IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31154

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

WILEY JOE PICKNER,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Order Granting Petition for Intermediate Appeal
entered September 5, 2025

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PRELIMINARY STATEMENT

In this brief, Appellant, the State of South Dakota, is referred to as "State." Appellee, Wiley Jo Pickner, is referred to as "Pickner." References to the settled record in Hughes County Criminal File No. 32CRI18-496 is designated as "SR" followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On July 28, 2025, the Honorable M. Bridget Mayer, Circuit Court Judge, Sixth Circuit, entered a memorandum decision, titled Decision and Order Denying State's Motion to Correct Sentence. SR 797-806. The Notice of Entry was filed on the same day. SR 807. The State filed a Petition for Permission to File an Intermediate Appeal on July 31, 2025, and this Court granted permission for the intermediate appeal to proceed on September 5, 2025. SR 827-28. This Court has jurisdiction under SDCL 23A-32-12 and SDCL 23A-32-22.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT HAD AUTHORITY AND JURISDICTION TO ENTER A SUSPENDED IMPOSITION OF SENTENCE AFTER PICKNER ALREADY SERVED HIS PRISON TERM?

The circuit court found it had authority and jurisdiction to enter a suspended imposition of sentence after Pickner already served his prison term.

State v. Marshall, 247 N.W.2d 484 (S.D. 1976)

State v. Oban, 372 N.W.2d 125 (S.D. 1985)

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

SDCL 23A-27-19

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II.

WHETHER THE STATE CAN CHALLENGE THE CIRCUIT COURT'S ORDER SUSPENDING IMPOSITION OF SENTENCE?

The circuit court found the State was barred from challenging Pickner's sentence.

State v. Tibbetts, 333 N.W.2d 440 (S.D. 1983)

United States v. Murillo, 709 F.2d 1298 (9th Cir. 1983)

SDCL 23A-31-1

STATEMENT OF THE CASE AND FACTS[1]

On September 18, 2020, a Hughes County jury found Pickner guilty of third-degree rape. SR 199-200. The circuit court sentenced

[1] The Statement of the Case and Statement of the Facts have been combined for brevity.

Pickner to ten years in prison with seven years suspended. SR 340-41. Pickner did not appeal his conviction or sentence. SR 344.

Pickner completed his penitentiary sentence and was granted parole. SR 344. He then filed a Motion of Sentence Reduction, asking the circuit court to "vacate his judgment of conviction and grant his request for a suspended imposition of sentence." SR 345. The circuit court held a hearing on the motion where the State objected to his request.[2] SR 608-12. The circuit court granted Pickner's motion, entered a suspended imposition of sentence, and placed Pickner on probation for fifteen years. SR 612-28. In making its decision the circuit court reiterated it was not vacating Pickner's conviction but modifying it. SR 626.

The State subsequently filed a motion to reconsider the circuit court's sentence modification, arguing the circuit court lacked authority and jurisdiction to enter a suspended imposition of sentence in Pickner's case. SR 492-501. Pickner filed a reply brief, arguing he was eligible for a suspended imposition of sentence under SDCL 23A-27-13. SR 507-34. The circuit court held a hearing where it heard arguments from both parties.

The circuit court denied the State's motion. SR 535-43. The circuit court found it had the jurisdiction to enter a suspended imposition of sentence within two years of the judgment of conviction

[2] The victim in the case also spoke out against Pickner receiving a suspended imposition of sentence. SR 602-08.

being entered under SDCL 23A-31-1. SR 538. The State filed a Notice of Appeal with this Court pursuant to SDCL 15-26A-3(2) and (4). This Court issued an Order Dismissing Appeal stating that the circuit court's order was not a "final order appealable by right pursuant to SDCL 15-26A-3." SR 740.

