IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30654

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

CHAD DALE MARTIN,

Defendant and Appellant.

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

HONORABLE SANDRA HANSON
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on March 15, 2024

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30654

vs.

Chad Dale Martin,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment Hearing held September 11, 2023 is referred to as "AH." The transcript of the Change of Plea hearing held October 30, 2023 is referred to as "PH." The transcript of the Sentencing Hearing held February 8, 2024 is referred to as "SH." All references to documents will be followed by the appropriate page number. Exhibits are referred to as "Ex." followed by the exhibit number. Defendant and Appellant, Chad Martin, will be referred to as "Martin."

JURISDICTIONAL STATEMENT

Martin appeals from the Judgment and Sentence entered February 20, 2024, by the Honorable Sandra Hanson, Circuit Court Judge of the Second Judicial Circuit. SR 18. Martin's Notice of Appeal was filed March 15, 2024. SR 129. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN CONSIDERING UNCHARGED CONDUCT WITHOUT FINDING THE CONDUCT TO BE PROVEN BY A PREPONDERANCE OF EVIDENCE.

The circuit court, without a finding of proof by a preponderance of evidence, considered uncharged conduct which Martin denied perpetrating.

State v. McKinney, 2005 S.D. 74, 699 N.W.2d 460

State v. McCrary, 2004 S.D. 18, 676 N.W.2d 116

U.S. v. Schaefer, 291 F.3d 932 (7th Cir. 2002)

U.S. v. Watts, 519 U.S. 148, 117 S. Ct. 633 (1997)

STATEMENT OF CASE AND FACTS

On September 26, 2023, a Minnehaha County Grand Jury returned an Indictment charging Martin with the following criminal charges:

- Count 1: Vehicular Battery
- Count 2: Receiving or Possession of Stolen Motor Vehicle
- Count 3: Hit and Run Accident Resulting in Death or Injury
- Count 4: Aggravated Eluding
- Count 6: DWI
- Count 7: DWI

- Count 8: Reckless Driving
- Count 9: Resisting Arest
- Count 10: Obstructing Law Enforcement
- Count 11: No Driver's License

SR 9. The same day, the State filed a Part II Information alleging Martin had been convicted of three or more prior felony offenses, including one or more crimes of violence. SR 12. Arraignment on the Indictment was held on September 11, 2023. *See generally* AH.

On October 30, 2023, the circuit court held a plea hearing. *See generally* PH. Martin agreed to enter a guilty plea to Count 1 and Count 4 of the Indictment and admit the Part II information. *Id.* at 2-3. In exchange, the State agreed to dismiss the remaining charges. *Id.* Furthermore, per the agreement, the penitentiary time that could be imposed was capped at 12 years, with any further suspended penitentiary time left to the discretion of the circuit court. *Id.* Martin confirmed his understanding of the plea agreement. *Id.* at 3. The circuit court advised Martin of his rights. *Id.* at 3-12. Martin subsequently pleaded guilty to Counts 1 and 4 of the Indictment and admitted the Part II information. *Id.* at 13.

In the State's factual basis, the prosecutor detailed law enforcement's high-speed pursuit of a stolen vehicle. PH 16. The driver of the stolen vehicle, who was eventually identified as Martin, ran a red light, caused a vehicle disabling car accident, and was apprehended after a short foot pursuit. Id. at 16-18. Martin agreed that a factual basis existed to support his guilty pleas, but denied stealing the vehicle. *Id.* at 18. Instead, according to Martin's attorney,

Martin believed he was authorized to use the vehicle. *Id.* at 18. The circuit court accepted Martin's pleas, finding them to be knowing, voluntary, intelligent, and supported by an adequate factual basis. *Id.* at 21-23. Martin requested a delay in sentencing and the circuit court ordered a presentence investigation ("PSI"). *Id.* at 24.

The police reports contained within the PSI detail two separate incidents which are relevant to Martin's basis for appeal. SR 69-86. The first incident is described in the police reports of Officers Landon Leveranz, Cody Nachreiner, and Ryan Baker. SR 76-78, 83-85. According to their reports, on August 25, 2023, around 4:30 p.m., a heavy set Native American male, using physical force and violence, stole a Blue Saturn Outlook near W. 1St St. and N. Prairie Ave. in Sioux Falls, SD. *Id.* For readability, the remainder of the brief will refer to the initial vehicle theft described in the police reports of Leveranz, Nachreiner, and Baker as "uncharged conduct." The second incident is described in the police reports of Officers Jordan Taylor and Michael Cliff. SR 79-82. Their reports detail the high-speed pursuit on August 25, 2023, around 10:30 p.m., where Martin was driving the same Blue Saturn Outlook that had been stolen roughly 6 hours earlier. *Id.*

Like he did at the plea hearing, Martin's statement in the PSI admitted to driving the stolen vehicle during the high-speed pursuit, but again, he maintained that he was not the person that perpetrated the uncharged conduct. SR 21.

The sentencing hearing occurred on February 8, 2024. *See generally* SH.

During the hearing, the circuit court meticulously advised Martin of the factors it would consider in determining the appropriate sentence, including "conduct that was uncharged or was that – was the basis for charges later dismissed. It is not limited to the conduct stipulated in support of the guilty plea." *Id.* at 4. When the circuit court pronounced its sentence, it referenced the uncharged conduct, stating:

> "And when the Court looks at this case, and considers those factors, as well as the presentence investigation and the recommendations of the parties and Mr. Martin's statements, there are concerns that – when the events that led to all of these circumstances started, there was an incident where it looked like the Defendant entered a vehicle while the victim was distracted and drove away with the victim hanging out of the car window, trying to hit at him, and that person got injuries while doing that. Then, while the defendant was driving away, there was a woman, the owner of the vehicle had been arguing with and the vehicle struck her because she stood in the middle of the road to try to help the victim, that sent her airborne over the hood of the vehicle and she got significant injuries to her head, wrist, hip, and other road rash, but that she refused medical care, indicating that she didn't want to leave her child at the scene, even though the report indicates professionals thought she should receive medical review, at least, if not treatment."

