 23A-7-4 and ensured that Ware had an understanding of his constitutional rights and waiver of those rights, as well as an understanding of the nature and consequences of his guilty pleas:

THE COURT: Mr. Ware, first of all, did you understand your rights today?

THE DEFENDANT: I did, Your Honor.

THE COURT: And Mr. Ware, is that understanding of the agreement? It looks like it has been signed by you and dated. Is that your understanding as Mr. Barnaud read it off?

THE DEFENDANT: It is, your honor.

THE COURT: Has anyone threatened you or promised you anything to get you to plead guilty aside from this agreement?

THE DEFENDANT: No, ma'am.

(...continued)

(4) That if he pleads guilty . . . there will not be a further trial of any kind, so that by pleading guilty . . . 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 . . . 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.

THE COURT: Do you understand by pleading guilty you give up the right to a jury trial, the right to confront and cross-examine witness and the right to remain silent?

THE DEFENDANT: I understand.

THE COURT: Today are you under the influence of any drugs, alcohol or mind-altering substance?

THE DEFENDANT: No, ma'am.

THE COURT: Are you mentally competent to the best of your knowledge?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is this a voluntary plea?

THE DEFENDANT: It is.

SR1 406-07; SR2 362-63; SR3 321-22; SR4 308-09; SR5 278-79, 301-02; PH1 4-5. The circuit court then advised Ware of the charges against him and the maximum penalties he faced, and Ware stated that he understood each charge and the maximum penalties. *See, generally* SR1 407-11; SR2 363-67; SR3 322-26; SR4 309-13; SR5 278-83, 302-06; PH1 5-9. The circuit court again questioned Ware about his understanding of the waiver of his rights and the voluntary nature of his plea. SR1 411-12; SR2 367-68; SR3 326-27; SR4 313-14; SR5 283-84, 306-07; PH1 9-10.

After the above colloquy with Ware, the circuit court stated “[t]he Court finds Mr. Ware has been regularly held to answer. He understands the nature of the charges, maximum penalty, his constitutional and statutory rights. He is represented by competent

counsel and is here to enter voluntary pleas to these charges.” SR1 412; SR2 368; SR3 327; SR4 314; SR5 284, 307; PH1 10. In addition, the Judgments of Conviction in the Lawrence County cases state the following:

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntarily, knowing and intelligent; that the Defendant was represented by competent counsel; that the Defendant understood the nature of consequences of the plea at the time said plea was entered; and that a factual basis existed for the plea.

SR1 261, SR2 256; SR3 215; SR4 206-07; SR5 203.

The same process was followed by the circuit court in the Meade County case. At the hearing on October 16, 2024, Ware was first advised of his rights. SR6 146-50; PH2 2-6. The circuit court then advised Ware of the charge in the Information, as well as the maximum penalty and mandatory minimum sentence for the charge. SR6 150-51; PH2 6-7. The circuit court also had the following discussion with Ware:

THE COURT: All right. So, Mr. Ware, other than the plea agreement, any other promises been made to induce you to want to plead guilty today?

THE DEFENDANT: No, sir.

THE COURT: Okay. Has anyone threatened you, or is anyone forcing you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you doing this of your own free will and accord?

THE DEFENDANT: I am, Your Honor.

THE COURT: Are you doing it voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand, Mr. Ware, that if you plead guilty, you'd be waiving that right to a jury trial, you'd be giving up your right to confront and cross-examine witnesses, and you'd be giving up your right against self-incrimination?

THE DEFENDANT: I understand, sir.

THE COURT: Has your lawyer answered all of the questions you have about your rights in this case?

THE DEFENDANT: Yes, he has.

THE COURT: Have you discussed with your lawyer the advantages and the disadvantages of having a trial versus having a plea agreement?

THE DEFENDANT: Yes, sir.

SR6 153-54; PH2 9-10. Having had this discussion, the circuit court then stated:

I'm going to find you've been regularly held to answer, you're represented by competent counsel, you understand the charge, the maximum penalty, the mandatory minimum in this case, and that this plea that you contemplate entering is being made freely and voluntarily and intelligently by you with a full knowledge of the potential consequences.

SR6 155; PH2 11. Finally, the Amended Judgment of Conviction notes that the circuit court found Ware to have been fully advised of his rights and that Ware's guilty plea was "entered knowingly, freely, and voluntarily" with a factual basis for accepting the plea. SR6 104.

In addition to the requirements set out in SDCL 23A-7-4 and the case law cited above for taking a plea, this Court also "look[s] to the

totality of the circumstances when ascertaining whether a plea was made knowingly and voluntarily.” *Outka*, 2014 S.D. 11, ¶ 33, 844 N.W.2d at 608 (citing *State v. Olson*, 2012 S.D. 55, ¶ 20, 816 N.W.2d 830, 836). In doing so, this Court considers such factors as “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.” *Outka*, 2014 S.D. 11, ¶ 33, 844 N.W.2d at 608 (citing *Olson*, 2012 S.D. 55, ¶ 20, 816 N.W.2d at 836).