The State then filed a Motion to Correct Sentence under SDCL 23A-3-1, arguing the circuit court did not have jurisdiction or authority to enter a suspended imposition of sentence after a judgment of conviction had been entered. SR 747-57. Pickner opposed the motion. SR 759-87. The court considered the briefs and denied the State's motion, finding it had jurisdiction to enter the suspended imposition of sentence and that the State was barred by res judicata and collateral estoppel from making its motion. 797-806. The State filed a petition for intermediate appeal, which was granted. SR 827-28.

ARGUMENTS

I. THE CIRCUIT COURT LACKED AUTHORITY AND JURISDICTION TO ENTER A SUSPENDED IMPOSITION OF SENTENCE AFTER PICKNER ALREADY SERVED HIS PRISON TERM.

A. *Standard of Review.*

"[W]hether a defendant's sentence exceeds the jurisdiction and authority of the court is reviewed de novo." *State v. Humpal*, 2017 S.D. 82, ¶ 6, 905 N.W.2d 117, 119 (citing *State v. Orr*, 2015 S.D. 89, ¶ 3, 871 N.W.2d 834, 835). And because the circuit court's jurisdiction to modify a defendant's sentence is determined by statute, the issue becomes an

issue of statutory interpretation, which is also reviewed de novo. *State v. Bettelyoun*, 2022 S.D. 14, ¶ 16, 972 N.W.2d 124, 129 (*State v. Thoman*, 2021 S.D. 10, ¶ 17, 955 N.W.2d 759, 766).

B. *The Circuit Court Did Not Have Authority or Jurisdiction to Enter a Suspended Imposition of Sentence.*

The circuit court found it had jurisdiction to reduce Pickner's sentence as it was within the two-year timeframe allowed by SDCL 23A-31-1. SR 802. It reasoned that SDCL 23A-27-19 allows for the circuit courts to suspend "any sentence for a period of two years from the effective date of the judgment of conviction."[3] SR 801. But the South Dakota Legislature did not give circuit courts the authority nor jurisdiction to enter a suspended imposition of sentence after a defendant has been sentenced to prison in the same case.

i. The circuit court lacked authority to enter a suspended imposition of sentence in Pickner's case after the judgment of conviction became final.

"The power to sentence comes from statutory and constitutional provisions." *Humpal*, 2017 S.D. 82, ¶ 6, 905 N.W. 2d at 119 (quoting *State v. Oban*, 372 N.W.2d 125, 129 (S.D. 1985)). When imposing a sentence, the circuit court has several options, including a suspended execution of sentence or suspended imposition of sentence. SDCL 23A-27-18, SDCL 23A-27-13. While "[b]oth are akin in spirit, purpose and practice, they are two distinct sentencing options." *Oban*, 372

[3] The circuit court also pointed out it reserved the right to amend "any and all terms [of Pickner's sentence] at any time." SR 798.

N.W.2d at 127 (citing *State v. Elder*, 77 S.D. 540, 544, 95 N.W.2d 592, 594 (S.D. 1959).

A suspended execution of sentence is when the circuit court imposes a sentence but defers execution upon certain conditions. SDCL 23A-27-18. This allows an opportunity for defendants to be rehabilitated while the circuit court retains jurisdiction. SDCL 23A-27-18. Whereas a suspended imposition of sentence, the circuit court does not enter a judgment of guilt and instead places the defendant on a term of probation. SDCL 23A-27-13. This provides the opportunity for a "first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of a conviction record." *State v. Schempp*, 498 N.W.2d 618, 620 (S.D. 1993) (quoting *State v. Marshall*, 247 N.W.2d 484, 487 (S.D. 1976)). The circuit court also maintains jurisdiction over the defendant during the pendency of its probation term. SDCL 23A-27-13.

This Court construes "statutes to determine the intent of the Legislature." *State v. Turner*, 2025 S.D. 13, ¶ 45, 18 N.W.3d 673, 688, *reh'g denied* (Apr. 29, 2025) (quoting *State v. Armstrong*, 2020 S.D. 6, ¶ 13, 939 N.W.2d 9, 16). The Legislature's intent when enacting laws is determined from the language of the statute. *Armstrong*, 2020 S.D. 6, ¶ 13, 939 N.W.2d at 16 (citing *State v. Bordeaux*, 2006 S.D. 12, ¶ 8, 710 N.W.2d 169, 172). "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed."