Id. at 16.

When the circuit court referenced the uncharged conduct again, *Id.* at 17-18, Martin's counsel interjected to inform the circuit court that Martin denied involvement, stating:

> "[T]he allegations regarding taking the vehicle, we have never entered any sort of facts that support that. Every statement from my client is that he took the vehicle in the nighttime. The allegations regarding the woman getting hit, is not anything that we have pled to. I believe at that point, we would have likely gone

> to trial, he disputes those allegations. But we do admit to taking of the vehicle when it was parked idling, but do dispute the allegations regarding hours prior. Just so the Court is aware."

Id. at 18. The Court indicated it understood Martin was denying involvement, but was relying on information from the PSI, and information received from Martin and his defense counsel to determine the appropriate sentence. *Id.* at 19.

On Count 1, the circuit court sentenced Martin to 20 years in the state penitentiary with 8 years suspended. *Id.* at 20. On Count 4, the circuit court suspended 2 years in the state penitentiary. Martin was credited for 167 days of pretrial incarceration and the sentences were deemed to run concurrently. *Id.* at 20-21. At the end of the hearing, Martin addressed the circuit court with his concerns, stating:

> "Well, was I just – was I just sentenced on – like, a – what was the basis of where I was just sentenced? You brought up something totally different from what I am facing and what I am charged with."

Id. at 22. After a brief discussion between Martin and his counsel, the sentencing hearing was adjourned. *Id.*

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY CONSIDERING UNCHARGED CONDUCT WITHOUT A FINDING OF PROOF BY A PREPONDERANCE OF EVIDENCE.

"Circuit courts have broad discretion in sentencing." *State v. Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d 351, 360. This Court "generally review[s] a circuit court's sentencing decision for an abuse of discretion." *Id.* ¶ 26. In exercising this

broad discretion, circuit courts must consider evidence "tending to mitigate or aggravate the severity of a defendant's conduct and its impact on others," and "are often required, in this regard, to accurately assess the 'true nature of the offense.' " *Id.* ¶ 28.

In assessing the true nature of the offense, circuit courts may consider "conduct that was uncharged or served as the basis for charges that later resulted in a dismissal ... as long as the State proves the conduct by a preponderance of the evidence." *Id.* (citing *State v. Mitchell*, 2021 S.D. 46, ¶ 31, 963 N.W.2d 326, 333); *see State v. McKinney*, 2005 S.D. 74, ¶ 18, 699 N.W.2d 460, 466 (this Court finding that if the circuit court is "to consider such conduct at sentencing, the State must prove the conduct by a preponderance of the evidence."). Also, "a defendant must have the opportunity to contest the uncharged conduct." *McKinney*, ¶ 18, 699 N.W.2d at 466. These sentencing precepts, which are referenced in *McKinney*, *Mitchell*, and *Caffee*, trace back to this Court's decisions in *State v. McCrary*, 2004 S.D. 18, ¶ 8, 676 N.W.2d 116,120 and *State v. Arabie*, 2003 S.D. 57, ¶ 21, 663 N.W.2d 250, 257. In *McCrary* and *Arabie*, this Court relied on *U.S. v. Schaefer*, 291 F.3d 932 (7th Cir. 2002). The *McKinney* case cites *Schaefer*, and also references *U.S. v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997).

In *Watts*, the United States Supreme Court acknowledged language from the Federal Sentencing Guidelines which suggest it is "'appropriate' that facts relevant to sentencing be proved by a preponderance of evidence," and that applying "the preponderance standard at sentencing generally satisfies due

process." *Watts*, 519 U.S. at 156, 117 S. Ct. at 637 (citing USSG § 6A1.3, comment.)

In *Schaefer*, the defendant was convicted of 5 counts of mail and wire fraud, acquitted on 9 other counts, and had 1 count vacated on other grounds. *Schaefer*, 291 F.3d at 935. At sentencing, the district court adopted findings from the Pre-Sentence Report, more specifically, a loss calculation which recommended an upward departure under the Federal Sentencing Guidelines. *Id.* at 937. Schaefer appealed, arguing the loss calculation from the Pre-Sentence Report was inaccurate. *Id.* at 935-936. The Seventh Circuit Court of Appeals noted "the district court's sentencing order did not, however, include any specific findings that Schaefer, under a more lenient preponderance of evidence standard, committed most or all of the crimes charged in the indictment, or was guilty of other uncharged criminal conduct." *Id.* at 936. The Court of Appeals vacated the judgment and remanded for further proceedings "because the district court did not make specific findings of fact that would allows us to conclude with confidence that the relevant conduct relied upon to make [the loss calculation] consisted of unlawful conduct. . . ." *Id.* at 934.

Although *Watts* and *Schaefer* are federal cases interpreting applications of the Federal Sentencing Guidelines, this Court has cited both cases to support Martin's contention on appeal: uncharged conduct can only be considered if the State has proven the conduct by a preponderance of evidence and the defendant has been afforded an opportunity to contest the uncharged conduct.

Here, despite Martin's denial, the circuit court considered the uncharged

conduct, relied on it, and referenced it multiple times throughout the sentencing hearing. Because the circuit court considered the uncharged conduct to determine the appropriate sentence, the State should have proven, and the circuit court should have found, that a preponderance of evidence showed Martin was in fact the individual responsible for perpetrating the uncharged conduct. Moreover, Martin was not afforded a meaningful opportunity to contest the circuit court's consideration of the uncharged conduct.

To ensure procedural fairness and alleviate any due process concerns, Martin should be afforded an opportunity to contest the uncharged conduct at a resentencing hearing, and the State should be required to produce a preponderance of evidence showing Martin perpetrated the uncharged conduct if the circuit court is to consider it in determining the appropriate sentence.

CONCLUSION

The circuit court abused its discretion in considering uncharged conduct without finding the conduct to be proven by a preponderance of evidence. In addition, the circuit court did not provide a meaningful opportunity for Martin to contest the uncharged conduct. For the aforementioned reasons, authorities cited, and upon the settled record, Martin respectfully asks this Court to vacate the Judgment and Sentence and remand this case for a resentencing.

