

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 30774

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**State of South Dakota,**  
Plaintiff and Appellee,  
v.  
**Claude Kampeska Jr.,**  
Defendant and Appellant.

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Appeal from the Circuit Court, Third Judicial Circuit  
Codington County, South Dakota

The Honorable Carmen Means  
Circuit Court Judge

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APPELLANT'S BRIEF

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Notice of Appeal filed on the 26<sup>th</sup> day of July, 2024

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## JURISDICTIONAL STATEMENT

In this appeal, Claude Kampeska Jr. seeks review of the following orders: (1) Memorandum Decision re: Decision on Withdrawing Plea, signed and filed on June 20, 2024; (2) Findings of Fact and Conclusions of Law signed and filed on June 25, 2024, which contains clerical errors; (3) Order Denying Defendant's Motion to Withdraw Guilty Plea signed and filed on July 8, 2024; (4) Judgment of Conviction and Order Suspending Sentence for Counts I, II, and III signed and filed on July 17, 2024.

Kampeska respectfully submits that jurisdiction exists pursuant to SDCL §15-26A-3(1) (appeal from final judgment as a matter of right).<sup>1</sup>

### STATEMENT OF THE ISSUES

- I. The Trial Court Abused its Discretion in its Refusal to Allow Kampeska to Withdraw His Guilty Plea.

Relevant Cases and Statutes:

SDCL § 23A-27-11 (Time for withdraw of plea of guilty)

SDCL § 22-24A-3 (appeal from final judgment as matter of right)

*State v. Engelmann*, 541 N.W.2d 96 (S.D. 1995)

*State v. Thielsen*, 2004 SD 17, 675 N.W.2d 429

*State v. Schmidt*, 2012 SD 77, 825 N.W.2d 889

*State v. Ceplecha*, 2020 S.D. 11, 940 N.W.2d 682

- II. Alternatively, Kampeska's Judgments of Conviction for Counts II and III Do Not Accurately Reflect the Trial Court's Sentence and Should be Amended Nunc Pro Tunc for Clerical Mistakes.

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<sup>1</sup> For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "Appx." designates Appellant's Appendix; (3) "HT" designates the hearing transcripts followed by the hearing date and transcript page and line number.

Relevant Cases and Statutes:

SDCL § 23A-31-2

*Lykken v. Class*, 1997 S.D. 29, 561 N.W.2d 302

*Rapid City Journal v. Callahan*, 2022 S.D. 38, 977 N.W.2d 742

#### STATEMENT OF THE CASE

Claude Kampeska Jr. was arrested on May 5, 2023, and charged with Sexual Exploitation of a Minor and Possession of Child Pornography. A two count Indictment was filed on May 15, 2023. CR. 11. A Habitual Offender Information was filed by the State on May 15, 2023. CR. 13. Kampeska appeared with his counsel, Ms. Teree Nesvold, on May 16, 2023, and was fully advised of his rights. HT 5/16/23, 2:1-3:1. Ms. Nesvold acknowledged receipt and waived reading of the Indictment, entered not guilty pleas, and asked for jury trial dates. *Id.* at 3:5-9. The Part II Information was not specifically addressed at the May 16, 2023, hearing.

A Superseding Indictment charging Kampeska with seven additional counts of possession of child pornography was filed on June 26, 2023. CR. 17-19. On July 7, 2023, Kampeska appeared with Ms. Nesvold. HT 7/5/23, 2:3-7; CR. 75-76. Ms. Nesvold waived reading of the Superseding Indictment, acknowledged receipt of the same, and entered not guilty pleas to the new charges. *Id.* The Part II Information was not addressed, and the transcript is devoid of any advisement of rights. *Id.*

On September 26, 2023, Ms. Nesvold filed a written plea agreement that included an advisement of rights and waiver by plea of guilty. CR. 29-32.

On September 27, 2023, Kampeska appeared in court and entered guilty pleas to three counts of Possession of Child Pornography, Counts I, II, and III of the Superseding

Indictment. HT 9/27/23, 3:23-4:6. The court delayed sentencing and ordered a Presentence Investigation Report and psychosexual evaluation be completed. *Id.* at 5:18-21. The court scheduled Kampeska's Sentencing Hearing for November 15, 2023, but advised the date would be pushed back if the psychosexual evaluation was not completed. *Id.* at 5:21-6:1. The psychosexual evaluation was not completed by that date; Kampeska's sentencing hearing was rescheduled to January 10, 2024.

On January 10, 2024, the psychosexual evaluation was still not completed; however, a hearing was held at which Kampeska asked for a new attorney. HT 1/10/24, 4:22-5:11. At the hearing, Kampeska raised concerns about his ability to review discovery, specifically the actual images he was charged with possessing, the allegation dates identified on the superseding indictment, and the Part II information. *Id.* at 3:18-20, 4:3, 4:8-15. Kampeska did not seek to withdraw his guilty plea at that hearing, but advised he wanted new counsel to help him understand whether or not he made the right decision in pleading guilty. *Id.*

THE COURT : I don't hear you saying you're ready to say I want to withdraw my plea and I want to go to trial, you're just saying I want to talk to somebody else about whether I've made the right decision. Does that sound right?

CLAUDE KAMPESKA: Yes, your Honor.

*Id.* at 4:22-5:1.

The trial court opined, "I think there might be some benefit to giving Mr. Kampeska a chance to talk to a different attorney to kind of get some input about whether or not he made the right decision," and granted Kampeska's request for new counsel. *Id.* The trial court appointed Mr. Tim Cummings to represent Kampeska on January 10, 2024. CR. 36.

On April 10, 2024, a bond hearing was held. At that hearing, Kampeska advised the

court that he intended to withdraw his guilty plea and had 12 issues he wanted to raise about his case. HT 4/10/24, 3:6-23. On May 2, 2024, a formal motion was filed by Cummings asserting Kampeska's wish to withdraw his guilty plea to Counts I, II, and III of the Superseding Indictment. CR. 41. A brief did not accompany the motion filed by Cummings. The State objected to the motion. CR. 81. A hearing was held on May 15, 2024, to address the Motion.

At the May 15, 2024 hearing, the trial court received Exhibit A, which was a letter Kampeska wrote to the court 6 months earlier on November 13, 2023, addressing his concerns about the pleas he entered at the September 27, 2023 plea hearing. Appx. 10-15; CR. 75-80; HT 5/15/24, 3:5. The letter outlined Kampeska's eventual reasons for wanting to withdraw his guilty plea; those reasons were continuously raised in subsequent letters and at subsequent hearings. HT 5/15/24, 3:12-10:19; CR 75-80, Appx. 10-15. The Court took under advisement the issue of whether Kampeska was "adequately advised of [his] rights by the Court and if [he] knew what [he was] doing at the time [he] entered [his] plea and that [his] plea was knowing, voluntary, and intelligent." HT 5/15/24, 10:21-24; 11:9-10.

On June 20, 2024, the court issued a written decision and denied Kampeska's Motion to Withdraw Guilty Plea. On June 25, 2024, the trial court signed Findings of Fact and Conclusions of Law. CR. 98-99. Kampeska thereafter filed Objections to the Findings of Facts and Conclusions of Law. CR. 101. The trial court entered an Order denying Defendant's Motion to Withdraw Guilty Plea on July 7, 2024. CR. 102.

Kampeska's sentencing hearing took place on July 17, 2024. At the hearing, Kampeska objected to being sentenced and reiterated his concerns and wish to withdraw his guilty plea and proceed to trial. HT 7/17/24, 4:10-5:7. The trial court overruled



Kampeska's objections.

Kampeska was sentenced to ten years in the South Dakota State Penitentiary, with three years suspended, on Count I, and six years suspended in the South Dakota State Penitentiary on Counts II and III. *Id.* at 7:14-25. All three sentences were run concurrent to one another, and Kampeska was given credit for 439 days. *Id.* at 8:2-4. Three separate Judgment of Convictions were signed and filed on July 17, 2024. CR. 103-108; Appx. 1-6. Two of those Judgments did not accurately reflect the court's sentence. CR. 103-106; Appx. 3-6; HT 7/17/24, 7:14-8:17. Notice of Appeal was filed with the Codington County Circuit Clerk on July 26, 2024. CR 182-183.

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

On May 5, 2023, law enforcement responded to a call alleging suspicious activity after an individual observed an older male sitting on a bench in a park with a young female. CR. 3. When law enforcement arrived, they found Kampeska sitting with a 16-year-old female. CR. 3. The female identified Kampeska as her uncle and stated, "she was having bad anxiety so he met her to talk." CR. 3. Kampeska was on parole at the time and incorrectly identified as a registered sex offender. CR. 4; HT 9/27/23, 4:15-16. Kampeska's parole agent advised local law enforcement that Kampeska "was not supposed to be in Watertown and advised if his PBT was over .100% to take him to the jail on a parole detainer." CR. 4. Kampeska's parole agent authorized a search of Kampeska's cell phone. CR. 4. Law enforcement seized two cellphones from Kampeska. CR. 4. The original cellphone search revealed a Facebook Messenger conversation between Kampeska and the juvenile which included a photograph of the juvenile's bare

breasts. CR. 5; HT 9/27/23, 4:16-19. In the conversation, the juvenile advised Kampeska that she is 16 years old. CR. 5. A subsequent search of Kampeska's cellphones revealed an image of a prepubescent vagina with an object being inserted into it, and another image of a close-up photo of a prepubescent vagina with no pubic hair visible. HT 9/27/23, 4:20-25. A Superseding Indictment was filed which included additional charges for additional images found on Kampeska's cellphones. The images from Counts II and III were found on a second cellphone that originally belonged to Kampeska's niece. HT 5/15/24, 4:23-25. His niece was logged into a Google account, Tik Tok, Instagram, and Snap Chat account. *Id.* at 4:25-5. Kampeska denies knowingly possessing the images identified in Counts II and III.

#### STANDARD OF REVIEW

On appeal, this Honorable Court will review a circuit court's "refusal to permit a defendant to withdraw his guilty plea prior to sentencing under an abuse of discretion standard." *State v. Schmidt*, 2012 SD 77, ¶ 12, 825 N.W.2d 889, 893-94 (quoting *State v. Bailey*, 1996 SD 45, ¶ 11, 546 N.W.2d 387, 390). "The term 'abuse of discretion' refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.* (quoting *State v. Engelmann*, 541 N.W.2d 96, 100 (S.D. 1995)). "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 and unreasonable.'" *Kaberna v. Brown*, 2015 SD 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850).

"The [trial] court's findings are given 'considerable deference' and [the Supreme Court] will not reverse these findings unless they are clearly erroneous." *Lykken*, 1997

S.D. 29, ¶ 4, 561 N.W.2d at 304 (citing *St. Cloud v. Leapley*, 521 N.W.2d 118, 121 (S.D.1994)). Under the clearly erroneous standard, this Court should only reverse if it is “‘left with a definite and firm conviction that a mistake has been made’ after a thorough review of the evidence.” *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 15, 746 N.W.2d 437, 442–43 (quoting *Fin–Ag, Inc. v. Feldman Bros.*, 2007 SD 105, ¶ 19, 740 N.W.2d 857, 862–63).

“An orally pronounced sentence . . . control[s] over the written judgment[.]” *Lykken v. Class*, 1997 S.D. 29, ¶ 13, 561 N.W.2d 302, 306 (quoting *State v. Sieler*, 1996 SD 114, ¶ 12, 554 N.W.2d 477, 481). “Where the state produces a document constituting a judgment of conviction, the petitioner has the burden to prove by a preponderance of the evidence that there exists credible evidence of invalidity in that judgment.” *Lykken*, 1997 S.D. 29, ¶ 5, 561 N.W.2d at 304 (citing *State v. Moeller*, 511 N.W.2d 803, 809 (S.D. 1994)).

## ARGUMENT

### **I. Circuit Court Abused Its Discretion in Denying Kampeska’s Motion to Withdraw Guilty Plea**

A motion to withdraw a plea of guilty ... may be made only before sentence is imposed or imposition of sentence is suspended ...

SDCL § 23A-27-11.