Armstrong, 2020 S.D. 6, ¶ 16, 939 N.W.2d at 13 (quoting *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 654).

SDCL 23A-27-19 provides that "The sentencing court retains jurisdiction for the purpose of suspending any sentence for a period of two years from the effective date of the judgment of conviction, notwithstanding the fact that the time for an appeal from such judgment is limited to a shorter period of time..." The plain reading of SDCL 23A-27-19 does not allow a circuit court to enter a suspended imposition of sentence after a defendant has already been sentenced to prison. A suspended imposition is more than merely suspending a sentence. With a suspended imposition of sentence, there is not a judgment of guilt, and the individual is placed on probation. In order for the circuit court to enter a suspended imposition, it needed to vacate Pickner's original judgment of conviction first. That entails more than just suspending a sentence.

Further, SDCL 23A-31-1,[4] in part reads: "A court may reduce a sentence: (1) within two years after the sentence is imposed[.]" The ordinary use of the phrase "reduce a sentence" means the "lessening of a sentence or the severity of a punishment." https://thelawdictionary.org/reduction-of-sentence/ (last visited October 7, 2025). By this definition a reduction in sentence would be cutting the time a defendant is ordered to serve in prison or on probation. Whereas

[4] Subsections 2 and 3 do not apply in this case.

vacating a judgment renders the judgment void or canceled. https://thelawdictionary.org/vacate/ (last visited October 7, 2025). Despite the circuit court's belief,[5] canceling a judgment of conviction is not lessening a sentence.

Not only is it not a reduction in sentence, but the circuit court did not have the authority to vacate Pickner's judgment. SDCL 23A-27-4.1 allows the circuit court to "relieve a defendant from final judgment if required in the interest of justice." But this statute does not apply in this case.

By vacating the judgment of conviction, the circuit court granted Pickner a judicial pardon, which is something that does not exist. *See Epps v. Commonwealth*, 59 Va. App. 71, 83, 717 S.E.2d 151, 157 (2011) ("At common law, 'there simply was no such thing as a judicial pardon."). "Suspended sentences partake of the nature of a pardon which is an exclusive executive, not judicial, power." *Oban*, 372 N.W.2d at 128 (S.D. 1985). Pardons are an "act of grace" and restores the individual to the same status as before being arrested or charged. SDCL 24-14-11.

Similarly, a suspended imposition of sentence is also a "matter of grace" that exempts a person from lawful punishment. *See Marshall*, 247 N.W.2d at 486; *Schempp*, 498 N.W.2d at 620. And it restores the individual to his status before being arrested or charged. SDCL

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[5] In its decision on the motion to reconsider, the circuit court stated that, "Certainly, changing a felony conviction to 'no felony conviction' is a reduction of a sentence." SR 538.

23A-27-17. The circuit courts are granted the authority to impose a suspended imposition of sentence "under certain statutorily mandated circumstances and in certain statutorily mandated ways." *Oban*, 372 N.W.2d at 129. And as explained, those circumstances did not exist here.

ii. The circuit court lacked jurisdiction to enter a suspended imposition of sentence in Pickner's case after the judgment of conviction became final.

While the circuit court retains jurisdiction over a defendant with a suspended imposition or suspended execution of sentence, it loses jurisdiction over a defendant when it imposes a prison sentence. *Oban*, 372 N.W.2d at 129. This Court has historically held that a defendant cannot be subject to both supervision of the executive branch and the judicial branch. *Orr*, 2015 S.D. 89, ¶ 4, 871 N.W.2d 834, 835 (citing *State v. Anderson*, 2015 S.D. 60, ¶ 16, 867 N.W.2d 718, 724). There are a few exceptions to this rule, including the circuit court retaining the ability to modify a sentence, to suspend a sentence,[6] or to correct an illegal sentence.[7] SDCL 23A-31-1, SDCL 23A-27-19.