CERTIFICATE OF COMPLIANCE

I. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 2,131 words.

II. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 9th day of July, 2024.

/s/ Christopher Miles
Christopher Miles
Attorney for Appellant

CERTIFICATE OF SERVICE

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

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Dated this 9th day of July, 2024.

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APPENDIX

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 23-018542 & 23-018571
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI23005759
vs.	+	JUDGMENT & SENTENCE
CHAD DALE MARTIN, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on September 6, 2023, charging the defendant with the crimes of Count 1 Vehicular Battery on or about August 25, 2023; Count 2 Receiving or Possession of Stolen Motor Vehicle(s) on or about August 25, 2023; Count 3 Hit and Run-Accident Resulting in Death or Injury on or about August 25, 2023; Count 4 Aggravated Eluding on or about August 25, 2023; Count 6 DWI-Under the Influence on or about August 25, 2023; Count 7 DWI on or about August 25, 2023; Count 8 Reckless Driving on or about August 25, 2023; Count 9 Resisting Arrest (Use/Threaten Force) on or about August 25, 2023; Count 10 Obstructing Law Enforcement on or about August 25, 2023; Count 11 No Driver's License on or about August 25, 2023 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on September 11, 2023, Alex Braun appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

Defendant with counsel Kylie Beck, returned to Court on October 30, 2023, the State appeared by Mark Joyce, Deputy State's Attorney. The defendant thereafter changed his plea to guilty to Count 1 Vehicular Battery (SDCL 22-18-36), guilty to Count 4 Aggravated Eluding (SDCL 32-33-18.2) and admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-8) with sentencing continued until after the completion of a presentence report.

Thereupon on February 8, 2024, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

S E N T E N C E

AS TO COUNT 1 VEHICULAR BATTERY / HABITUAL OFFENDER : CHAD DALE MARTIN shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty (20) years with credit for one hundred sixty-seven (167) days served and with eight (8) years of the sentence suspended (consecutive to #49CRI 21-9174) on the conditions that the defendant comply with all terms of Parole Agreement and that the defendant pay $116.50 court costs and $165.00 testing fees through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 4 AGGRAVATED ELUDING / HABITUAL OFFENDER : CHAD DALE MARTIN shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for two (2) years with the sentence suspended (concurrent to Count 1) on the conditions that the defendant comply with all terms of Parole Agreement and that the defendant pay $116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

It is ordered that the attorney fees in this matter shall be converted to a civil lien in favor of Minnehaha County.

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

It is ordered that Counts 2, 3 and 6 through 11 charging with Receiving or Possession of Stolen Motor Vehicle(s); Hit and Run-Accident Resulting in Death or Injury; DWI-Under the Influence; DWI; Reckless Driving; Resisting Arrest (Use/Threaten Force); Obstructing Law Enforcement and No Driver's License be and hereby are dismissed.

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

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BY THE COURT:

Sandra Hanson

JUDGE SANDRA HOGLUND HANSON
Circuit Court Judge

Attest:
Jelen, Megan
Clerk/Deputy

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IN THE SUPREME COURT
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STATE OF SOUTH DAKOTA,

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APPEAL FROM THE CIRCUIT COURT
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THE HONORABLE SANDRA HOGLUND HANSON
Circuit Court Judge

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Notice of Appeal filed March 15, 2024

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STATE OF SOUTH DAKOTA

No. 30654

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

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CHAD DALE MARTIN,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Chad Dale Martin, is referred to as "Defendant." The victim is referred to by her initials, "S.A.R." The settled record in the underlying case is denoted as "SR." Defendant's Brief is denoted as "DB." All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On February 20, 2024, the Honorable Sandra Hoglund Hanson, Circuit Court Judge, Second Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Chad Dale Martin*, Minnehaha County Criminal File Number 49CRI23-005759. SR:18-19. Defendant filed his Notice of Appeal on March 15, 2024. SR:129-30. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT ABUSED ITS DESCRETION BY CONSIDERING UNCHARGED CONDUCT IN THE PSI WHEN IMPOSING SENTENCE?

The circuit court considered the uncharged conduct in the PSI when imposing sentence.

State v. Caffee, 2023 S.D. 51, 996 N.W.2d 351

State v. Garreau, 2015 S.D. 36, 864 N.W.2d 771

State v. Lanpher, 2024 S.D. 26, 7 N.W.3d 308

SDCL 23A-27-7

STATEMENT OF THE CASE AND FACTS[1]

On September 6, 2023, in Minnehaha County Criminal File Number 49CRI23-005759, a grand jury issued an Indictment charging Defendant with ten counts:

- Count 1: Vehicular Battery in violation of SDCL 22-18-36, a Class 4 felony;
- Count 2: Receiving or Possession of Stolen Motor Vehicle in violation of SDCL 32-4-5, a Class 5 felony;
- Count 3: Hit and Run Accident Resulting in Death or Injury in violation of SDCL 32-34-5, a Class 6 felony;
- Count 4: Aggravated Eluding in violation of SDCL 32-33-18.2, a Class 6 felony;

---

[1] The Statement of the Case and Statement of the Facts sections are combined because of the intertwined nature of the facts and procedural history.

- Count 6: Driving Under the Influence in violation of SDCL 32-23-1(2), a Class 1 misdemeanor;
- Count 7: Driving Under the Influence in violation of SDCL 32-23-1(4), a Class 1 misdemeanor;
- Count 8: Reckless Driving in violation of SDCL 32-24-1, a Class 1 misdemeanor;
- Count 9: Resisting Arrest (Use/Threaten Force) in violation of SDCL 22-11-4(1), a Class 1 misdemeanor;
- Count 10: Obstructing Law Enforcement in violation of SDCL 22-11-6, a Class 1 misdemeanor; and
- Count 11: Driving without Driver's License in violation of SDCL 32-12-22, a Class 2 misdemeanor.