Ware was 31 years old at the time of each sentencing. SR1 78, 312, 438; SR2 73, 288, 394; SR3 32, 247, 353; SR4 24, 237, 340; SR5 20, 234; SR6 25; SENT1 13. The record shows that Ware has an extensive criminal history, with seven prior felony convictions, and he pled to nine additional felonies in these cases. SR1 85-90, 302, 428; SR2 80-85, 278, 384; SR3 39-44, 237, 343; SR4 31-36, 227, 330; SR5 27-32, 224; SR6 27-32; SENT1 3. Additionally, Ware was represented by counsel throughout the proceedings and when he entered his guilty pleas pursuant to the plea agreements. SR1 403; SR2 359; SR3 318; SR4 305; SR5 275, 298; SR6 145; PH1 1, PH2 1. Ware acknowledges all of these factors. AB 9-10. Under the totality of the circumstances, Ware’s pleas were freely, knowingly, and voluntarily made.

Ware, however, argues that he did not knowingly and voluntarily enter into the plea agreement because he did not know how the

sentence for Count II in 40CRI23-1501 (aggravated assault on law enforcement) would be impacted by the Truth in Sentencing Act, found at SDCL 24-15-4.1. AB 9. Specifically, SDCL 24-15-4.1(12) provides that an inmate convicted of and sentenced for aggravated assault against law enforcement, if committed on or after July 1, 2023, is not eligible for parole. Ware committed this offense on December 28, 2023; therefore SDCL 24-15-4.1(12) applies to his sentence, and he is not eligible for parole on this charge; rather, he has to serve the entire ten-year sentence imposed.

“Parole is the discretionary conditional release of an inmate from actual state correctional facility custody before the expiration of the inmate’s term of imprisonment.” SDCL 24-15-1.1. “A prisoner is never entitled to parole. However, parole may be granted if in the judgment of the Board of Pardons and Paroles granting a parole would be in the best interests of society and the prisoner.” *Id.* The United States Supreme Court has also held that a convicted person has no constitutional right to parole:

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: ‘[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.’

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104 (1979) (quoting *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538 (1976)).

The determination of parole eligibility is an executive act instead of a judicial act, and therefore, it is not part of circuit court's sentence. *State v. Semrad*, 2011 S.D. 7, ¶ 7, 794 N.W.2d 760, 763. And this Court has held that "it is not necessary for a court to inform a defendant of the collateral consequences of a guilty plea, *such as eligibility for parole*, in order for a plea to be intelligently and voluntarily entered." *Gregory v. State*, 353 N.W.2d 777, 781 (S.D. 1984) (citing *Johnson v. Dees*, 581 F.2d 1166 (5th Cir. 1978); *Armstrong v. Egeler*, 563 F.2d 796 (6th Cir. 1977); *Fryer v. Scurr*, 309 N.W.2d 441 (Iowa 1981)) (emphasis added). Therefore, the circuit court was not required to advise Ware as to parole eligibility.

Ware agrees that he knew the maximum potential sentence he could receive for the aggravated assault on law enforcement charge. AB 11. His argument, though, is that "[t]he time incarcerated prior to parole eligibility is a significant factor in a defendant's decision to enter into a plea agreement" and "when there is not an adequate understanding on the defendant's part of what percentage of a sentence he will be incarcerated the guilty plea is not knowingly and voluntarily entered." AB 11. However, there is simply no basis in the record for this argument.

Ware asserts that he was “advised that he would only have to serve fifty percent of the sentence imposed by his trial counsel⁷ and court services via his presentence investigation report (PSI).” AB 10. But other than making this assertion in his brief, there is nothing in the record showing the substance of any conversations between Ware and trial counsel regarding parole eligibility. In the absence of any evidence to the contrary, “[i]t is assumed that legal counsel has explained the consequences of a guilty plea to a defendant.” *State v. Goodwin*, 2004 S.D. 75, ¶ 14, 681 N.W.2d 847, 853.

In addition, although incorrect, the PSI actually noted that Ware would be eligible for parole after serving 75% of his sentence on Count II, not 50% as Ware asserts. SR1 97. The PSI also included a disclaimer that any calculations “may not accurately reflect parole eligibility that will be determined by the Department of Corrections.” SR1 97. There is nothing in record indicating that either circuit court improperly relied on the statements regarding parole eligibility in the PSI in pronouncing sentence. *See, generally*, SR1 312-18, 438-44; SR2 288-94, 394-400; SR3 247-53, 353-59; SR4 237-43, 340-46; SR5 234-40; SR6 169-72; SENT1 13-19; SENT2 11-14. In fact, parole eligibility was not mentioned by the State, circuit court, or defense counsel during either the plea hearings or sentencing hearings.

⁷ Ware’s trial counsel is not appellate counsel.