This Court has “said that the trial court’s discretion to allow withdrawal of a guilty plea prior to ‘sentencing should be exercised liberally in favor of withdrawal.’” *State v. Goodwin*, 2004 SD 75, ¶ 4, 681 N.W.2d 847, 849 (quoting *State v. Wahle*, 521 N.W.2d 134, 137 (S.D. 1994)). The trial court’s discretion should favor withdrawal of the guilty plea when a defendant enters a plea “without full knowledge of the consequences and involuntarily.” *Wahle*, 521 N.W.2d at 137. Kampeska’s challenge to the voluntariness

of his guilty plea by direct appeal requires “a more intense scrutiny than if the challenge is by a collateral habeas corpus action.” *Goodwin*, ¶ 4, 681 N.W.2d at 849 (citing *Moeller*, 511 N.W.2d at 809). Kampska is to be given “all the presumptions and protections possible under our constitution.” *Moeller*, 511 N.W.2d at 809.

“When deciding whether to allow a criminal defendant to withdraw his plea, the [circuit] court must look at the reasons why the plea is sought to be withdrawn and if the request to withdraw is obviously frivolous, the circuit court need not grant it.” *State v. Olson*, 2012 SD 55, ¶ 18, 816 N.W.2d 830, 835-36. Provided a defendant provides “ ‘ a tenable reason why withdrawal should be permitted, a reason ’ ” the court deems fair and just, the request to withdraw a guilty plea should be granted. *Schmidt*, ¶ 16, 825 N.W.2d at 894 (quoting *Everett v. U.S.*, 336 F.2d 979, 982 (D.C. Cir. 1964)); *State v. Thielsen*, 2004 SD 17, ¶ 15, 675 N.W.2d 429, 433 (quoting *Engelmann*, 541 N.W.2d at 100)).

A defendant who seeks to withdraw his guilty plea “no longer enjoys the presumption of innocence and, on a motion to withdraw the plea, bears the burden of production and persuasion.” *Thielsen*, 2004 SD 17, ¶ 19, 675 N.W.2d at 434. When considering whether to allow a defendant to withdraw a guilty plea, this Court is to consider a non-exclusive list of factors to determine whether a defendant’s proffered reason is fair and just:

- (1) Whether the defendant knowingly and voluntarily pled guilty;
- (2) Whether defendant asserts he is innocent;
- (3) The delay between the plea and request for withdrawal;
- (4) Whether the defendant received competent assistance of counsel in making the decision to plead guilty;
- (5) Whether withdrawing the plea will prejudice the prosecution; and
- (6) Whether withdrawing the plea will waste judicial resources.

*State v. Kvasnicka*, 2016 SD 2, ¶ 9, 873 N.W.2d 705, 709.

Additional factors include whether the plea is contrary to the truth, whether the

defendant misapprehended the facts, and whether the plea was procured by misapprehension and improper means via coercion. *Thielsen*, ¶ 17, 675 N.W.2d at 433.

**A. Plea Contrary to the Truth/Actual Innocence**

Kampeska asserted actual innocence by way of an alibi and lack of knowledge of possession when he alleged the images were found on a phone that recently belonged to someone else.

I did not knowingly possess these images, the phone that they were found on belongs to my niece and with that she's logged into a Google account, she's logged into a Tik Tok, a Facebook—or no, not a Facebook, a Instagram, a Snap Chat and I believe there's one more [ac]count but she also has numerous pictures and videos on there that will show that this phone wasn't, you know, in the beginning it wasn't mine, you know, so I didn't knowingly know that these images were possessed or were contained in this phone because in the detective report it shows that the only way that the detective found these images was that he did some kind of program software to find these images in the phone.

HT 5/15/24, 4:21-5:9. Kampeska also identified Counts II through VIII allege possession which occurred while he was in custody and had no access to the phones.

On Count 2 through 8 it reads on May 10 and on May 24 that I committed the crime of possession and on May 5 I was arrested here in Watertown and I've been in custody ever since, so with regards to an alibi for those counts, I was in custody during that time.

*Id.* at 3:14-18.

Kampeska asserted actual innocence by way of an alibi defense as the main reason for wanting to withdraw his guilty plea. Forty-seven days after his change of plea hearing, Kampeska alerted the court via a letter dated November 13, 2023, that he had never been provided an opportunity to view the images he was charged with possessing, that one of the phones recently belonged to someone else, and that he had an alibi for May 10, 2023, and May 24, 2023. CR. 77. On January 4, 2024, Kampeska wrote to the

court expressing concerns about his attorney's failure to question the facts of his case. CR. 35. At the motion hearing on January 10, 2024, Kampeska again advised the court that the superseding indictment charged him with crimes on May 10 and May 24 and he was incarcerated on those dates, providing him with an alibi. HT 1/10/24, 4:13-15. Further, Kampeska alleged that he was not given a copy of the superseding indictment until after he changed his plea, which prevented him from challenging the dates earlier. *Id.* at 6:5-9. At the bond hearing on April 10, 2024, Kampeska again asserted issues with the indictment charging him after he was in custody given he had an alibi. HT 4/10/24, 3:18. On May 15, 2024, the trial court addressed Kampeska's Motion to Withdraw Guilty Pleas, and Kampeska once again raised the same issues and asserted an alibi defense. HT 5/15/24, 3:12-18.

In its June 20, 2024, Memorandum Decision, the trial court acknowledged the May 10, 2023, indictment date created an issue in this case and then inserted speculation to justify its decision not to allow the withdraw of the guilty plea: "While the court is unsure why the dates on the Superseding Indictment charges offense dates after the defendant's arrest, this could be a typographic error that likely would have been corrected prior to trial." CR. 96; Appx. 8. Given Kampeska's alibi, to proceed to trial, the State would have needed to file a second superseding incitement to correct the date or dismiss the charges. The trial court injected its own subjective belief to rationalize a serious error in order to move forward with sentencing instead of allowing Kampeska to withdraw his plea and forcing the State to correct its errors in the superseding indictment or dismiss the charges if there wasn't in fact an error.

The precise time at which an offense was committed need not be stated in an indictment or information, but it may be alleged to have been

committed at any time before the filing thereof, except when the time is a material element of the offense.

SDCL § 23A-6-9.

While South Dakota Codified Law 23A-6-9 does not require a precise time at which an offense was committed to be stated in an indictment, it is important to note that a charging document “operates to provide the defendant with the specific time, date and place claimed by the prosecution” for purposes of a defendant’s right to present an alibi defense. *State v. Nelson*, 310 N.W.2d 777, 782 (S.D. 1981) (Fosheim, J., dissenting) (citing Fed. R. Crim. P. 12.1, 18 U.S.C.A., Historical Note and Notes of Advisory Committee on Rules.) In this case, given Kampeska’s alibi defense, the “on or about” language used in the superseding indictment does not cure the timeline defect. An “on or about” instruction cannot be given if a defendant has an alibi for the entire timeframe. See *Nelson*, 310 N.W.2d at 781 (holding appellant needed an alibi for the entire time period the crime could have occurred to avoid an “on or about” jury instruction.) “While often times ‘on or about’ is included as surplus language in an information or indictment, when an alibi is noted, the ‘surplusage in the allegation is no longer irrelevant and time may be of ‘decisive importance.’” *Nelson*, 310 N.W.2d at 782 (Fosheim, J., dissenting) (quoting *Missouri v. Clark*, 509 S.W.2d 740 (Mo. Ct. App.1974)). “When the defendant is committed to an alibi time and place, unfairness occurs if the time frame is then shifted or expanded in the minds of the jury. The defendant is trapped and an ‘on or about’ instruction in effect nullifies his alibi defense.” *State v. Nelson*, 310 N.W.2d 777, 782 (S.D. 1981) ) (Fosheim, J., dissenting); *Missouri v. Siems*, 535 S.W.2d 261 (Mo. Ct. App. 1976). “Alibi evidence must show that the accused could not have committed the alleged crime, because at the time of its commission he was at a place other than where such

offense was committed.” *Nelson*, 310 N.W.2d at 779–80 (citing *State v. Reiman*, 284 N.W.2d 860, 871 (S.D. 1979)). Kampeska’s alibi of being in custody during the time alleged satisfies the high burden placed on a defendant who asserts an alibi which renders an “on or about” instruction improper.

When it presented the Superseding Indictment to a grand jury on June 26, 2023, the State had all of the cellphone data. CR. 17. The fact that the dates in the superseding indictment identify a date during which Kampeska was in custody create a legitimate alibi defense to a material element. In denying Kampeska’s Motion to Withdraw Guilty Plea, the trial court found the date issue “*could* be a typographic error that *likely would* have been corrected prior to trial.” CR. 87 (emphasis added). The trial court did not know, and at this stage on appeal, this Court cannot say for certain, that this was simply a typographical error. If this is not a typographical error, Kampeska is innocent of Counts II and III based on his alibi. Absent a reason “obviously frivolous,” the Circuit Court is directed to exercise its discretion liberally in favor of allowing withdrawal of a guilty plea. *Goodwin*, ¶ 4, 681 N.W.2d at 849 (quoting *Wahle*, 521 N.W.2d at 137)).

The Court erred in not allowing Kampeska to withdraw his guilty plea given his alibi defense. The Circuit Court’s refusal to recognize Kampeska’s alibi as a “tenable reason why withdrawal should be permitted,” is “discretion exercised to an end or purpose, not justified by, and clearly against reason and evidence.” *Schmidt*, ¶ 12, 825 N.W.2d at 893-94 (quoting *Engelmann*, 541 N.W.2d at 100). The Circuit Court’s denial of Kameska’s Motion to Withdraw should be reversed, Kampeska’s convictions should be vacated, and Kampeska should be allowed to proceed to trial.



**B. Kampeska's Plea Was Involuntary and Procured by Improper Means; Kampeska Misapprehended the Facts; and Kampeska Lacked Competent Assistance of Counsel When he Made the Decision to Plead Guilty**

In determining whether a guilty plea was offered knowingly and voluntarily, the Court looks to the totality of the circumstances. *State v. Lohnes*, 344 N.W.2d 686, 688 (S.D. 1984). “The fundamental test is whether the plea of guilty was ‘an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.’” *State v. Bolger*, 332 N.W.2d 718, 720 n. 2 (S.D. 1983) (quoting *Watkins v. Solem*, 571 F.2d 435, 437 (8th Cir. 1978)).

Where the record shows that ‘circumstances as they existed at the time of the guilty plea, *judged by objective standards*, reasonably justified [a defendant’s] mistaken impression,’ a defendant must be held to have entered [the] plea without full knowledge of the consequences and involuntarily.

*Engelmann*, 541 N.W.2d at 101 (quoting *Wahle*, 521 N.W.2d at 137 (emphasis in original)). When considering whether to grant a motion to withdraw a guilty plea, the court can look to whether the defendant misapprehended the facts and whether the plea was procured by misapprehension and improper means via coercion. *Thielsen*, ¶ 17, 675 N.W.2d at 433.

Kampeska advised the trial court he was not given a copy of the superseding indictment until after he changed his plea and was never given access to the actual photos he was charged with possessing. HT 1/10/24, 3:18-4:3; 6:5-9. Kampeska alleged he did not know the photos he admitted a factual basis to were found in the cache of an LG file of a phone that recently belonged to someone else, and that he was having a side conversation with his attorney at the time the factual basis was being read by the State’s Attorney. HT 5/15/24, 4:6-8,10-13. Further, the record shows Kampeska was influenced to plead guilty based on the repeated assertion that if he did not accept the plea agreement

the federal government would take over prosecuting his case, which coerced Kampeska into accepting the plea offer despite the lack of a factual basis and his alibi defense. *Id.* at 5:24-6:8.

In Kampeska's November 13, 2023 letter, he informed the trial court,

[M]y lawyer repeatedly told me I was being charged with the Habitual Offender status and that also the "Feds" were looking to get involved with my case if the plea agreement was anything less than taking 3 charges of child porn.

CR. 76-77.

My lawyer repeatedly denied me access to the evidence to allow myself a defense for such charges. She continually[sic] stated that I was being charged with the habitual offender and that the "Feds" would step in if anything less would be taken in plea deal to intimidate me into plea deal filed in court on September 27<sup>th</sup>, 2023.

CR. 78 (internal miscellaneous capitalizations omitted).

Furthermore, Kampeska asserted numerous times that the State used the Part II Information that he had never been advised on to "intimidate, manipulate, and coerce [him] into taking this plea deal." HT 5/15/24, 5:15-23.