SR:9-11. S.A.R. was the alleged victim in Counts 1 and 3. SR:9-10.

The State filed a Part II Information pursuant to SDCL 22-7-8 alleging Defendant was convicted of seven prior felonies arising out of South Dakota. SR:12. The seven felonies included:

- August 1, 2022: Grand Theft in Minnehaha County;
- December 8, 2021: Felony Fail to Appear in Minnehaha County;
- September 6, 2021: Simple Assault on Law Enforcement in Minnehaha County;
- September 6, 2021: Receiving Stolen Vehicle in Minnehaha County;
- October 25, 2018: Attempted Escape First Degree in Pennington County;
- May 26, 2017: Possession of Controlled Substance in Pennington County; and
- August 3, 2015: Possession of Controlled Substance in Pennington County.

SR:12.

On October 30, 2023, Defendant appeared before the Honorable Sandra Hoglund Hanson, Circuit Court Judge, Second Judicial Circuit, ("circuit court") for a change of plea hearing. SR:190. A plea agreement was set out on the record. SR:191-92. Pursuant to the plea agreement, Defendant agreed to plead guilty to Vehicular Battery and Aggravated Eluding and admit to the Part II Information. SR:191-92. The parties agreed to a cap of twelve-years penitentiary time with more time suspended. SR:191-92. Defendant confirmed to the circuit court that this was his understanding of the plea agreement. SR:192.

The circuit court advised Defendant of his rights. SR:192-95. Defendant confirmed he understood his rights. SR:194-95. The circuit court advised Defendant that Vehicular Battery was a Class 4 felony with a maximum sentence of ten years in prison. SR:196-97. The circuit court advised that Aggravated Eluding was a Class 6 felony with a maximum sentence of two years in prison. SR:197. The circuit court further advised that the Part II Information elevated a conviction for either charge to a Class C felony with a maximum sentence of life imprisonment. SR:198-99. Defendant agreed he understood the maximum sentences and the effect of the Part II Information. SR:199. The circuit court confirmed that Defendant understood it was not bound by the parties' plea agreement. SR:200-01. Defendant subsequently pled guilty to Vehicular Battery and Aggravated Eluding. SR:202.

Defendant also agreed the seven felony convictions in the Part II Information were his and he pled guilty to all of them. SR:203.

The State set forth the factual basis for the record:

> [O]n August 25th, 2023, Sioux Falls police were traveling near 14th Street and Cliff Avenue . . . in Sioux Falls, Minnehaha County, when they encountered a vehicle that they recognized as being a stolen vehicle. They attempted to initiate a traffic stop on that vehicle, but the vehicle did not stop.
>
> The officers that were attempting to do the stop were able to get authorization to pursue the vehicle. While that is not the normal police department policy, the circumstances under which this vehicle had been stolen made it a higher risk so they were able to get authorization to pursue.
>
> At that point, a high-speed chase did begin through -- throughout Sioux Falls throughout multiple residential areas where the suspect vehicle was greatly exceeding the posted speed limits. . . . [O]n Cliff Avenue, speeds reached about 75 miles per hour. The vehicle was running through stop signs and stop lights and generally not following the rules of traffic as officers were pursuing it.
>
> Eventually they came to the intersection of 10th and Cliff . . . . At that point, the suspect vehicle ran through a red light at that intersection and broad sided another vehicle that was going through a green light . . . disabling both vehicles.
>
> The suspect driver then got out and started running on foot. Officers were able to catch up to him and take him into custody. He was identified as the defendant, Chad Martin. One of the occupants of the vehicle that got hit was [S.A.R.]. She was transported to Sanford Hospital with a broken collar bone.
>
> And the defendant, when officers were dealing with him, was showing indicators of impairment. He had bloodshot and glossy eyes. And officers did not conduct standard field sobriety tests on him due to the nature of the incident and considering they deemed him to be a flight risk at that time.

> They asked the defendant about drugs or alcohol. He was mostly unresponsive about alcohol. He did admit that he had smoked some marijuana earlier that day. When asked what [he] had to drink he responded that he had, quote, "A pizza to drink."
>
> Officers did feel based on the totality of all of their observations that he was under the influence of either alcohol and/or drugs during their interactions with him. So he was placed under arrest at that point.

SR:205-07.

Defendant's counsel agreed a sufficient factual basis existed. SR:207. Defendant's counsel added that Defendant denied knowledge that the vehicle was stolen. SR:207. Defense counsel stated that Defendant believed the vehicle belonged to someone he knew and he thought they authorized him to use the vehicle. SR:207. He also added that Defendant agreed he was intoxicated and had at least six to seven shots of alcohol prior to operating the vehicle. SR:208. Defendant's counsel clarified that he believed S.A.R. was injured on the intersection of 14th and Cliff instead of 10th and Cliff, but agreed there were adequate facts to support the plea. SR:207-08. Defendant also answered specific questions from the circuit court regarding the facts. SR:208-12. The circuit court found there was an adequate factual basis and accepted the plea. SR:212.

A Presentence Investigation Report ("PSI") was prepared for the circuit court. *See* SR:20-125 (PSI Sealed). Neither party filed written objections to the PSI. The PSI included both an official version of offense that referred to attached police reports and a Defendant's version of

offense which was a transcription of a written statement from Defendant. SR:21-22, 69-89.

According to the police reports, on August 25, 2023, at about 4:30 p.m., a person described as a Native American male, possibly in his thirties, with a crew cut haircut, and wearing a maroon shirt, stole Alvin Covey's vehicle. SR:76, 83. Right before the theft, Alvin exited his vehicle to speak with Martina Arroyo, who was walking on the sidewalk with her child. SR:76, 84. Alvin left his vehicle running. SR:76. While speaking with Martina, Alvin noticed a person jump into the driver's seat of his vehicle. SR:76. Alvin ran over to the vehicle. SR:76. Alvin hit or attempted to hit the person in the face through the open driver's side window. SR:76. The person put the vehicle in drive with Alvin hanging from the window. SR:76. Alvin was drug briefly by the vehicle before he fell to the ground. SR:83.