Entering a suspended imposition of sentence after a prison term violates the separation of powers between the judicial branch and executive branch. Once a defendant is sentenced to prison, the circuit

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[6] SDCL 23A-27-19 provides that a circuit court retains jurisdiction to suspend a sentence for two years from the date of the judgment.
[7] SDCL 23A-31-1 allows for a circuit court to correct an illegal sentence at any time or to correct a sentence illegally imposed within two years of the sentence being imposed.

court loses jurisdiction, and the defendant falls under the control of the executive branch. *Orr*, 2015 S.D. 89, ¶ 10, 871 N.W.2d at 838. Even when someone has been paroled, they remain under the jurisdiction of the Board of Pardons and Paroles.[8] *State v. Hulfile*, 367 N.W.2d 193, 195 (S.D. 1985). And as this Court has recognized, "there is no scenario where a defendant is placed under simultaneous supervision of two branches of government." *Orr*, 2015 S.D. 89, ¶ 7, 871 N.W.2d at 837.

In fact, "[o]nce a defendant is released on a suspended sentence, the Board [of Pardons and Paroles] has the 'responsibility for enforcing the conditions imposed by the sentencing judge, and the [B]oard retains jurisdiction to revoke the suspended portion of the sentence for violation of the terms of suspension.'" *Krukow v. S. Dakota Bd. of Pardons & Paroles*, 2006 S.D. 46, ¶ 10, 716 N.W.2d 121, 123–24 (quoting SDCL 23A-27-19). Because Pickner was on parole at the time the circuit court vacated its finding of guilt and entered a suspended imposition of sentence, it did not have jurisdiction to do so; he was under supervision of the executive branch.

The circuit court relied on the fact that "According to the State Court Administrator's Office, since January 1, 2024, judges in this state have modified a sentence by suspending imposition of a sentence 942 times." SR 800. And that this Court has reviewed this very same

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[8] The Board of Pardons and Paroles was formally named the Board of Charities and Corrections. *See Smith v. Bd. of Pardons and Paroles*, 515 N.W.2d 219, 221 n. 3 (S.D. 1994).

"sentencing technique" of granting a suspended imposition of sentence after a judgment of conviction has been entered, and there was no indication of wrongdoing. SR 801 (citing *State v. Schmidt*, 2012 S.D. 77, ¶ 45, 825 N.W.2d 889, 900). But neither of these things gives the court authority to do what it did.

First, just because courts across the state have misconstrued the statutes, does not mean it is the correct way to impose a suspended imposition of sentence. As the adage goes, "wrong is wrong even if everyone is doing it." Similarly, if ten cars are speeding on the highway, and law enforcement pulls over one vehicle, that driver does not evade a ticket simply because other cars were also speeding.

Second, the circuit court's reliance on *State v. Schmi*dt misplaced. Schmitt pleaded guilty but mentally ill to ten counts of grand theft and was sentenced prison. She appealed her conviction and sentence.[9] When this Court addressed her sentence argument, it noted that she had a prior criminal history where she was convicted of grand theft and sentenced to prison. *Schmidt*, 2012 S.D. 77, ¶ 45, 825 N.W.2d at 900. Her prior sentence was later modified to a suspended imposition of sentence, and she was placed on probation. *Id.* This Court's analysis was not condoning what the previous circuit court did; the suspended imposition of sentence was not the issue before this Court. This Court

[9] Schmidt raised four issues, one being her sentence was cruel and unusual under the Eighth Amendment. *See Schmidt*, 2012 S.D. 77, ¶ 1, 825 N.W.2d at 892

was merely recognizing Schmidt's criminal past. Further, this Court did not have authority or jurisdiction to address the issue because the case where Schmidt received a suspended imposition of sentence was not even before this Court.