What the record does show is that Ware was facing twenty felony and misdemeanor charges between the six files included in this appeal, as well as possible sentence enhancements through each Part II Information or Amended Part II Information. SR1 43-44, 45-46, 59-60; SR2 50-51, 52-53, 55-56, 57-58; SR3 13, 14, 16-17, 18-19; SR4 1, 3-4, 10-11; SR5 1, 2, 5-6; SR6 14-15. Although he pled to nine felonies, a significant number of charges were dismissed or not charged under the plea agreements. SR1 116-17; SR2 156-57; SR3 139-40; SR4 151-52; SR5 153-54; SR6 17-18, 54.

As noted by the State during the sentencing hearing in the Lawrence County cases, Ware was facing up to seventy-nine years in the state penitentiary on the charges to which he pled. SR1 302, 428; SR2 278, 384; SR3 237, 343; SR4 227, 330; SR5 224; SENT1 3. However, the plea agreement for those cases provided that the State would recommend concurrent sentences, with the highest sentence recommended by the State being fifteen years. SR1 116-17; SR2 156-57; SR3 139-40; SR4 151-52; SR5 153-54. He faced up to an additional ten years in the Meade County case, with a mandatory minimum sentence of one year, but the State agreed to and did in fact recommend a sentence concurrent with the Lawrence County cases. SR6 17, 151, 164-65; PH2 7; SENT2 6-7.

In light of the significant number of charges pending, the total number of years in the state penitentiary Ware was possibly facing on

those charges, and the fairly generous plea offers given by the State, Ware cannot now claim that the only basis for him entering the plea agreement was the consideration of parole eligibility or that parole eligibility played a significant part in inducing his guilty pleas. Ware was fully and properly advised of his constitutional rights, waiver of those rights by entering pleas, the nature of the charges against him, and the maximum penalties he faced. His pleas were knowingly and voluntarily entered and the judgments entered as a result, whether for just Count II in 40CRI23-1501 or in their entirety, should not be vacated.

II

NONE OF THE SENTENCES IN THE LAWRENCE COUNTY CASES SHOULD BE VACATED.

Ware argues that under the “sentence package doctrine,” all of the sentences in his Lawrence County cases have to be vacated if this Court vacates the judgment on Count II in 40CRI23-1501. As set out by Ware, the “sentence package doctrine” provides that “interdependent sentences create a coherent sentencing package, and the reversal on appeal of one count may render the underlying package voidable.”

United States v. Sprenger, 14 F.4th 785, 794 (7th Cir. 2021). However, Ware does not cite to any authority showing that South Dakota adheres to this doctrine.

Rather, this Court has consistently held that sentences for multiple convictions can be treated as separate transactions, with the

sentencing court entering separate judgments for each conviction. *See, e.g., State v. Thomas*, 499 N.W.2d 621 (S.D. 1993); *State v. Sieler*, 1996 S.D. 114, 554 N.W.2d 477; *State v. Puthoff*, 1997 S.D. 83, 566 N.W.2d 439; *State v. Simonsen*, 2024 S.D. 21, 5 N.W.3d 843. And SDCL 22-6-6.1 allows for a court to enter concurrent or consecutive sentences.

If a defendant is convicted of two or more offenses, regardless of when the offenses were committed or when the judgment or sentence is entered, the judgment or sentence may be that the imprisonment on any of the offenses or convictions may run concurrently or consecutively at the discretion of the court.

SDCL 22-6-6.1.

In the Lawrence County cases, the circuit court entered a separate judgment for each case, treating each one as a separate transaction. They are not “interdependent sentences.” And most importantly, the circuit court made all of the sentences concurrent to each other. Even if this Court follows the “sentence package doctrine,” one of the cases that Ware cites in his brief clearly states that “[t]he sentencing package doctrine generally applies to sentences with interdependent, consecutive counts, and *not to concurrent sentences.*”

McKeever v. Warden SCI-Graterford, 486 F.3d 81 (3d Cir. 2007) (emphasis added). Therefore, there is no legal basis cited by Ware for this Court to vacate the sentences and judgments in any or all of the

Lawrence County cases.⁸ And, as argued above, as Ware's sentence in 40CRI23-1501 should not be vacated because it was knowing, intelligent, and voluntarily made, none of the other sentences should be vacated either.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that the judgments and sentences in all six of Ware's cases be affirmed.

Respectfully submitted,

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⁸ Even though Ware acknowledges that the sentence issued in the Meade County case, 46CRI24-1006, was ordered consecutive to the sentences in the Lawrence County cases, he states that sentence should not be vacated and asks that this Court take no action on it. AB 12-13. The State agrees that this sentence should be affirmed.

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 6,212 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 19th day of November, 2025.

/s/ Angela R. Shute

Angela R. Shute
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of November, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kolten Bradford Ware* was served via electronic mail upon Adam Bryson at adam@brysonlawoffice.com.

/s/ Angela R. Shute

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