During the altercation, Martina positioned herself in front of the vehicle. SR:76. The person struck Martina with the vehicle and sent her flying over the hood. SR:76. Both Martina and Alvin suffered injuries. SR:76. The person drove off in Alvin's vehicle. *See* SR:84.

Law enforcement spoke to multiple people who witnessed the altercation. SR:76-78, 83-85. Law enforcement also reviewed video footage captured on an exterior home camera. *See* SR:84. The footage aligned with statements Alvin and Martina provided to law enforcement. SR:84.

Hours later, at about 10:34 p.m., law enforcement found Defendant driving Alvin's vehicle. SR:81-82. The remaining facts from the police reports are consistent with the factual basis statement from the change of plea hearing.

Contrary to what Defendant's counsel stated at the change of plea hearing, Defendant crafted a new story for Defendant's version of the offense for the PSI. *Compare* SR:21-22, *with* SR:207. According to Defendant's version of the offense, Defendant stated that when he took the vehicle, he saw the unoccupied vehicle parked running outside an administration building. SR:21. Defendant reported he waited twenty minutes to see if someone was coming back for the vehicle, then stole it. SR:21. After he was apprehended by law enforcement, Defendant admitted he had a bloody lip. SR:22. He alleged his injury occurred when he hit S.A.R.'s vehicle. SR:22. He blamed his actions on intoxication. SR:21. He also noted that he believed law enforcement would not pursue him in city limits. SR:21-22.

Defendant's prior record, according to the PSI before the circuit court, included a vast criminal history, with multiple offenses beginning when he was a juvenile. SR:22-28. The information showed he had at least seven prior felonies and was on Department of Corrections supervision at the time the offenses occurred. SR:27-28, 52-68; *see also* SR:12 (Part II Information). Defendant reported, "[e]ver since fourteen

years old I been in and out of institutions. Literally in & out even today." SR:29-30.

The information showed Defendant had a history with alcohol and drugs. SR:32-33. Defendant reported he consumed alcohol three to four times per week, marijuana daily, and methamphetamine weekly. SR:22. He reported quitting or being terminated from multiple jobs because of relapse. SR:31. Defendant admitted failing UAs while on supervision. SR:28.

On February 8, 2024, Defendant appeared before the circuit court for sentencing. SR:146. During the hearing, the circuit court gave the State, Defendant's counsel, and Defendant an opportunity to be heard. SR:150-60.

The State argued a twelve-year penitentiary sentence was appropriate based on the facts of the case. SR:151. Defendant possessed a stolen vehicle, fled from officers at a high rate of speed, clipped a vehicle, kept driving, collided with another vehicle, and then fled on foot. SR:151. After law enforcement tackled Defendant and placed him under arrest, Defendant admitted he used marijuana. SR:152. A few hours later, Defendant's blood was drawn. SR:152. He had a BAC of .03 and was positive for methamphetamine, amphetamine, carboxy THC, dextromethorphan, and Delta-9 THC. SR:152. The State argued Defendant had a lifetime of poor choices considering on his age, criminal history, and drug use. SR:152. Based on these reasons and the

other sentencing factors, the State argued a twelve-year sentence of served time with a substantial amount of additional suspended time was an appropriate sentence. SR:152-53.

Defendant's counsel argued for a sentence of something less than twelve years based, in part, on Defendant's remorse and acceptance of responsibility. SR:154-57. Defendant's counsel noted that "it is quite clear through his PSI that he did not have a stable home" and "he didn't grow up with positive influences." SR:155-65. Defendant's counsel asked the circuit court to impose a sentence that recognized the life Defendant had and allowed Defendant to continue to grow. SR:156. Defendant also had an opportunity to be heard and addressed the circuit court. SR:157-60.

After reviewing the PSI, which included the police reports regarding the initial theft of the vehicle, and hearing from counsel and Defendant, the circuit court sentenced Defendant to twenty years in the South Dakota State Penitentiary with eight suspended for Vehicular Battery and two years with two suspended for Aggravated Eluding. SR:165.

At the end of the sentencing hearing, Defendant asked the circuit court, "[w]ell, was I just – was I just sentenced on – like, a – what was – what was the basis of where I was just sentenced? You brought up something totally different from what I am facing and what I am charged with." SR:167. An off the record discussion occurred between Defendant

and Defendant's counsel. Defendant's counsel then informed the circuit court, "We don't have any other questions." SR:167.

The circuit court entered a written Judgment of Conviction. SR:18-19. Defendant appealed. SR:129-30.

ARGUMENT

I.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING THE PSI WHEN IMPOSING SENTENCE.

A. *Background.*

When imposing sentence, the circuit court relied on what the PSI characterized as the official version of offense. *See* SR:161-63. The official version of offense referred to police reports attached to the PSI. SR:21. On appeal, Defendant claims the circuit court abused its discretion by considering the uncharged conduct in the PSI without first allowing Defendant a meaningful opportunity to contest the information. DB:8-9. Defendant also argues that the circuit court abused its discretion by failing to find the State proved Defendant committed the conduct by a preponderance of the evidence. DB:8-9.

The circuit court did not abuse its discretion. Consistent with SDCL 23A-27-7, Defendant had an opportunity to comment on the PSI before the circuit court imposed sentence. He also had the opportunity to request to present information at sentencing. Ultimately, the circuit court found Defendant was the person who initially stole the vehicle.

SR:161, 163. The circuit court properly considered the PSI in coming to that conclusion to fashion an appropriate sentence.

B. *Standard of Review.*

A circuit court's sentencing decision is generally reviewed under the abuse of discretion standard. *State v. Lanpher*, 2024 S.D. 26, ¶ 25, 7 N.W.3d 308, 317 (citing *State v. Caffee*, 2023 S.D. 51, ¶ 26, 996 N.W.2d 351, 359-60). "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.* (quotation omitted). A circuit court possesses broad discretion in crafting a sentence that falls "within constitutional and statutory limits." *State v. Deleon*, 2022 S.D. 21, ¶ 17, 973 N.W.2d 241, 246 (quotation omitted). Consequently, "a sentence within the statutory maximum [generally] will not be disturbed on appeal." *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (quoting *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406).