To enter a suspended imposition of sentence, the circuit court is required to place Pickner on probation. SDCL 23A-27-13. But if Pickner is on parole, he can't also be on probation. *Orr*, 2015 S.D. 89, ¶ 10, 871 N.W.2d at 838 (finding that "probation is not available for those defendants that are incarcerated in the penitentiary or on parole."). And the circuit court cannot remove an individual from parole, only the Parole Board has that authority. *Oban*, 372 N.W.2d at 131.

Additionally, entering a suspended imposition of sentence after a defendant has already served a prison term, completely defeats the purpose and intent of a suspended imposition of sentence. Suspended imposition of sentences were designed to allow a person to rehabilitate themselves without the trauma of prison. Pickner already served his three-year prison sentence. He has already experienced the "trauma" of prison. It is also counterintuitive to give a person a chance to rehabilitate themselves while on probation when they already served time in prison.

II. THE STATE CAN CHALLENGE THE CIRCUIT COURT'S ORDER SUSPENDING IMPOSITION OF SENTENCE.

A. Standard of Review.

Whether a sentence was imposed in an illegal manner is a question of law reviewed de novo. *State v. Simonsen*, 2024 S.D. 21, ¶ 11, 5 N.W.3d 843, 846 (citing *State v. Cook*, 2015 S.D. 46, ¶ 6, 865 N.W.2d 878, 880). Similarly, "[t]he applicability of the doctrine of res judicata is [also] a question of law reviewed de novo." *Wells v. Wells*, 2005 S.D. 67, ¶ 11, 698 N.W.2d 504, 507 (citing *Banks v. International Union Elec., Elec., Technical, Salaried and Mach. Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004)).

B. *The State can challenge an illegal sentence.*

Typically, an illegal sentence is one that exceeds the relevant statutory maximum limit, violates double jeopardy, or is ambiguous or internally contradictory. *Cook*, 2015 S.D. 46, ¶ 7, 865 N.W.2d at 880 (citing *State v. Thomas*, 499 N.W.2d 621, 622 (S.D. 1993)). Whereas an illegally imposed sentence is a sentence within the statutory limit but "'imposed in a way which violates [the] defendant's right' to not have his sentence enhanced once the defendant has left the judicial branch of government and is within the jurisdiction of the executive branch." *State v. Sieler*, 1996 S.D. 114, ¶ 6, 554 N.W.2d 477, 479 (quoting 8A J. Moore, Moore's Federal Practice ¶ 35.04[3][a] (2d Ed. 1995)). The circuit court can correct an illegal sentence at any time, but an illegally imposed

sentence may only be corrected within two years of it being imposed. SDCL 23A-31-1.

While this Court has consistently stated that an illegal sentence is "essentially only those which exceed the relevant statutory maximum limits or violate double jeopardy or are ambiguous or internally contradictory." *Sieler*, 1996 S.D. 114, ¶ 7, 554 N.W.2d at 480 (quoting *Thomas*, 499 N.W.2d at 622). The use of "essentially"[10] indicates that this is not an exhaustive list. This is further shown when this Court found that when a defendant was not given credit for pre-sentence incarceration due to indigency it is a due process violation and therefore an illegal sentence under SDCL 23A-31-1. *State v. Tibbetts*, 333 N.W.2d 440, 441 (S.D. 1983). Not being given for credit for time served does not fall within one of the four qualifiers of an illegal sentence but was still found to be an illegal sentence.

Because the circuit court lacked authority or jurisdiction to enter a suspended imposition of sentence, when the circuit court did so for Pickner, it entered an illegal sentence.[11] *See United States v. Murillo*, 709 F.2d 1298, 1300 (9th Cir. 1983) (finding that the lower court lacked authority not to order forfeiture of the defendant's property and therefore, the sentence was illegal).