Kampeska's also misunderstood Paragraph 26 of the Advisement of Rights and Authorization to Plead Guilty. CR 29-32. Kampeska believed the provision "if I plead guilty the Court will pass sentence and judgment, which sentence and judgment will be in the sole discretion of the Judge and neither my attorney nor the State's Attorney can control the sentence" meant that the State's Attorney could not request a specific sentence from the Court. At the sentencing hearing, the State did specifically request a penitentiary sentence. HT 7/17/24, 3:7-8.

This Court's duty is to determine whether Kampeska's "request to withdraw his plea was frivolous." *Engelmann*, 541 N.W.2d at 100. Kampeska "need only state a

tenable reason why withdrawal should be permitted, a reason based on more than a mere wish to have a trial.” *Id.* In his letters and at his hearings, Kampeska reiterated the totality of his misperception of the facts, the evidence against him, and his options. Appx. 10-15; CR. 75-80; HT 1/10/24; HT 5/15/24; HT 7/17/24. Kampeska articulated a desire to understand the impact of those things and requested new counsel. HT 1/10/24, 2:18-5:1. Kampeska’s concerns about the advice he was provided and his right to challenge the evidence, resulted in the trial court finding it in Kampeska’s best interest to allow him the ability to talk to another attorney about his case and get a second opinion. HT 1/10/24, 5:13-16 (“I think there might be some benefit to giving Mr. Kampeska a chance to talk to a different attorney to kind of get some input about whether or not he made the right decision.”). After being provided substitute counsel, Kampeska had an opportunity to question the advice Ms. Nesvold gave him. This compounded Kampeska’s concerns and resulted in his expressed wish to withdraw his guilty plea.

I got those three things and the ineffective assistance of counsel, with that it’s the letter to you, there was letters that went along with that too that were from Teree Nesvold and it actually shows that she responded to my concerns in my case, those weren’t provided to me, back to me whatever. Also with that, yeah, she failed to provide me adequate time to review the reports, she denied me access to view the evidence to what the actual Counts 2 through 8 stem from. I still haven’t seen that evidence. She failed to investigate evidence of possession, the venue, the domain and control of the phone because it was my nieces, she failed to investigate the claim and the police report that I was a registered sex offender which was used in the supporting affidavit to initiate the search warrant in my case, and the -- in the police report it says that the two, Sergeant Johnson and Corporal Fischer when they did a background check that it came back that I was a registered sex offender. Well, I got a copy of my criminal background history from the Clerk of Courts and one provided from Teree Nesvold and not one of them, not one of my charges has that I have to register. She failed to challenge that, she failed to investigate it, she failed to challenge an Amended Indictment, an illegally provided Amended Indictment. After I pled guilty to these three counts I continually questioned her into regards of how I can be convicted on May 10 and May 24 of 2023 when I was

incarcerated in the county jail already and my phone was seized on May 5 and she produced this Amended Indictment saying -- charging not specifically on May 5, May 10, and May 24, but the wording on it changes to on or about May 5, May 10, and May 24 giving the State a broader range to produce evidence to convict me and with that, that's an Amended Indictment, it's changing – it's bringing prejudice to me by, you know, putting more out there that I need to defend against, and that's in the January 10 hearing that's what I was talking about the Amended Indictment.

HT 5/15/24, 6:8-7:16.

The “circumstances as they existed at the time of the guilty plea” involve an individual who had had an alibi for seven of the nine counts, had never been provided access to the actual images he was charged with, a misunderstanding about where the images were found and what phone they were found on, threats of a federal indictment if he didn't accept a plea offer with an admission to at least three counts, and fear of a habitual offender sentencing enhancement. Under the totality of the circumstances, considering Kampeska's misapprehension of the facts and the likelihood that the guilty pleas were procured by misapprehension, and improper means via coercion, resulted in Kampeska “enter[ing] [the] plea without full knowledge of the consequences and involuntarily.” *Engelmann*, 541 N.W.2d at 101.

It was “arbitrary and unreasonable” for the Circuit Court to refuse to recognize Kampeska's misapprehension of the facts and the defenses available to him as a “tenable reason why withdrawal should be permitted.” *Id*; *Kaberna*, ¶ 13, 864 N.W.2d at 501 (quoting *Gartner v. Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850). The trial court's denial of Kampeska's Motion to Withdraw should be reversed, Kampeska's convictions should be vacated, and Kampeska should be allowed to proceed to trial.

## II. Judgments of Conviction for Counts II and III Must Be Amended For Clerical Mistakes

“An orally pronounced sentence does control over the written judgment, however, if the verbal sentence is not clear, the intent of the sentencing court may be construed from the entire record.” *Lykken*, 1997 S.D. 29, ¶ 13, 561 N.W.2d at 306 (quoting *State v. Sieler*, 1996 SD 114, ¶ 12, 554 N.W.2d 477, 481).

On July 17, 2024, the trial court sentenced Kampeska to ten years in the South Dakota State Penitentiary, with three years suspended, on Count I, and six years suspended in the South Dakota State Penitentiary on Counts II and III. HT 7/17/24, 7:14-25. All three sentences were run concurrent to one another, and Kampeska was given credit for 439 days. *Id.* at 8:2-4.

On Count 1 I am going to impose 10 years in the South Dakota state penitentiary, I'm going to suspend 3 of those years on conditions to be established by the Department of Corrections. I'm going to impose court costs only, I'm going to impose restitution in the amount of \$2200 for completion of the psychosexual evaluation, and I'm going to order that you repay Codington County for the cost of your court-appointed attorney's fees. On Count 2 I am going to suspend 6 years in the South Dakota State Penitentiary, I'm going to impose court costs on that file, I am going to suspend that time on conditions to be established by the Department of Corrections. On Count 3 I am also suspending 6 years in the South Dakota State Penitentiary, I'm imposing court costs, I will suspend that time on conditions to be established by the Department of Corrections. These three sentences are going to run concurrent to one another and you will be given credit for [439] days previously served.

*Id.* at 7:14-8:4,18-19.

Three separate Judgment of Convictions were signed and filed on July 17, 2024. Appx. 1-6; CR. 103-108. The Judgment of Conviction for Count I accurately reflects the trial court's sentence. The Judgments of Conviction for Counts II and III incorrectly state Kampeska is to be imprisoned in the South Dakota State Penitentiary for a term of “Ten

(10) years” and that “Six (6) years of the prison sentence are suspended[.]” Appx. 3-6; CR. 103-106. Credit for 439 days is also missing from the judgments for counts II and III. Appx. 3-6; CR. 103-106.

The oral sentence pronounced by the trial court was clear. The written judgments for Counts II and III are inconsistent with the trial court’s oral sentences and should be corrected.

Clerical mistakes in judgments, orders, or other parts of a record and errors in a record arising from oversight or omission may be corrected by a court at any time and after such notice, if any, as the court orders.

SDCL § 23A-31-2.

“A ‘*nunc pro tunc*’ designation has been used by other courts in orders correcting sentencing errors.” *Rapid City Journal. v. Callahan*, 2022 S.D. 38, ¶29, 977 N.W.2d 742, 751. “A ‘[n]unc pro tunc’ judgment is a judgment entered to make the record speak the truth and the function of such entry is to correct the judicial records insofar as they fail to record a judgment by the court[.]” *Rapid City Journal*, 2022 S.D. 38, ¶ 28 , 977 N.W.2d at 751–52 (quoting *Andersen v. Andersen*, 2019 S.D. 7, ¶ 11, 922 N.W.2d 801, 803). “‘Nunc pro tunc’ means ‘now for then’ and when applied to entry of a legal order or judgment, it normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act.” *Id.*

A nunc pro tunc judgment should be entered for counts II and III to reflect the sentence of the court, which was six years in the South Dakota State Penitentiary with all six years suspended and credit for 439 days.

## CONCLUSION

Kampeska provided the trial court with numerous tenable reasons to withdraw his guilty plea. Kampeska respectfully requests that this Honorable Court vacate his conviction for Counts I, II and III, reverse the trial court's order denying Kampeska's Motion to Withdraw Guilty Plea, and allow Kampeska to proceed to trial.

Should the Court deny Kampeska's request to reverse the trial court's decision and allow him to withdraw his guilty plea and proceed to trial, Kampeska asks that a nunc pro tunc judgement be entered so Counts II and III accurately reflect the trial court's orally pronounced sentence.

Respectfully submitted this 13<sup>th</sup> of December, 2024.

*/s/ Clint Sargent* \_\_\_\_\_  
Clint Sargent  
Erin E. Willadsen  
Meierhenry Sargent LLP  
315 S. Phillips Avenue  
Sioux Falls, SD 57104  
605-336-3075  
clint@meierhenrylaw.com  
erin@meierhenrylaw.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing

Appellant's Brief and all appendices were filed online and served upon:

Marty Jackley  
Office of the Attorney General  
1302 E. Hwy 1 Ste. 1  
Pierre, SD 57501  
605-773-3215  
ATGSERVICE@STATE.SD.US

On this 13<sup>th</sup> day of December, 2024.

/s/ Clint Sargent  
Clint Sargent  
Erin E. Willadsen  
MEIERHENRY SARGENT LLP  
315 South Phillips Avenue  
Sioux Falls, SD 57104-6318  
(605) 336-3075  
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*Attorneys for Defendant*



## CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5,570 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 13<sup>th</sup> day of December, 2024.

*/s/ Clint Sargent*  
\_\_\_\_\_  
Clint Sargent  
MEIERHENRY SARGENT LLP  
315 South Phillips Avenue  
Sioux Falls, SD 57104-6318  
(605) 336-3075  
clint@meierhenrylaw.com

**APPENDIX**

Tab 1 - Judgment of Conviction Counts I, II and III..... Appx. 1-6

Tab 2 - Memorandum Re Decision on Motion to Withdraw Plea ..... Appx. 7-9

Tab 3 - Kampeska’s November 13, 2023, Letter to the Court .....Appx. 10-15

# Tab 1

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON )

THIRD JUDICIAL CIRCUIT

\*\*\*\*\*

STATE OF SOUTH DAKOTA,  
Plaintiff

# 14CRI23-000464

vs.

Judgment of Conviction  
and  
Order Suspending Sentence

CLAUDE KAMPESKA JR.  
Date of Birth: 07/08/1980  
Defendant.

\*\*\*\*\*

A Superseding Indictment was filed in this Court on June 26, 2023. The Defendant was arraigned on September 27, 2023. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Teree Nesvold and Becky Morlock Reeves of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant pled GUILTY to the offense Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)) COUNT I, committed on or about May 5, 2023.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)).

SENTENCE

On the July 17, 2024, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:  
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Ten (10) years, there to be kept, fed and clothed according to the rules and disciplines governing said institution. Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

IT IS FURTHER ORDERED that Three (3) years of the prison sentence are suspended on the following conditions:

1. That the Defendant reimburse Codington County for the costs of the psycho-sexual evaluation in the amount of \$2200.00.
2. That the Defendant pay the assessed costs as ordered.
3. That the Defendant reimburse Codington County for the costs of the court appointed attorney fees.
4. That all other terms and conditions are to be established by the Department of Corrections.

IT IS FURTHER ORDERED that the Defendant is given credit of Four Hundred Thirty-nine (439) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 17th day of July, 2024.

ATTEST



*[Signature]*  
Clerk/Deputy

BY THE COURT:

*[Signature]*  
CIRCUIT COURT JUDGE

**FILED**

JUL 17 2024

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON )

THIRD JUDICIAL CIRCUIT

\*\*\*\*\*

STATE OF SOUTH DAKOTA,  
Plaintiff

# 14CR123-000464

vs.

Judgment of Conviction  
and  
Order Suspending Sentence

CLAUDE KAMPESKA JR.  
Date of Birth: 07/08/1980  
Defendant.

\*\*\*\*\*

A Superseding Indictment was filed in this Court on June 26, 2023. The Defendant was arraigned on September 27, 2023. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Teree Nesvold and Becky Morlock Reeves of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant pled GUILTY to the offense Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)) COUNT II, committed on or about May 10, 2023.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)).