C. *The Circuit Court Appropriately Considered the Uncharged Conduct in the PSI when Imposing Sentence.*

In determining its sentence, the circuit court "should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation." *Lanpher*, 2024 S.D. 26, ¶ 26, 7 N.W.3d at 317 (quoting *Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d at 360). These factors are to be weighed "on a case-by-case basis" and a

circuit court may determine "which theory is accorded priority" in a particular case. *Id.* (quoting *Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d at 360). "Additionally, 'courts must consider sentencing evidence tending to mitigate or aggravate the severity of a defendant's conduct and its impact on others. Sentencing courts are often required, in this regard, to accurately assess the true nature of the offense.'" *Id.* ¶ 26, 7 N.W.3d at 317-18 (quoting *State v. Mitchell*, 2021 S.D. 46, ¶ 30, 963 N.W.2d 326, 333).

As part of its consideration, the circuit court "should have access to the fullest information possible concerning the defendant's life and characteristics." *Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d at 360 (cleaned up). The circuit court should acquire a thorough acquaintance with the character and history of the defendant by studying the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *Id.* (quotation omitted).

"Whether evaluating a defendant's general inclination to commit crimes or the extent of his specific offense, sentencing courts can consider a wide range of information from a variety of sources." *State v. Peltier*, 2023 S.D. 62, ¶ 30, 998 N.W.2d 333, 342 (quoting *Mitchell*, 2021 S.D. 46, ¶ 29, 963 N.W.2d at 333). "Courts have recognized that the broad range of evidence that may be considered at sentencing even includes inquiry into 'uncharged conduct or even conduct that was

acquitted,' because sentencing determinations are made under a preponderance of the evidence standard, unlike criminal convictions." *Lanpher*, 2024 S.D. 26, ¶ 30 n.17, 7 N.W.3d at 319 n.17 (quoting *State v. Arabie*, 2003 S.D. 57, ¶ 21, 663 N.W.2d 250, 257); *see State v. Banks*, 2023 S.D. 39, ¶ 19, 994 N.W.2d 230, 235 (reasoning "[t]his broad range of information may include evidence that would be inadmissible at trial, as the rules of evidence do not apply at sentencing hearings").

One source of information a circuit court may consider during sentencing is a PSI. *See* SDCL 23A-27-5. The circuit court may order a PSI to aid it in exercising its sentencing discretion. SDCL 23A-27-5. The court services officer who drafts the PSI acts as a neutral information gatherer for the judge. *State v. Garreau*, 2015 S.D. 36, ¶ 23, 864 N.W.2d 771, 778. PSIs contain the defendant's prior criminal record. SDCL 23A-27-6. PSIs also contain information about a defendant's characteristics, financial condition, and the circumstances affecting his or her behavior that "may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant." SDCL 23A-27-6. "Hearsay may be included, and the [PSI] normally includes information from a variety of sources, including family members, law enforcement, employers, and others who know the defendant." *Hansen v. Kjellsen*, 2002 S.D. 1, ¶ 7, 638 N.W.2d 548, 549.

Before imposing sentence, a circuit court generally must disclose the PSI to the parties. SDCL 23A-27-7. The circuit court shall also

afford the parties "an opportunity to comment thereon and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." SDCL 23A-27-7.

The circuit court did not abuse its discretion when it considered uncharged conduct in the PSI. Before sentencing, the circuit court ordered court services to prepare a PSI to help it fashion an appropriate sentence for Defendant. SR:16. Court services prepared a PSI. SR:20-125. Before imposing its sentence, the circuit court received and reviewed the PSI. SR:150, 161. The PSI contained, among other things, information about Defendant's age, criminal history, personal history, education, employment, finances, alcohol/drug history, and emotional/medical history. *See* SR:20-125 (PSI Sealed). The PSI included both an official version of offense that referred to attached police reports and a Defendant's version of offense. SR:21-22, 69-89. The PSI also attached various other documents including prior PSIs. SR:37-51.

In making its decision, the circuit court extensively reviewed and recited controlling case law. SR:148-50. The circuit court stated, in part, that it may look at "conduct that was uncharged or was that – was the basis for charges later dismissed. It is not limited to the conduct stipulated in support of the guilty plea." SR:149. The record shows that

the circuit court was aware of the types of information it should consider when deciding Defendant's sentence.

The circuit court gave the State, Defendant's counsel, and Defendant himself an opportunity to be heard before it imposed its sentence. SR:150. The sentencing argument of Defendant's counsel showed he had an opportunity to view the PSI before sentencing as he based part of his argument on what the PSI reflected. *See* SR:155-57. Defendant himself then had an opportunity to address the circuit court.

After hearing from the State, Defendant's counsel, and Defendant himself, the circuit court said that in arriving at its sentencing decision, it considered the sentencing factors, the PSI, recommendations of the parties, and Defendant's statements. SR:161. Then, the circuit court delved into the facts of the case from the official version of offense in the PSI. It noted, in part,

> [W]hen the events that led to all of these circumstances started, there was an incident where it looked like Defendant entered a vehicle while the victim was distracted trying to hit at him, and that person got injuries while doing that. Then while the Defendant was driving away, there was a woman, the owner of the vehicle had been arguing with and the vehicle struck her because she stood in the middle of the road to try and help the victim, that sent her airborne over the hood of the vehicle and she got significant injuries to her head, wrist, hip, and other road rash, but that she refused medical care, indicating that she didn't want to leave her child at the scene . . . .

SR:161. The circuit court then summarized the rest of the facts of the incident. SR:161-62. The circuit court noted that Defendant was on parole when the crimes occurred, had a significant criminal history, and

had repeatedly taken cars from people. SR:162. The circuit court again pointed to facts contained in the official version of the offense—"[i]n this case you know, taking a car literally from someone's person while they're actively trying to have you not take it . . . is pretty assaultive." SR:163.