SENTENCE

On the July 17, 2024, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:  
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Ten (10) years, concurrent with Count I and Count III, there to be kept, fed and clothed according to the rules and disciplines governing said institution.  
Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

IT IS FURTHER ORDERED that Six (6) years of the prison sentence are suspended on the following conditions:

1. That the Defendant reimburse Codington County for the costs of the court appointed attorney fees.
2. That the Defendant pay the costs as ordered.
3. That the Defendant abide by all other terms and conditions established by the Department of Corrections.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 17th day of July, 2024.

ATTEST

  
Clerk of Courts/Deputy

BY THE COURT:

  
CIRCUIT COURT JUDGE



**FILED**

JUL 17 2024

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON )

THIRD JUDICIAL CIRCUIT

\*\*\*\*\*

# 14CRI23-000464

STATE OF SOUTH DAKOTA,  
Plaintiff

vs.

Judgment of Conviction  
and  
Order Suspending Sentence

CLAUDE KAMPESKA JR.  
Date of Birth: 07/08/1980  
Defendant.

\*\*\*\*\*

A Superseding Indictment was filed in this Court on June 26, 2023. The Defendant was arraigned on September 27, 2023. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Teree Nesvold and Becky Morlock Reeves of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant pled GUILTY to the offense Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)) COUNT III, committed on or about May 10, 2023.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Possession of Child Pornography - Class 4 Felony (SDCL 22-24A-3 & 22-6-1(7)).

SENTENCE

On the July 17, 2024, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:  
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Ten (10) years, concurrent with Count I and Count II, there to be kept, fed and clothed according to the rules and disciplines governing said institution.  
Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.




IT IS FURTHER ORDERED that Six (6) years of the prison sentence are suspended on the following conditions:

1. That the Defendant reimburse Codington County for the costs of the court appointed attorney fees.
2. That the Defendant pay the costs as ordered.
3. That the Defendant abide by all other terms and conditions to be established by the Department of Corrections.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 17<sup>th</sup> day of July, 2024.

ATTEST

  
Clerk of Courts/Deputy

BY THE COURT:

  
CIRCUIT COURT JUDGE



**FILED**  
JUL 17 2024

Tab 2

14CR123-000464

STATE OF SOUTH DAKOTA  
**THIRD JUDICIAL CIRCUIT COURT**  
CODINGTON COUNTY COURTHOUSE  
14 1<sup>st</sup> Avenue S.E., Watertown, SD 57201  
FAX Number (605) 882-5106

HON. CARMEN A. MEANS  
Circuit Court Judge  
(605) 882-5090  
Carmen.Means@ujs.state.sd.us



DAWN RUSSELL  
Court Reporter  
(605) 882-5092  
Dawn.Russell@ujs.state.sd.us

Rebecca Morelock Reeves  
Codington County State's Attorney  
14 First Avenue SE  
Watertown, SD 57201  
rreeves@codington.org

Tim Cummings  
Attorney at Law  
P.O. Box 1600  
Watertown, SD 57201  
tim@grolawfirm.com

Re: State v. Kampeska, Motion to Withdraw Plea

*Sent via email transmission only*

June 20, 2024

Dear Counsel:

The court issues the following letter decision regarding the Defendant's request to withdraw his guilty plea. This matter was scheduled for hearing on May 15, 2024. The defendant was present with his attorney Tim Cummings. The State was represented by Rebecca Morelock-Reeves. The court has reviewed the file and reviewed the arguments of the Defendant and hereby denies the request to withdraw his plea.

**FACTS**

The defendant was charged on May 5, 2023, with possession of child pornography and sexual exploitation of a minor. An indictment was filed along with a habitual offender information on May 15, 2023. The State filed an Amended Indictment charging one count of possession of child pornography and one count of sexual exploitation of a minor. The defendant appeared with counsel and was advised of his rights at his appearance in Magistrate Court on May 16, 2023. Defendant entered into a written plea agreement with the State wherein he agreed to plead guilty to three counts of possession of child pornography. In exchange for the defendant's pleas, the State agreed to dismiss all remaining charges, agreed to file no additional charges arising out of the same

incident and dismissed the Habitual offender information. A plea hearing was conducted on September 27, 2023. At the time of the plea hearing, the court advised the defendant of his *Boykin* rights and that he waived those rights if he pleads guilty. The defendant indicated that he had reviewed the plea agreement documents completely and that he understood those documents before he executed them. The defendant gave a factual basis for his guilty plea, acknowledging that images constituting child pornography were found on his phone and that he, in fact, downloaded them from the internet. The court found a factual basis for the guilty pleas and found voluntary and intelligent pleas. The court ordered the preparation of a pre-sentence investigation report and the preparation of a psycho-sexual evaluation report prior to sentencing.

On November 13, 2023, the defendant wrote a letter to the court complaining about his court-appointed attorney. The court forwarded this letter to the state and defense counsel in the hope that any complaints could be resolved. Ultimately, the court appointed a second attorney to assume representation of the defendant on January 10, 2024. The defendant made a motion to withdraw his guilty plea on May 2, 2024. This motion was heard by the court on May 15, 2024.

The defendant claimed several bases for a motion to withdraw his guilty plea. He asserted that he was innocent of the charges to which he pled guilty. He complained that he was unaware of the dates that were alleged for counts two and three and claimed that he thought those counts arose from Facebook messages. He complained about the habitual offender information, stating that he was not granted a hearing on the habitual offender information and complaining that the filing of said information was coercive to him. He claimed that his attorney discussed with him the possibility of federal involvement in the prosecution if the state prosecution was not resolved. He stated that he had inadequate time to view the evidence against him. He stated that in the police reports, law enforcement claimed that he was a registered sex offender, and that this was not true. He generally complained about his counsel being ineffective and that he was dissatisfied with counsel's representation.

#### ANALYSIS

A motion to withdraw a guilty plea can be made at any time, and the court has discretion whether to grant the motion. When a motion to withdraw a guilty plea is made prior to the imposition of sentence, the court is directed to exercise its discretion liberally in favor of permitting the withdrawal of the plea. However, a defendant does not have an automatic right to withdraw his plea, and the court must consider whether the defendant has established fair and just grounds in favor of withdrawing his plea. In reviewing the defendant's claimed bases for withdrawing his plea, the court acknowledges that he claims "actual innocence" as a grounds for withdrawing his plea. However, a closer examination of the defendant's argument is that he did not possess child pornography *on the date alleged*. The defendant argues that he couldn't have possessed child pornography on or about May 10, 2023, because he was in jail at that time. This claim does not appear to the court to be a claim of actual innocence at all, even though it is couched in those terms. While the court is unsure why the dates on the Superseding Indictment charges offense dates after the defendant's arrest, this could be a typographic error that likely would have been corrected prior to trial. The defendant's argument that the language "on or about May 10" couldn't have included May 5 is unpersuasive.

Mr. Kampeska complains that the habitual offender information was not properly filed, that he was not granted a hearing on the information and that the filing of the information by the State constituted coercive conduct. In reviewing the file, the State filed the habitual offender information at the same time as the indictment. There was nothing untimely about the filing of the habitual offender information. A hearing was not held on the part II information because the defendant entered into a plea agreement that called for the information to be dismissed. Finally, the argument that the filing was part of provided motivation for defendant to enter a plea is not a basis for withdrawing a guilty plea.

Finally, Mr. Kampeska claims that his previous counsel was ineffective. Ms. Nesvold stated in court that she had reviewed the police reports with the defendant numerous times during the pendency of the case. If she advised the defendant about possible federal charges, she was within her duty to do so. There was no basis or reason to challenge Mr. Kampeska being mistakenly referred to as a registered sex offender in the police reports. Mr. Kampeska was on parole, and his parole agent authorized his detention as well as a search of his phone. Mr. Kampeska's complaints about counsel are not persuasive.

The court concludes that Mr. Kampeska moved to withdraw his guilty plea eight months after it was entered. His first complaint about his attorney over 45 days after his plea was entered. The court finds that Mr. Kampeska was thoroughly advised of his rights prior to his entry of a plea. He signed a detailed plea agreement document that explained his rights. The court also advised him orally of his rights prior to his entering a plea. When the State described the pornographic images on his phone, he acknowledged that they were on his phone because he downloaded them from the internet. The court finds that Mr. Kampeska is seeking a "do-over" and that there is no reasonable basis or reason put forward justifying allowing him to withdraw his guilty plea.

#### CONCLUSION

The court denies the Defendant's motion to withdraw his guilty plea. It is a motion which is not supported by any tenable legal or factual basis. The State is directed to prepare an Order for the court's signature, and the above matter shall be added to the court's calendar for sentencing.

Sincerely,

  
Carmen Means

Circuit Court Judge  
Third Judicial Circuit

Tab 3

①

To: Judge - means

Re: CR 123-464 motion for hearing

Date: 11-13-2023

from: CLAUDE W. KAMPENET JR.

D.O.B. 07/08/1980

3464 Lohan Rd

Wynning, SD 57273

Your Honor,

I'm writing this letter in regards to my case involving 3 counts of Possession Child Pornography, 1 count of Sexual Exploitation of a minor and Habitual Offender status charged against me.

Upon completing my Pre-Sentence Investigative Report and coming across the Point Questioning My Opinion of the Legal process and my lawyers ability to properly counsel me in these proceedings.

It has come to my attention a few concerning factors to which factored a major part in accepting a Plea Agreement with the State and pleading Guilty to 3 counts of "possession" of child Pornography.

After the Initial charge of 1 count Possession of child Pornography and Sexual Exploitation of a minor on May 15th I was again in court on July 5th 2023 for a Suspended Indictment

DEFENDANT'S EXHIBIT 4 5-15-24 CR

(2)

of 8 counts of child pornography and 1 count of Sexual Exploitation of a minor. On September 27th 2023 I pled guilty to 3 counts of child pornography in a plea agreement with the States Attorney (Rebecca), Tamee Nesvold (my court appointed) and myself. In said plea agreement that my lawyer set up with the state, stated that 5 counts of child pornography, Sexual contact of a minor and the Habitual Offender will be dismissed. The plea agreement was read in court and a factual basis for the 3 counts of child porn was read also.

### My Concerns

with my legal process is that I was never given a hearing (identifying myself, Attorney Representation and Convictions) in a Part II Information of Habitual offender Filing 22-7-11/22-7-11 it also states I was to receive a copy of Information as it was stated in Plea Agreement with state and my lawyer.

Also during the process of settling on a plea agreement with state, my lawyer repeatedly told me I was being charged with the Habitual offender status and that also the "Feds" were looking to get involved with my case if the plea agreement was anything less than



(8)

taking 3 charges of child porn,

Finally after I was charged with additional 7 counts of Possessing Child Porn on the dates of May 10<sup>th</sup> and May 24<sup>th</sup> 2023. I repeatedly asked my lawyer to see the evidence in respects to New charges, the only information I was shown was a list of pictures from both my phones in custody of the state since my arrest on May 5<sup>th</sup> 2023, I repeatedly asked for the information of which phone had pictures because one phone did not belong to me, that phone had another account logged into it with a phone # attached also. I was in prison from August 27<sup>th</sup> 2022 - December 21 2022.

I believe that on part of the state, and my lawyer, the legal process has not been followed in regards to said information not being properly filed (habitual offender) and the states evidence for the photos said to have been collected. I feel that said information was withheld on part of both parties to intimidate me into taking the deal with state. I've only been to court 4x in this case so I know the part with the habitual offender filing was never done and the state proceeded

to acknowledge that Post by offering to Drop That charge along with 5 counts of Possession of Child Porn & Sexual Exploitation of a Minor. I feel it safe to say that the State Openly played a part in getting these convictions by accepting Plea agreements.

My Lawyer Repeatedly denied me access to the evidence to allow myself a defense for such charges. She continually stated that I was being charged with the Habitual Offender and that the "Fed's" would step in if anything less would be taken in plea deal to intimidate me into plea deal filed in court on September 27th 2023. I also believe she deliberately tried to get me sentenced that day I enter in Plea's, also The charges I plead to in court the factual basis was said that crimes were committed after I was in custody of County. How can they charge me with crimes after I was in custody and state had possession of Both Phones. I was Arrested with when I was served warrant for phones, Doesn't the tech people have the Ability to Determine when such Photo's / Images were Downloaded / Uploaded or Viewed stamped into them?

①

Like I told my lawyer in the beginning and with the cooperation with Detective, I know I'm guilty of Initial charges & seeing the flows in the way my lawyer and states prosecution <sup>has</sup> made me feel negative in their actions. I also asked my lawyer if she thought this was a fair deal in which I might be, but still she never responded. I asked if she knew what about the kind of someone I would receive and no response. She told me she was a former states prosecution and that I would have to make her "believe" in my innocence. In the beginning did my admittance of guilt in the beginning corrupt her ability to defend me? I truly believe so. I believe the state is also responsible in their "turning of head" towards the ruling of the habitual offender in question to intimidate me into taking the deal. I believe both parties exceeded their responsibilities in getting this "deal" done in a unprofessional manner. I hope I haven't strayed too far from my "factual" statements for this letter and that you can help me determine the next action to go about. I feel I could have been given a better opportunity to defend myself.

- \* state file habitual offender?
- \* photos dated May 10th + 24th?
- \* state accepting plea deal 9-27-2023
- \* Detective signed "true bill" stating offenses
- Approved on May 10th + May 24th 2023
- I was incarcerated.

Sincerely,  
 Charles Hampton Jr.

6

If this letter produces more legal hearings and motions I would like to reevaluate my Bond and on allowed to proceed to Prison if my Parole Officer decides to Violate my Parole. I've been in custody since May 5th 2023 under the Assumption from Lawyer telling me that If I Bonded out I was going back to Prison and that the staying home in county jail was going to help my case in sentencing and My Lawyer having easy access to me personally.

I know that with my case already being under review for future sentencing date on January 16th 2024, it would be readily available for you to see the Factual Basis in the state not Filing Habitual Offense, agreeing to plea agreement and the Factual Basis of Pictures Being on Dates that I was in custody.

Chuang

- 23-A-8-25 Grounds for Dismissal of Indictment or Information on Motion
- 23-A-6-9 Pretrial time of offense need not be stated
- 23-A-7-11 Habitual Criminal Information - Filing - Contents - proof
- 23-A-7-12 Defendant to receive copy of information - contents kept from Jury until conviction - right to Jury Trial
- 23-A-7-13 Felony classes of Prejury

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30774

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

CLAUDE WINFIELD KAMPESKA, JR.,

*Defendant and Appellant.*

---

APPEAL FROM THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
CODINGTON COUNTY, SOUTH DAKOTA

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THE HONORABLE CARMEN MEANS  
Circuit Court Judge

---

**APPELLEE'S BRIEF**

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Notice of Appeal filed July 26, 2024

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30774

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

CLAUDE WINFIELD KAMPESKA, JR.,

*Defendant and Appellant.*

---

**PRELIMINARY STATEMENT**

This brief refers to the State of South Dakota as “the State” and Claude Winfield Kampeska as “Kampeska.” References to documents are designated as follows:

Settled Record ..... SR

Appellant’s Brief..... AB

Document designations are followed by the appropriate page number.

**JURISDICTIONAL STATEMENT**

This is an appeal of a Judgment and Sentence entered by the Honorable Carmen Means, Circuit Court Judge, Third Judicial Circuit, Codrington County, South Dakota. SR:103-08. Judgment was timely entered on July 17, 2024, and Kampeska filed a Notice of Appeal on

July 26, 2024. SR:103-08, 182-83; SDCL 23A-32-15. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

**STATEMENT OF LEGAL ISSUES AND AUTHORITIES**

I.

WHETHER THE CIRCUIT COURT PROPERLY DENIED KAMPESKA'S MOTION TO WITHDRAW HIS GUILTY PLEA?

After pleading guilty to three counts of possession of child pornography, Kampeska moved the circuit court to withdraw the plea. The circuit court denied the motion.

*State v. Alvarez*, 2022 S.D. 66, 982 N.W.2d 12

*State v. Ceplecha*, 2020 S.D. 11, 940 N.W.2d 682

*State v. Kvasnicka*, 2016 S.D. 2, 873 N.W.2d 705

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

II.

WHETHER THE FINAL WRITTEN JUDGMENTS OF CONVICTION PROPERLY REFLECT THE CIRCUIT COURT'S ORALLY PRONOUNCED SENTENCE?

The circuit court's orally pronounced sentence and the final written Judgments of Conviction are not identical. The Judgments of Conviction on Counts II and III do not include credit for time served.

SDCL 23A-31-2

*Lykken v. Class*, 1997 S.D. 29, 561 N.W.2d 302

*Rapid City Journal v. Callahan*, 2022 S.D. 38, 977 N.W.2d 742

**STATEMENT OF THE CASE**

On May 5, 2023, Kampeska was charged with possession of child pornography and sexual exploitation of a minor. SR:7. An Indictment

was filed along with a part II information for a habitual offender. SR:11-13. On May 16, 2023, Kampeska appeared with his counsel, Terec Nesvold, and was fully advised of his rights. SR:56-57. Ms. Nesvold acknowledged receipt and waived reading of the Indictment, entered not guilty pleas, and asked for a date for the jury trial. *Id.*

On June 26, 2023, the State filed a Superseding Indictment charging Kampeska with eight counts of possession of child pornography and one count of sexual exploitation of a minor. SR:17-19. On July 7, 2023, Kampeska appeared with Ms. Nesvold for an arraignment. SR:60. Kampeska waived reading of the Superseding Indictment, acknowledged receipt of the same, and entered not guilty pleas to the new charges. *Id.*

On September 26, 2023, Kampeska entered into a written plea agreement with the State where he agreed to pled guilty to three counts of possession of child pornography. SR:29-32. The plea agreement included an advisement of rights and waiver by plea of guilty. *Id.* In exchange for Kampeska's plea, the State agreed to dismiss the remaining counts, agreed to file no additional charges arising from the incident, and dismissed the habitual offender information. *Id.*

A change of plea hearing was conducted on September 27, 2023. SR:44-48. The circuit court advised Kampeska of his constitutional and statutory rights and waiver thereof by plea of guilty. SR:44-45. Kampeska confirmed he reviewed the plea agreement documents completely and understood those documents before he signed them.

SR:45. The State read the factual basis for his guilty plea, and Kampeska acknowledged images constituting child pornography were found on his phone and he downloaded the images from the internet.

SR:47. The court found a factual basis for the guilty pleas and found the pleas to be voluntary and intelligently made. *Id.* The court ordered the preparation of a pre-sentence investigation report and the preparation of a psycho-sexual evaluation report before sentencing. *Id.* The court scheduled Kampeska's sentencing for November 15, 2023, but advised the date would be pushed back if the psychosexual evaluation was not completed. *Id.* The psychosexual evaluation was not completed by that date; Kampeska's sentencing was rescheduled. SR:63.

On November 13, 2023, Kampeska wrote a letter to the court complaining about his court-appointed attorney. SR:75-80. On January 10, 2024, a hearing was held on Kampeska's request for new counsel. SR:63-68. At the hearing, Kampeska raised concerns about his ability to review discovery, specifically the actual images he was charged with possessing, the allegation dates identified on the superseding indictment, and the part II information. SR:64-65. Kampeska did not seek to withdraw his guilty plea but advised he wanted new counsel to help him understand if he made the right decision in pleading guilty. SR:65-66. The circuit court opined, "I know Miss Nesvold to be a very capable criminal deference [sic] attorney and I know her to be very thorough in the work that she does, but I think there might be some benefit to giving

Mr. Kampeska a chance to talk to a different attorney to kind of get some input about whether or not he made the right decision,” and granted Kampeska’s request for new counsel, appointing Tim Cummings as counsel. SR:36, 66.

On April 10, 2024, a bond hearing was held. SR:71-73. At that hearing, Kampeska told the court that he wished to withdraw his guilty plea. SR:72. On May 2, 2024, seven months after pleading guilty, a formal motion<sup>1</sup> was filed asserting Kampeska’s wish to withdraw his guilty plea. SR:41. The State objected to the motion. SR:81-83.

A hearing was held on May 15, 2024, to address the motion. SR:200-09. At the hearing, Kampeska put forth various reasons to withdraw his guilty plea. *Id.* He asserted he was innocent of the charges to which he pled guilty. SR:201-08. He complained he was unaware of the dates for Counts II and III and claimed he thought those counts arose from a Facebook Messenger conversation. SR:202. He complained about the habitual offender information, stating he was not granted a hearing and the filing of the information was coercive. SR:203. He stated he was pressured into pleading guilty because his attorney discussed with him the possibility of federal prosecution if the state case was not resolved. SR:203-04. He expressed dissatisfaction with his counsel’s representation. SR:204. The court took under advisement whether Kampeska was “adequately advised of [his] rights by the [c]ourt

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<sup>1</sup> A brief did not accompany the motion filed. *See* SR.

and if [he] knew what [he was] doing at the time [he] entered [his] plea and that [his] plea was knowing, voluntary, and intelligent.” SR:208. On June 20, 2024, the court issued a written decision and denied Kampeska’s motion to withdraw guilty plea. SR:95-97.

Kampeska’s sentencing occurred on July 17, 2024. SR:212-18. Kampeska was orally sentenced to ten years in the South Dakota State Penitentiary, with three years suspended, on Count I, and ten years with six years suspended on Counts II and III. SR:217-18. The written judgment omitted suspending any time on Counts II and III. SR:103-06. The sentences were to run concurrently, and Kampeska was given credit for time served, which was 439 days. SR:218.

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

On May 5, 2023, law enforcement responded to a report of suspicious activity after an individual observed an older male sitting on a park bench with a young female. SR:3. When law enforcement arrived, they found Kampeska sitting with T.H., a 16-year-old female. *Id.* T.H. identified Kampeska as her uncle and stated she was having anxiety, so he met her to talk. *Id.* A check for warrants revealed Kampeska was on parole. SR:4, 46. Law enforcement called his parole agent, who advised Kampeska was not allowed to be in Watertown and if his preliminary breath test (PBT) was over .100% to take him to jail. SR:4. After being advised of the circumstances of the law enforcement contact, the parole agent authorized a search of Kampeska’s cell phone. *Id.* Law

enforcement had Kampeska conduct a PBT, and the result was .228%.

*Id.* Law enforcement seized two cellphones from Kampeska. SR:4.

Kampeska gave law enforcement the passcode for the first cellphone; the second phone appeared to not be functioning. *Id.* Kampeska was transported to the Codington County Detention Center. *Id.*

A search of the first cellphone revealed a Facebook Messenger conversation between Kampeska and T.H.; the conversation included an image<sup>2</sup> of child pornography. SR:5, 46. A search of Kampeska's second cellphone revealed more images<sup>3</sup> of child pornography of a female believed to be between the ages of 7 and 10. SR:46.

## **ARGUMENT**

### I.

THE CIRCUIT COURT PROPERLY DENIED KAMPESKA'S MOTION TO WITHDRAW HIS GUILTY PLEA.

#### A. *The standard of review.*

This Court uses the abuse of discretion standard to review a circuit court's ruling on a defendant's motion to withdraw a guilty plea. *State v. Trueblood*, 2024 S.D. 17, ¶ 10, 5 N.W.3d 571, 575 (quoting *State v. Cepelcha*, 2020 S.D. 11, ¶¶ 40-41, 940 N.W.2d 682, 694). 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

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<sup>2</sup> This image constituted Count I.

<sup>3</sup> These images constituted Counts II and III.

arbitrary or unreasonable.” *State v. Stone*, 2019 S.D. 18, ¶ 34, 925 N.W.2d 488, 499-500 (citation omitted).