Defendant's counsel interjected,

> Your Honor, if I may, the allegations regarding taking the vehicle, *we have never entered any sort of facts that support that.* Every statement from my client is that he took the vehicle in the nighttime. The allegations regarding the woman getting hit, is not anything that we have pled to. I believe at that point, we would have likely gone to trial, he disputes those allegations. But we do admit to the taking of the vehicle when it was parked idling, but do dispute the allegations regarding hours prior. Just so the Court is aware.

SR:163 (emphasis added).

The circuit court responded,

> I recognize that from the presentence investigation and the officer that performed that that noted that there was quite a distinction between what the Defendant described as the events that led up to these circumstances and what other official reports or witness' statements or other information indicates about how this all got started, and so *I understand that that is not what Mr. Martin agrees occurred*, but the *Court is not limited to what he stipulates to in support of a guilty plea* when the Court renders a sentence. And the presentence investigation is something that I think that the Court can generally rely upon, and I am relying on that as well as the information received from Counsel and received from Mr. Martin. I am not sentencing beyond the bounds of the plea agreement . . . .

SR:163 (emphasis added). While Defendant would have liked the circuit court constrained to merely the factual basis statement or even Defendant's version of offense in the PSI when imposing its sentence, the

circuit court correctly noted that it is not limited to "information contained in a stipulated factual basis statement used to support a defendant's guilty plea." *Caffee*, 2023 S.D. 51, ¶ 28, 996 N.W.2d at 360 (quotations omitted); *see generally Garreau*, 2015 S.D. 36, ¶ 17, 864 N.W.2d at 777 (holding that the circuit court was not required to exclude inflammatory facts unrelated to the charges faced by the defendant in the federal presentence report from its consideration in determining an appropriate sentence).

On appeal, Defendant alleges he "was not afforded a meaningful opportunity to contest the circuit court's consideration of the uncharged conduct" described in the PSI. DB:9. Defendant argues that the "uncharged conduct" was not proven by a preponderance of the evidence by the State. DB:8-9. Defendant also argues that "the circuit court should have found, that a preponderance of evidence showed [Defendant] was in fact the individual responsible for perpetrating the uncharged conduct." DB:9.

SDCL 23A-27-7 governs how to dispute information in a PSI. Pursuant to SDCL 23A-27-7, "[t]he court shall afford the defendant [and] the defendant's counsel . . . an opportunity to comment" on the PSI. SDCL 23A-27-7. Both Defendant and his counsel had an opportunity to comment on the PSI during the sentencing hearing. SR:154-60. Indeed, Defendant's counsel did comment on the PSI. SR:155-65. He made a sentencing argument referencing what the PSI showed and reflected.

SR:155-65. Later in the hearing, Defendant's counsel noted that Defendant did not agree he was the person who initially stole the vehicle. SR:163. Now, Defendant argues that he "was not afforded a meaningful opportunity to contest the circuit court's consideration of the uncharged conduct" described in the PSI, DB:9, but he was given that opportunity.[2]

Further, pursuant to SDCL 23A-27-7, the circuit court *may, in its discretion*, allow a defendant to introduce testimony or other information relating to any alleged factual inaccuracy contained in the PSI. SDCL 23A-27-7. However, Defendant never sought to introduce testimony or information other than merely wanting to make the circuit court "aware" that he denied initially stealing the vehicle.

As for Defendant's argument on findings, the circuit court's findings were sufficient. While Defendant is correct that the circuit court did not specifically say that "Defendant's uncharged conduct was proven by a preponderance of the evidence," the circuit court found Defendant was the person who initially stole the vehicle. The circuit court found, "it looks like the Defendant entered a vehicle while the victim was distracted." DB:161. It further found that Defendant's "actions do present a danger to the public . . . . taking a car literally from someone's person while they're actively trying to have you not take it." SR:163.

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[2] Defendant also could have filed written objections to the PSI. *See generally State v. Garreau*, 2015 S.D. 36, 864 N.W.2d 771 (addressing a defendant's written objections to a PSI that contained a federal presentence report).

And sentencing determinations are made under a preponderance of the evidence standard. *Lanpher*, 2024 S.D. 26, ¶ 30 n.17, 7 N.W.3d at 319 n.17. Nothing in the record indicates the circuit court applied some other standard in reaching its conclusions.[3] *See generally Deleon*, 2022 S.D. 21, ¶ 24, 973 N.W.2d at 247 (This Court has "never required a sentencing court to file detailed findings of fact to justify a sentence." (quoting *State v. Bult*, 1996 S.D. 20, ¶ 12, 544 N.W.2d 214, 217)).

The circuit court's findings were also supported by the PSI. The circuit court was presented with three versions of how Defendant acquired the vehicle—one from the police reports attached to the PSI and two inconsistent versions from Defendant. At the change of plea hearing, Defendant's counsel stated that Defendant believed the vehicle belonged to someone he knew, and Defendant thought they authorized him to use the vehicle. SR:207. In Defendant's version of offense in the PSI, he stated that he saw the vehicle parked running, waited twenty minutes to see if anybody was coming back for the vehicle, then stole it. SR:21. Circuit courts "may exercise wide discretion with respect to the type of information used as well as its source" when determining an appropriate sentence. *State v. Klinetobe*, 2021 S.D. 24, ¶ 36 n.6, 958 N.W.2d 734, 743 n.6 (quotation omitted). The circuit court

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[3] If this Court disagrees with the State and determines the circuit court needed to make an explicit preponderance determination, this Court need only remand for resentencing; Defendant's convictions should remain intact.

chose not to believe either of Defendant's inconsistent stories. Instead, it relied on police reports in the PSI to support its finding that Defendant was the person who initially stole the vehicle.

The circuit court did not abuse its discretion by considering information in the PSI. A circuit court may consider an extremely broad range of information at sentencing, even information that may be inadmissible at trial. *Banks*, 2023 S.D. 39, ¶ 19, 994 N.W.2d at 235. When the information comes from a PSI, by statute, the parties have an opportunity to comment on the information and may request to introduce contrary information. Defendant had an opportunity to comment on the PSI and make any request. The circuit court properly considered the information before it and ultimately determined Defendant was the person who initially stole the vehicle. The circuit court then relied on this information, along with other information, to acquire a thorough acquaintance with the character and history of Defendant and fashioned an appropriate sentence.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that Defendant's convictions and sentences 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 4,797 words.

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

Dated this 21st day of August 2024.

/s/ Jennifer M. Jorgenson
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 21, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Chad Dale Martin*, was served via Odyssey File and Serve on Christopher Miles at cmiles@minnehahacounty.org.

/s/ Jennifer M. Jorgenson
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30654

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

CHAD DALE MARTIN,

Defendant and Appellant.

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

HONORABLE SANDRA HANSON
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on March 15, 2024

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30654

CHAD DALE MARTIN,

Defendant and Appellant.

PRELIMINARY STATEMENT

To avoid repetitive arguments, Defendant and Appellant, Chad Martin ("Martin") will limit discussion to the issues that need further development or argument. Any matter raised in Martin's initial brief, but not specifically mentioned herein, is not intended to be waived. Martin will attempt to avoid revisiting matters adequately addressed in Appellant's brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." All citations will be followed by the appropriate page number. Martin relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on July 9, 2024.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY CONSIDERING UNCHARGED CONDUCT WITHOUT A FINDING OF PROOF BY A PREPONDERANCE OF THE EVIDENCE.

The State's brief fairly construes Martin's argument on appeal. Martin, as he did in his initial brief, acknowledges that the circuit court can properly consider "conduct that was uncharged or served as a basis for chargers that later resulted in a dismissal[.]" But again, Martin reiterates that the uncharged conduct should be considered only if "the State proves that conduct by a preponderance of the evidence." *State v. Caffee*, 2023 S.D. 51, ¶ 28, 996 N.W.2d 351, 360. Here, because the circuit court's reliance on the uncharged conduct was a significant consideration in fashioning Martin's sentence, Martin maintains the circuit court should have made an explicit finding indicating the uncharged conduct had been proven by a preponderance of the evidence.

In circuit court, the State exercised its discretion and did not pursue an indictment on charges related to the circumstances of the initial vehicle theft. Furthermore, at the sentencing hearing, the State's sentencing argument only briefly alluded to the initial vehicle theft. SH 6, 8. Instead, the State's primary focus at the sentencing hearing consisted of Martin's lengthy criminal history and the facts underpinning the Vehicular Battery and Aggravated Eluding convictions. SH 5-9.

In its brief, the State contends the circuit court's findings related to the

uncharged conduct were sufficient. SB 19. To support this contention, the State references the circuit court's comment at the sentencing hearing which suggested "it looked like the Defendant entered a vehicle while the victim was distracted." *Id.*; SH 16. But the circuit court's comment should not supplant an explicit finding which determined the uncharged conduct was proven by a preponderance of the evidence.

Both parties agree that "sentencing determinations are made under a preponderance of the evidence standard." SB 20 (citing *State v. Lanpher*, 2024 S.D. 26, ¶ 30 n. 17, 7 N.W.3d 308, 319 n. 17). The parties disagree, however, on whether or not the preponderance of the evidence standard was applied. The State concedes "the circuit court did not specifically say that Defendant's uncharged conduct was proven by a preponderance of the evidence," SB 19, but argues "[n]othing in the record indicates the circuit court applied some other standard." SB 20. Martin's issue, however, is not that the circuit court applied a different standard, but that it failed to apply *any* standard before considering the uncharged conduct.

Recently, this Court vacated a defendant's sentence and remanded for resentencing because the circuit court did not make an explicit finding. *State v. Feucht*, 2024 S.D. 16, ¶ 30, 5 N.W.3d 561, 570. This Court's decision to remand for resentencing in *Feucht* was necessary "because a review of the sentencing record reveal[ed] no mention of SDCL 22-6-11 by the court or of aggravating factors found by the circuit court that pose a significant risk to the public requiring a

departure from presumptive probation[.]" *Id.* at ¶ 32, 5 N.W.3d at 571. In *Feucht*, "the question [was] not whether the court *could* have made such a finding, but whether the court actually found aggravating circumstances that pose a significant risk to the public." *Id.* at ¶ 30, 5 N.W.3d at 570. Moreover, Martin's argument comparing the issue presented in *Feucht* should not be diminished by virtue of SDCL 22-6-11 and its text which mandates an explicit finding.[1] Although Martin does not find statutory support requiring an explicit finding, as was the case in *Feucht*, this Court has constrained the circuit court's consideration of uncharged conduct to instances where "the State proves the conduct by a preponderance of the evidence." *State v. Henry*, 2024 S.D. 30, ¶ 24, 7 N.W.3d 907, 913.

Like *Feucht*, the question is not whether the circuit court could have found that the uncharged conduct was proven by a preponderance of the evidence, but whether the circuit court did in fact make such a finding. Because the circuit court relied heavily on the uncharged conduct in fashioning its sentence, it should have made a finding at the sentencing hearing indicating the uncharged conduct had been proven by a preponderance of the evidence.

CONCLUSION

The circuit court abused its discretion in considering uncharged conduct

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[1] Under SDCL 22-6-11, "the judge must state the aggravating circumstances on the record at the time of the sentencing and in the dispositional order" which warrant the circuit court's departure from a presumptive probation or fully suspended state correctional facility sentence.

without explicitly finding the uncharged conduct was proven by a preponderance of evidence. In addition, the circuit court did not provide a meaningful opportunity for Martin to contest the uncharged conduct. For the aforementioned reasons, authorities cited, and upon the settled record, Martin respectfully asks this Court to vacate the Judgment and Sentence and remand this case for a resentencing.

Respectfully submitted this 20th day of September, 2024.

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1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Brief contains 759 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 20th day of September, 2024.

/s/ Christopher Miles
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CERTIFICATE OF SERVICE

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

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