*B. Kampeska failed to show a fair and just reason to withdraw his plea.*

SDCL 23A-27-11 allows a defendant to move to withdraw a guilty plea before he is sentenced. While a circuit court “should exercise its discretion liberally in favor of withdrawal[,]” there is no guarantee that a plea will be withdrawn. *State v. Kvasnicka*, 2016 S.D. 2, ¶ 8, 873 N.W.2d 705, 708. That is because there is no “automatic right to withdraw a guilty plea.” *Ceplecha*, 2020 S.D. 11, ¶ 39, 940 N.W.2d at 694 (quoting *Kvasnicka*, 2016 S.D. 2, ¶ 8, 873 N.W.2d at 708). Instead, a defendant “must show a ‘fair and just’ reason for withdrawing” his plea. *State v. Alvarez*, 2022 S.D. 66, ¶ 25, 982 N.W.2d 12, 18 (citing *Ceplecha*, 2020 S.D. 11, ¶ 39, 940 N.W.2d at 694); *see State v. Schmidt*, 2012 S.D. 77, ¶ 16, 825 N.W.2d 889, 894 (If a defendant provides “a tenable reason why withdrawal should be permitted[,]” the request to withdraw a guilty plea should be granted. (internal citation omitted)).<sup>4</sup> The defendant bears this “burden of production and persuasion” because he “no longer enjoys the presumption of innocence after pleading guilty[.]” *Ceplecha*, 2020 S.D. 11, ¶ 41, 940 N.W.2d at 694 (citing *Schmidt*, 2012 S.D. 77,

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<sup>4</sup> This Court has used two phrases to describe the burden a defendant must satisfy to withdraw his plea: “tenable reason” and “fair and just reason.” *Kvasnicka*, 2016 S.D. 2, ¶ 8 n.2, 873 N.W.2d at 709 n.2. There is no difference between these standards. *Id.*



¶ 16, 825 N.W.2d at 894).

Whether a defendant's reasons to withdraw a guilty plea are "fair and just" is determined by several considerations:

whether the defendant knowingly and voluntarily pleaded guilty; whether the defendant asserts [he] is innocent; delay between the defendant's plea and request for withdrawal of the plea; whether the defendant received competent assistance of counsel in making the decision to plead guilty; whether withdrawing the plea will prejudice the prosecution of the defendant; and whether withdrawing the plea will waste judicial resources[.]

*Trueblood*, 2024 S.D. 17, ¶ 10, 5 N.W.2d at 575. Additional factors include whether the plea is contrary to the truth, whether the defendant misapprehended the facts, and whether the plea was procured by misapprehension and improper means via coercion. *State v. Thielsen*, 2004 S.D. 17, ¶ 17, 675 N.W.2d 429, 433.

1. *Kampeska's plea was knowing, voluntary, and not the product of any misapprehension of fact or coercion.*

"When assessing voluntariness, [this Court] do[es] not consider a defendant's after-the-fact regret about his decision to plead guilty. Rather, [this Court] review[s] the defendant's competency to waive his constitutional rights and his appreciation of the consequences of pleading guilty at the time of the plea." *Trueblood*, 2024 S.D. 17, ¶ 15, 5 N.W.3d at 576 (citation omitted).

When the accused has a full understanding of his constitutional rights and, having that understanding, waives those rights by a plea of guilty. In order for a plea to be voluntary, a defendant must "be advised of his rights relating to self-incrimination, trial by jury, and confrontation[.]" After this advisement, the defendant must "intentionally

relinquish or abandon [those] known rights.” If the record demonstrates “that the defendant understood his rights” and the consequences of his guilty plea, [this Court] will find that the defendant’s plea was “entered intelligently and voluntarily.” Because the record “must affirmatively show the plea was voluntary[,]” [this Court] reviews the circumstances of each plea in its entirety to determine whether they each “understood the consequences of pleading guilty[.]”

*Id.* ¶ 15, 5 N.W.2d at 576 (quoting *Ceplecha*, 2020 S.D. 11, ¶ 45, 940 N.W.2d at 695 (alterations in original) (citations omitted)). In examining the totality of the circumstances, this Court takes the following factors into consideration: the defendant’s age; his prior criminal record; whether he is represented by counsel; the existence of a plea agreement; and the time between advisement of rights and entering a plea of guilty. *State v. Goodwin*, 2004 S.D. 75, ¶ 11 681 N.W.2d 847, 852 (internal citations omitted).

At Kampeska’s change of plea hearing, the circuit court informed Kampeska:

You are presumed innocent of these charges[;] the State has the burden of proving you guilty beyond a reasonable doubt. You have the right to a speedy, public jury trial here in Codington County, you have the right to confront and cross-examine any witness who testifies against you, and you have the right to remain silent. If you plead guilty to these counts[,] you’ll give up those rights.

SR:45. Kampeska affirmed he understood and wanted to waive those rights. *Id.* Kampeska also affirmed he read and fully understood the contents of the plea agreement before he signed it. *Id.* Because the record establishes Kampeska understood his rights and the

consequences of his guilty plea, his plea was “entered intelligently and voluntarily.” *See Trueblood*, 2024 S.D. 17, ¶ 15, 5 N.W.2d at 576.

Kampeska’s personal characteristics support the assertion that he knowingly, voluntarily, and without misapprehension of fact or coercion entered his plea of guilt. First, Kampeska was 43 years old at the time he entered his plea. SR:11. Second, Kampeska’s criminal background, containing two felony convictions<sup>5</sup> for driving under the influence, gave him a familiarity with the court system. SR:13. Kampeska’s understanding of legal concepts and terminology is evidenced through his arguments in support of withdrawing his plea. SR:206, 208. Third, Kampeska was represented when he pled guilty, and Ms. Nesvold provided competent assistance of counsel in making his decision to pled guilty.<sup>6</sup> Fourth, the plea agreement contained a recitation of the maximum possible penalties he faced and Kampeska was advised of those possible penalties at his initial hearing. SR:29-32, 51. Consequently, Kampeska’s statement that he understood his plea agreement supports the finding that Kampeska understood the consequences of his guilty plea. SR:45. Fifth, the length of time between the advisement of rights and entering of the plea of guilty was brief. At the change of plea hearing, Kampeska was advised of and confirmed he

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<sup>5</sup> Kampeska was on parole for his 2019 conviction when he committed the current offense. SR:51.

<sup>6</sup> The issue of whether Kampeska received competent assistance of counsel in making his decision to pled guilty is discussed in section 4. *See p. 20-23.*

understood his rights minutes before pleading guilty. SR:44-48.

Kampeska's personal characteristics support the assertion that his plea was voluntary.

At the hearing on his motion to withdraw his plea and in his brief before this Court, Kampeska offered little in the way of a fair and just reason for withdrawing his plea. Kampeska asserted he should be permitted to withdraw his plea because: (1) he "was never given access to the actual photos he was charged with possessing[,]" (2) "he did not know the photos he admitted a factual basis to were found in the cache of an LG file of a phone that recently belonged to someone else," (3) "he was having a side conversation with his attorney at the time the factual basis was being read by the State's Attorney[,]" (4) he feared being prosecuted by the federal government, (5) he was never advised on and was intimidated by the habitual offender sentencing enhancement, and (6) he misunderstood his advisement of rights. AB:13-14; SR:201-08.

First, Kampeska asserts he should be permitted to withdraw his plea because he never saw the actual images of child pornography he was charged with possessing. AB:13; SR:64, 67. Assuming this is true, Kampeska was aware, at the time he pled guilty, that he was not given the opportunity to review the actual images of child pornography he was charged with possessing. Despite his ascertain, Kampeska voluntarily and intelligently entered the plea agreement. Therefore, Kampeska failed to show a fair and just reason to withdraw his plea.

Second, according to Kampeska, he was unaware that the images he pled guilty to were from a phone that recently belonged to someone else. AB:13; SR:202. During the change of plea hearing, the State read the factual basis for his guilty plea stating:

Through the course of the investigation, they found an image on the defendant's phone through Facebook Messenger of a conversation with the juvenile female that included a photograph of her bare breasts. A further search was done on his cell phones, they found an image of a prepubescent vagina with an object being inserted into it, the female's vagina is visible in the photo, it's believed the female was between the ages of 7 and 10, there was no pubic hair visible. Another image they found was a close-up photo of a prepubescent vagina with no pubic hair visible.

SR:46. Kampeska acknowledged images of minors either exhibiting nudity or being involved in a sexual act were found on his phone and he downloaded them from the internet. SR:47. Kampeska does not assert that he did not download the images, but rather the phone once belonged to someone else.<sup>7</sup> As a result, Kampeska failed to meet his burden of showing a fair and just reason for withdrawing his plea.

Third, Kampeska complains he was having a side conversation with his attorney when the factual basis was read. AB:13; SR:202. Kampeska's factual assertion about his "side conversation" is not supported by the transcript of the change of plea hearing. See SR:42-48. As this Court has repeatedly held, "the party claiming error carries the responsibility of ensuring an adequate record for review." *State v.*

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<sup>7</sup> This argument is further discussed in section 2. See p. 17-19.

*Andrews*, 2007 S.D. 29, ¶ 9, 730 N.W.2d 416, 420 (citations omitted). Without an adequate record that a “side conversation” even occurred, or a suggestion in the record that Kampeska asked for the factual basis to be repeated, his claim fails. Further, at the change of plea hearing, the court asked if Kampeska agreed with the factual basis supplied; Kampeska confirmed he did. SR:47. Kampeska agreed the images constituted child pornography. *Id.* Kampeska told the court that he downloaded those images from browsing on the internet. *Id.* The record supports the finding that Kampeska was fully aware of his factual basis statement presented during the change of plea during. Hence, this claim is without merit.

Fourth, Kampeska complains he was “influenced to plead guilty based on the repeated assertion that if he did not accept the plea agreement the federal government would take over prosecuting his case, which coerced Kampeska into accepting the plea offer[.]” AB:13-14 (quoting SR:203). Again, there is no evidence in the record that Ms. Nesvold or anyone else used this fear tactic to compel Kampeska to plead guilty. Kampeska’s statement is factually inaccurate, so it is especially doubtful he was compelled to plead. Kampeska’s plea agreement has no effect on the possible federal prosecution of his case. If the Federal Government wanted to, it could prosecute Kampeska for the same offenses he pled guilty to. *See State v. Chavez*, 2003 S.D. 93, 668 N.W.2d 89 (“double jeopardy does not bar successive prosecutions by

dual sovereigns”); *Gamble v. United States*, 587 U.S. 678 (2019).

Kampeska’s claim is without merit.

Fifth, Kampeska complains he “asserted numerous times that the State used the part II Information that he had never been advised on to “intimidate, manipulate, and coerce [him] into taking this plea deal.” AB:14 (quoting SR:203). Kampeska does not complain that he was not advised by the court on the part II Information for habitual offenders, but rather that he was “never supplied with the information for habitual offender[.]” The State finds it contrary to reason that Kampeska is asserting he was both “intimidate[d], manipulate[d], and coerce[d][,]” by the enhancement but also was never advised about it.

The State filed a part II information for habitual offenders on May 15, 2023. SR:13. The plea agreement stated as a result of his plea, the State “will dismiss the Habitual Offender Information.” SR:32. As the circuit court stated, “[a] hearing was not held on the part II information because the defendant entered into a plea agreement that called for the information to be dismissed.” SR:97. The circuit court determined Kampeska’s “argument that the [habitual offender] filing was part of provided motivation for defendant to enter a plea is not a basis for withdrawing a guilty plea.” The State agrees. Kampeska’s plea agreement should remain intact.

Sixth, according to Kampeska he misunderstood Paragraph 26 of the Advisement of Rights and Authorization to Plead Guilty. AB:14.

Kampeska complains he thought the paragraph “meant that the State’s Attorney could not request a specific sentence from the Court.” *Id.*

Unlike his previous claims, Kampeska failed to preserve this argument for appellate review. Kampeska also failed to invoke plain error; thus, this Court will ordinarily decline to review the issue.<sup>8</sup> *State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261 (to preserve an issue for appellate review, “[t]he trial court must be given an opportunity to correct any claimed error before we will review it on appeal”) (citation omitted).

Kampeska spoke at the sentencing hearing after the State recommended a term of imprisonment; accordingly, he had ample opportunity to raise this issue before the circuit court. *See State v. McCrary*, 2004 S.D. 18, ¶ 15, 676 N.W.2d 116, 121 (holding that the defendant did not preserve his claim for appellate review when he had forgone his “ample opportunity to object to the [circuit] court’s questions at sentencing”). By failing to bring his claims before the circuit court, through an objection, motion, or otherwise, Kampeska failed to preserve his arguments for appellate review and the issue should not be reviewed by this Court.

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<sup>8</sup> The State is not requesting or invoking plain error review on behalf of Defendant. *See State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818 (refusing to apply plain error review in the absence of a party’s request). *See id.* (“As a general rule, an appellate court may review only the issues specifically raised and argued in an appellant’s brief.” (quoting *United States v. Simmons*, 964 F.2d 763, 777 (8th Cir. 1992))).



Nonetheless, Kampeska’s argument is implausible because he is stating the court abused its discretion in denying his motion to withdraw his guilty plea based on something that happened after the court denied his motion. The court cannot logically consider facts that have not happened when ruling on the motion to withdraw his plea.

Additionally, Paragraph 26 makes it clear the court possesses sole discretion for sentencing and does not dictate whether either party make request a specific sentence. Kampeska recommended a sentence; thus, it is logical that the State would have the same opportunity. Therefore, Kampeska failed to meet his burden of providing a fair and just reason to withdraw his guilty plea.

2. *Kampeska did not assert actual innocence.*

“Self-serving testimony in which a defendant proclaims his innocence is not a persuasive basis for allowing a defendant to withdraw his guilty plea.” *Alvarez*, 2022 S.D. 66, ¶ 27, 982 N.W.2d at 18 (quoting *Ceplecha*, 2020 S.D. 11, ¶ 53, 940 N.W.2d at 697). This is especially true when, in the absence of “a compelling explanation[,]” the defendant makes a belated challenge to the factual basis for the plea. *Kvasnicka*, 2016 S.D. 2, ¶ 13, 873 N.W.2d at 710 (quoting *United States v. Peterson*, 414 F.3d 825, 827 (7th Cir. 2005) (“[A] motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction.”)).

The circuit court reviewed Kampeska's claim of "actual innocence" as a ground for withdrawing his plea and held:

The defendant argues that he couldn't have possessed child pornography on or about May 10, 2023, because he was in jail at that time. This claim does not appear to the court to be a claim of actual innocence at all, even though it is couched in those terms. While the court is unsure why the dates on the Superseding Indictment charges offense dates after the defendant's arrest, this could be a typographic error that likely would have been corrected prior to trial. The defendant's argument that the language "on or about May 10" couldn't have included May 5 is unpersuasive.

...

The court finds that Mr. Kampeska was thoroughly advised of his rights prior to his entry of a plea. He signed a detailed plea agreement document that explained his rights. The court also advised him orally of his rights prior to his entering a plea. When the State described the pornographic images on his phone, he acknowledged that they were on his phone because he downloaded them from the internet. The court finds that Mr. Kampeska is seeking a "do-over" and that there is no reasonable basis or reason put forward justifying allowing him to withdraw his guilty plea.

SR:96-97. The circuit court correctly found that Kampeska's *post hoc* alibi claim was not a claim of "actual innocence," and not a fair and just reason to allow Kampeska to withdraw his plea.

Despite his late claim of an alibi, Kampeska's plea is not contrary to the truth. Kampeska claims that because he was incarcerated on the dates in his indictment, he has an alibi for his offense. However, "[t]he precise time at which an offense was committed need not be stated in an indictment [], but it may be alleged to have been committed at any time before the filing thereof, except when the time is a material element of the

offense.” SDCL 23A-6-9. Here, the exact date Kampeska possessed the child pornography is not a material element of the offense, accordingly, the precise date in the indictment is unnecessary. The circuit court correctly found Kampeska was arguing the date in the indictment was incorrect, he was not arguing that he did not possess child pornography nor asserting actual innocence.

Further, Kampeska’s objection to the date on the indictment, unconnected to any evidentiary basis in the record, is not adequate to meet his burden under SDCL 23A-27-11. Rather, it is the sort of “[s]elf-serving testimony” that is generally considered insufficient to allow a defendant to withdraw a plea of guilty. *See Ceplecha*, 2020 S.D. 11, ¶ 53, 940 N.W.2d at 697. Moreover, the contradictory nature of his statements puts the court in the precarious position of accepting an admission of perjury as a basis for withdrawal, something this Court has justifiably decried. *See Kvasnicka*, 2016 S.D. 2, ¶ 18, 873 N.W.2d at 713 (“Lying to a plea-taking court does not support a fair and just reason for later withdrawing a guilty plea[.]”). The court did not abuse its discretion in denying Kampeska’s motion to withdraw his plea.

3. *Kampeska’s motion was unreasonably delayed.*

Kampeska pled guilty on September 27, 2023. SR:44-48. On November 13, 2023, over 45 days after his plea was entered, he first complained about his attorney via a written letter to the court. SR:75-

80. He did not move to withdraw his plea until May 2, 2024, seven months after it was entered. SR:41.

In *Harrison*, the Fifth Court of Appeals highlighted a five-week delay when it affirmed a denial of a motion to withdraw a guilty plea. *United States v. Harrison*, 777 F.3d 227, 237 (5th Cir. 2015). In *Catchings*, the Sixth Court of Appeals opined a delay of more than two months favored denial of such a motion. *United States v. Catchings*, 708 F.3d 710, 718 (6th Cir. 2013). In *White*, the Court affirmed the circuit court’s ruling that White’s three-week delay in making his motion “did not weigh in favor of allowing him to withdraw [his] plea.” *White v. United States*, 863 A.2d 839, 844 (D.C. 2004).

Kampeska’s delay of over seven months favored the circuit court’s denial of his motion, and this Court should uphold that decision.

4. *Kampeska Received Competent Assistance of Counsel in Making the Decision to Pled Guilty.*

Kampeska was “entitled to competent and effective legal counsel, nothing more.” *United States v. Kelley*, 774 F.3d 434, 439 (8th Cir. 2014). “[A]n attorney is competent until a showing to the contrary is made, and the petitioner has a heavy burden in establishing ineffective service of counsel.” *State v. Walker*, 287 N.W.2d 705, 706 (S.D. 1980) (citing *United States v. Valenzuela*, 521 F.2d 414 (8th Cir. 1975), *Cert. denied*, 424 U.S. 916 (1976)). Kampeska bears the burden of production and persuasion to show that the circuit court should have permitted him

to withdraw his guilty plea over ineffective assistance of counsel.

*Ceplecha*, 2020 S.D. 11, ¶ 41, 940 N.W.2d at 694.

Here, Kampeska provided no substantial argument on how Ms. Nesvold was incompetent. *See generally* AB. Instead, all Kampeska has to offer is his buyer's remorse that he chose to give up his rights and pled guilty. Because Kampeska offered nothing in furtherance of showing his counsel was incompetent, he failed to meet his burden to produce a "fair and just" reason for allowing withdrawal.

Kampeska's complaints regarding Ms. Nesvold are without merit for three primary reasons, namely: Ms. Nesvold spent sufficient time working on this case, his initial complaint was delayed, and Kampeska received a benefit in pleading guilty.

First, Ms. Nesvold spent sufficient time working on this case. *See* SR:38-40 (Invoice detailing the time she spent on this case). Ms. Nesvold spent approximately 12 hours working on this case prior to Kampeska's change of plea hearing. *Id.* Prior to Kampeska's change of plea hearing, which occurred on September 27, 2023, Ms. Nesvold communicated with Kampeska on the following dates: May 17, May 24, June 22, June 26, June 27, July 10, July 26, August 3, August 28, August 29, August 30, September 5, September 12, September 19, and September 26. SR:44-48. Based on the evidence in the settled record Ms. Nesvold provided sufficient representation.

Second, Kampeska did not inform the circuit court of any problems with his attorney until January 4, 2024. SR:34. This was fourteen weeks after his change of plea hearing. SR:44-48. This length of delay again suggests Kampeska merely got cold feet. Kampeska waited months before raising any complaints about Ms. Nesvold failing to provide competent assistance of counsel in making his decision to pled guilty. Therefore, Kampeska's delayed, vague complaints lack persuasion.

Third, Kampeska faced eight counts of possession of child pornography<sup>9</sup> and one count of sexual exploitation of a minor.<sup>10</sup> SR:17-19. He also faced a habitual offender part II information. SR:11-13. If sentenced to serve his counts consecutively, Kampeska maximum possible penalty was 125 years in prison and a \$250,000 fine. Ms. Nesvold's representation resulted in Kampeska being sentenced on only three counts of possession of child pornography. SR:29-32. The other charges and the part II information were dismissed. *Id.* Kampeska received a term of imprisonment of 10 years, with three years suspended on Counts I and six years suspended on Counts II and III, all to be

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<sup>9</sup> The crime of possession of child pornography is class 4 felony; Kampeska's possible enhancement makes it a class 3 felony, with a maximum sentence of fifteen years imprisonment in a state correctional facility and a fine of thirty thousand dollars. SDCL 22-6-1, 22-7-7, 22-24A-35.

<sup>10</sup> The crime of sexual exploitation of a minor is a class 6 Felony. SDCL 22-22-24.3. With Kampeska's possible enhancement it would become a Class 5 felony with a maximum possible sentence of five years imprisonment in a state correctional facility and a fine of ten thousand dollars. SDCL 22-6-1, 22-7-7, 22-22-24.3.

served concurrently. Kampeska greatly benefited from his plea agreement.

The circuit court found Kampeska's complaints about his counsel to be unpersuasive. SR:97. This Court should uphold its decision because Kampeska failed to meet his burden of establishing that Ms. Nesvold failed to provide competent assistance of counsel in making his decision to pled guilty.

*5. Withdrawal will prejudice the prosecution.*

The circuit court did not specifically address what possible prejudice the State would face if the motion was granted, but instead focused on Kampeska's failure to carry his burden due to his ongoing admission to the crime and inability to demonstrate he did not enter his plea knowingly and voluntarily. SR:97-98.

Even if this Court determines the State's case against Kampeska was not prejudiced by the delay his motion has caused, that is not determinative. The "absence of prejudice to the prosecution, by itself, is insufficient to mandate permission for withdrawal of a guilty plea." *Schmidt*, 2012 S.D. 77, ¶ 23,825 N.W.2d at 896 (quoting *State v. Bailey*, 1996 S.D. 45, ¶ 29, 546 N.W.2d 387, 393). This factor does not weigh against either party.

*6. Withdrawal would waste judicial resources.*

Overturning the circuit court's denial of the motion to withdraw and permitting Kampeska to go to trial would waste judicial resources.

Kampeska admitted to possessing three counts of child pornography; granting him a trial out of his mere desire to have one would needlessly waste judicial resources.

## II.

A NUNC PRO TUNC JUDGMENT SHOULD BE ENTERED ON COUNTS II AND III TO PROPERLY REFLECT THE COURT'S ORAL SENTENCE

A. *An orally pronounced sentence controls over the written judgment.*

The circuit court's "written sentence must conform to the court's oral pronouncement." *State v. Thayer*, 2006 S.D. 40, ¶ 8, 713 N.W.2d 608, 612. This Court may rely on the written sentence to clarify any ambiguity in the oral sentence. *State v. Munk*, 453 N.W.2d 124, 125 (S.D. 1990). But, when there is a difference between the written and oral sentences, this Court reviews the sentence "under the premise that the oral sentence controls." *Thayer*, 2006 S.D. 40, ¶ 7, 713 N.W.2d at 611. "Where the state produces a document constituting a judgment of conviction, the petitioner has the burden to prove by a preponderance of the evidence that there exists credible evidence of invalidity in that judgment." *Lykken v. Class*, 1997 S.D. 29, ¶ 5, 561 N.W.2d 302, 304 (citing *State v. Moeller*, 511 N.W.2d 803, 809 (S.D. 1994)).

Under SDCL 23A-31-2 clerical mistakes in judgments "may be corrected by a court at any time[.]" Courts have used a "nunc pro tunc" designation to correct sentencing errors. *Rapid City Journal v. Callahan*, 2022 S.D. 38, ¶ 29, 977 N.W.2d 742, 751. "A '[n]unc pro tunc' judgment



is a judgment entered to make the record speak the truth and the function of such entry is to correct the judicial records insofar as they fail to record a judgment by the court[.]” *Id.* ¶ 28, 977 N.W.2d at 751 (citation omitted).

*B. The Judgments of Conviction do not accurately reflect the circuit court’s oral sentence.*

On July 17, 2024, the circuit court orally sentenced:

On Count 1[,] I am going to impose 10 years in the South Dakota state penitentiary, I’m going to suspend 3 of those years on conditions to be established by the Department of Corrections. I’m going to impose court costs only, I’m going to impose restitution in the amount of \$2200 for completion of the psychosexual evaluation, and I’m going to order that you repay Codington County for the cost of your court-appointed attorney’s fees. On Count 2[,] I am going to suspend 6 years in the South Dakota State Penitentiary, I’m going to impose court costs on that file, I am going to suspend that time on conditions to be established by the Department of Corrections. On Count 3[,] I am also suspending 6 years in the South Dakota State Penitentiary, I’m imposing court costs, I will suspend that time on conditions to be established by the Department of Corrections. These three sentences are going to run concurrent to one another and you will be given credit for [439] days previously served.

SR:217-18.

Three separate Judgments of Conviction were signed and filed.

SR:103-08. The final written Judgments of Conviction for Counts II and III omit credit for time served. SR:103-06. The oral sentence pronounced by the circuit court was clear: Kampeska was sentenced to ten years, with three years suspended, on Count I, and six years suspended on Counts II and III; these sentences run concurrently; and

Kampeska was to receive credit for time served on each count. SR:217-18. Because the judgment does not properly reflect the oral pronouncement, a nunc pro tunc judgment should be entered for Counts II and III to properly accredit for time served.<sup>11</sup>

Kampeska argues the Judgments of Conviction for Counts II and III are incorrect, as the sentence on those counts should be “six years in the South Dakota State Penitentiary with all six years suspended and credit for 439 days.” AB:17-18. The State disagrees. In relevant part, the circuit court judge stated:

On Count 1[,] I am going to impose 10 years in the South Dakota state penitentiary, I'm going to suspend 3 of those years [ . . . ] . On Count 2[,] I am going to suspend 6 years[.] [And] [o]n Count 3[,] I am also suspending 6 years[.] These three sentences are going to run concurrent to one another and you will be given credit for days previously served.

SR:217-18.

The court started its pronouncement of the sentence with the term of years it was imposing, followed by how much time it was suspending for each count. While the court failed to explicitly declare what term of years it was imposing for Counts II and III, in examining the court's statement as a whole, it is evident the court sentenced Kampeska to a term of imprisonment of 10 years, with three years suspended on Counts I and six years suspended on Counts II and III.

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<sup>11</sup> Kampeska's term of incarceration will not be affected by this nunc pro tunc judgment because he was sentenced to a longer term of incarceration on Count I and his sentences run concurrently to each other.

## CONCLUSION

The record demonstrates that Kampeska affirmed to the circuit court that he voluntarily and knowingly entered the plea agreement without coercion and with a complete understanding of its ramifications and the rights he would be waiving. The circuit court did not abuse its discretion in denying Kampeska's motion to withdraw his guilty plea. Therefore, Kampeska's guilty plea must remain intact.

The written judgments do not accurately reflect the oral pronouncement of sentence; therefore, a nunc pro tunc judgment should be entered on Counts II and III.

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 6,298 words.

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

Dated this 22nd day of January 2025.

/s/ Renee Stellagher  
Renee Stellagher  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 22, 2025, a true and correct copy of Appellee’s Brief in the matter of *State of South Dakota v. Claude Winfield Kampeska, Jr.* was served by electronic mail on Clint Sargent and Erin E. Willadsen at [clint@meierhenrylaw.com](mailto:clint@meierhenrylaw.com) and [erin@meierhenrylaw.com](mailto:erin@meierhenrylaw.com).

/s/ Renee Stellagher  
Renee Stellagher  
Assistant Attorney General

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 30774

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**State of South Dakota,**  
Plaintiff and Appellee,  
v.  
**Claude Kampeska Jr.,**  
Defendant and Appellant.

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Appeal from the Circuit Court, Third Judicial Circuit  
Codington County, South Dakota

The Honorable Carmen Means  
Circuit Court Judge

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APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on the 26th day of July, 2024

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## ARGUMENT

### I. Trial Court Abused Its Discretion in Refusal to Acknowledge Tenable

#### Reasons to Withdraw Guilty Plea

Claude Kampeska's request to withdraw his guilty plea prior to sentencing should have been granted by the circuit court unless "the request to withdraw is obviously frivolous." *State v. Olson*, 2012 SD 55, ¶8, 816 N.W.2d 830, 835-36. As this Court has noted, "'Frivolous' is an elusive word.'" *Johnson v. Miller*, 2012 SD 61, ¶ 23, 818 N.W.2d 804, 810 (J. Konenkamp concurring).

Perhaps the most helpful guidance comes from Judge Weinstein's dictionary definition:

"Frivolous" is of the same order of magnitude as "less than a scintilla." It is defined in Webster's Third New International Dictionary (1967) as "of little weight or importance: having no basis in law or fact: light, slight, sham, irrelevant, superficial." The Oxford English Dictionary (1971) defines it as "[o]f little or no weight, value or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose ... In pleading: Manifestly insufficient or futile."

*Johnson*, 2012 SD 61, ¶ 24, 818 N.W.2d 804, 810 (J. Konenkamp concurring).

It speaks volumes that the State did not address the fact that Kampeska's main argument has consistently been that he cannot be guilty of two of the three counts he plead guilty to because he was in custody during the time frame alleged. The State references the May 15, 2024, Motion to Withdraw hearing and identifies six reasons why Kampeska asserted he should be permitted to withdraw his guilty plea, but its list is void of any mention of Kampeska's alibi defense. *Appellee Brief*, p.12. Review of the May 15, 2024, hearing transcript shows that the main reason consistently reiterated by Kampeska throughout that hearing, and the full appellate record, was his alibi for counts two through eight. In fact, the very first thing Kampeska said at that hearing was, "I would like to



withdraw my plea on a few conditions here, one would be actual innocence. On Count 2 through 8 it reads on May 10 and on May 24 that I committed the crime of possession and on May 5 I was arrested here in Watertown and I've been in custody ever since, so with regards to an alibi for those counts, I was in custody during that time." HT 5/15/24, 3:12-18. Kampeska continued to circle back to this argument as he detailed his other tenable reasons for wanting to withdraw his guilty plea.

The State continues to sidestep the alibi argument by citing SDCL § 23A-6-9 which states the precise time need not be stated in an indictment so long as time is not a material element of the offense, but fails to recognize the case law cited by Appellant which makes time a material element of the offense when an alibi is provided for the entire time frame alleged. An "on or about" instruction cannot be given if a defendant has an alibi for the entire timeframe. See *State v. Nelson*, 310 N.W.2d 777, 781 (S.D. 1981) (holding appellant needed an alibi for the entire time period the crime could have occurred to avoid an "on or about" jury instruction.)

Kampeska's custody status for the entirety of the additional dates identified in the superseding indictment makes time a material element of the offense and creates a legitimate assertion of actual innocence for those counts. The State actively added two separate dates, May 10 and May 24, for the seven additional counts it added in the superseding indictment. In denying Kampeska's Motion to Withdraw Guilty Plea, the trial court found the date issue "*could* be a typographic error that *likely would* have been corrected prior to trial." CR. 87 (emphasis added). Again, the trial court did not know, and at this stage on appeal, this Court cannot say for certain, that this was simply a typographical error. If this is not a typographical error, Kampeska is innocent of Counts II

and III. On appeal, this Court should not overlook the fact that counts 2 through 8 assert **two** separate dates, both of which fall well after Kampeska was taken into custody. As written, Kampeska's alibi renders him innocent of those charges. To proceed on those counts, the State would need to introduce a second superseding indictment that amended the dates or dismiss them.

Absent a reason "obviously frivolous," the Circuit Court is directed to exercise its discretion liberally in favor of allowing withdrawal of a guilty plea. *State v. Goodwin*, 2004 SD 75, ¶ 4, 681 N.W.2d 681, 849 (quoting *State v. Wahle*, 521 N.W.2d 134, 137 (S.D. 1994)). South Dakota's Pattern Jury Instructions underscore the relevance, significance, and substantial weight an alibi is afforded under the law. See *Johnson*, 2012 SD 61, ¶ 24, 818 N.W.2d 804, 810 (J. Konenkamp concurring). When an alibi defense is asserted, the circuit court instructs the jury,

Evidence has been introduced that the defendant was not present at the time when the offense was allegedly committed. The claim of alibi is legal and proper.

If after a full and fair consideration of all the facts and circumstances in evidence, you find that the state has failed to prove beyond a reasonable doubt that the defendant was present at the time and the place the offense charged was allegedly committed you must find the defendant not guilty.

SDPJI 2-1-1.

If a defendant is not present at the time the offense was committed a jury "**must** find the defendant **not guilty**." *Id* (emphasis added). To hold Kampeska's alibi, and thus his assertion of actual innocence, frivolous is equivalent to rendering a finding that the instructions that make up the foundation of our justice system are "frivolous." There is nothing "obviously frivolous" about Kampeska's rationale for seeking to withdraw his guilty plea. The Circuit Court's denial of Kampeska's Motion to Withdraw Guilty Plea

should be reversed, Kampeska's conviction should be vacated, and Kampeska should be allowed to proceed to trial.

## II. Clerical Mistakes Necessitate Nunc Pro Tunc Judgment

"It is general settled law in this state that the oral sentence is the only sentence and the written sentence must conform to it." *State v. Munk*, 453 N.W.2d 124, 125 (S.D. 1990) (quoting *State v. Cady*, 422 N.W.2d 828 (S.D. 1988)). There is only one exception to this rule: "if the oral sentence is ambiguous, the written judgment may be relied upon to clarify the ambiguity." *Id.* (citing *Cady*, supra.). If there is no ambiguity, the oral sentence stands. The circuit court's oral sentence is void of any ambiguity. The language the circuit court used to start each sentence is identical.

**On Count 1** I am going to impose 10 years in the South Dakota state penitentiary, I'm going to suspend 3 of those years on conditions to be established by the Department of Corrections. I'm going to impose court costs only, I'm going to impose restitution in the amount of \$2200 for completion of the psychosexual evaluation, and I'm going to order that you repay Codington County for the cost of your court-appointed attorney's fees. **On Count 2** I am going to suspend 6 years in the South Dakota State Penitentiary, I'm going to impose court costs on that file, I am going to suspend that time on conditions to be established by the Department of Corrections. **On Count 3** I am also suspending 6 years in the South Dakota State Penitentiary, I'm imposing court costs, I will suspend that time on conditions to be established by the Department of Corrections. These three sentences are going to run concurrent to one another and you will be given credit for [439] days previously served.

HT 7/17/24, 7:14-8:4,18-19 (emphasis added).

On Count I, the circuit court specifically imposed ten years and suspended three years. The language used in Counts II and III is void of any mention of imposed penitentiary time. The language in Counts II and III is clear and explicit. "I am going to suspend 6 years in the South Dakota State Penitentiary." *Id.* It is crucial that the sentence a defendant hears in the courtroom matches the sentence enumerated in the Judgment of

Conviction. The issue is important regardless of the fact that Kampeska's term of incarceration will not be affected by a nunc pro tunc judgment for Counts II and III given Count I has a longer term of incarceration and the sentences were served concurrently.

Beyond that, Appellee's suggestion would unlawfully increase Kampeska's sentence. "[A]s against an unwilling defendant, a valid sentence cannot be increased in severity after he has commenced the serving thereof..." *Munk*, 453 N.W.2d at 125 (quoting *State v. Hughes*, 255 N.W. 800, 802 (S.D. 1934)).

Modifying the sentence for Counts II and III as outlined in Appellee's Brief would modify an unambiguous oral sentence and increase the severity of Kampeska's sentence after it has commenced, both of which violate well settled law. A nunc pro tunc judgment should be entered for counts II and III to reflect the sentence of the court, which was six years in the South Dakota State Penitentiary with all six years suspended and credit for 439 days.

### **CONCLUSION**

The circuit court abused its discretion when it refused to recognize Kampeska's tenable reasons to withdraw his guilty plea. It is undisputed that the Judgment of Conviction for counts II and III do not accurately reflect the circuit court's sentence and should be amended.

Kampeska respectfully requests that this Honorable Court vacate his Possession of Child Pornography convictions, reverse the trial court's order denying Kampeska's Motion to Withdraw Guilty Plea, and allow Kampeska to proceed to trial. Alternatively, Kampeska respectfully asks this Court to remand for issuance of a nunc pro tunc judgment that accurately reflects the circuit court's oral sentence.

Respectfully submitted this 31st day of January, 2025.

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Reply Brief and all appendices were filed online and served upon:

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## CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1618 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 31st day of January, 2025.

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