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[10] Essentially is defined as "in a fundamental or basic way; in essence." https://www.dictionary.com/browse/essentially (last visited October 7, 2025).

[11] And a judgment rendered without jurisdiction is void. *Wells*, 2005 S.D. 67, ¶ 11, 698 N.W.2d 504, 507 (citing *Miller v. Weber*, 1996 S.D. 47, ¶ 13, 546 N.W.2d 865, 868).

SDCL 23A-31-1 does not specify who can challenge an illegal sentence and instead provides that a court may correct an illegal sentence at any time. The statute does not explicitly preclude the State from challenging the legality of a sentence. To find that the State could not challenge an illegal sentence illogical.

That logical fallacy is proved by SDCL 23A-32-22, which allows the State to appeal from an order granting or denying a motion to correct an illegal sentence. If the State can appeal the order, it can challenge the legality of the sentence at the circuit court level. If not, so long as the illegal sentence is favorable to the defendant, there would be no way to correct it.[12]

C. Res judicata does not bar the State's Motion to Correct Sentence. [13]

"The doctrine of res judicata prevents the relitigation of claims that were pursued and litigated in prior proceedings, as well as those 'issues

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[12] Other courts have also allowed the State to challenge illegal sentences under Rule 35 of the Federal Rules of Criminal Procedure (Rule 35). *See Murillo*, 709 F.2d at 1300 (applying a version of Rule 35 that has identical language to that in SDCL 23A-31-1(1) and ruling in favor of the government, who challenged the defendant's sentence).

[13] The circuit court determined that the State was barred from bring its claim bases on res judicata and collateral estoppel. SR 802-04. As this Court has stated, "Res judicata is comprised of two interrelated preclusion concepts, claim preclusion and issue preclusion. Issue preclusion has often been referred to independently as collateral estoppel; yet we discuss issue preclusion under the umbrella of res judicata because the difference between issue and claim preclusion is 'one of degree and emphasis[,]' and we apply the same elements of res judicata under both preclusion theories." *Torgerson v. Torgerson*, 2024 S.D. 50, ¶ 14, n.5, 11 N.W.3d 50, 57 n.5. Therefore the State will only be addressing res judicata in general.

which could have been properly raised and determined in a prior action.'" *State v. Anderson*, 2005 S.D. 22, ¶ 22, 693 N.W.2d 675, 682 (quoting *Merchants State Bank v. C.E. Light*, 458 N.W.2d 792, 794 (S.D.1990)). It prohibits continuous court litigation. *Anderson*, 2005 S.D. 22, ¶ 22, 693 N.W.2d at 682. But res judicata "bars relitigation of the same claim in a second lawsuit." *Centeno v. Wexford Health Sources Inc.*, 2014 WL 5465477, at *6 (N.D. Ill. Oct. 16, 2014) (citing *Prestwick Cap. Mgmt., Ltd. v. Peregrine Fin. Grp.*, 727 F.3d 646, 649 n.1 (7th Cir. 2013)). *See also Matter of Estate of Smeenk*, 2024 S.D. 23, ¶ 19, 6 N.W.3d 250, 254 (stating that when determining whether a claim is barred by res judicata, this Court considers "whether the issues in the *two* cases address the same wrong sought to be redressed.") (emphasis added).

To determine whether the action is prohibited, this Court analyzes the claim under a four-part test:

> (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Smeenk, 2024 S.D. 23, ¶ 18, 6 N.W.3d at 254 (quoting *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 42, 978 N.W.2d 786, 799).

None of the four-part test exists here. First, the issue was never adjudicated so there is no prior identical issue. Second, there was not a

final judgment in the pervious case, as there is no prior case.[14] Third, because there was no prior case, there are no pervious parties to compare to. And fourth, there was no prior adjudication where the State could have an opportunity to litigate this issue as the State could not have raised the issue of an illegal sentence until the circuit court imposed such sentence. When Pickner was first sentenced in 2021, he was sentenced to prison. This was not an illegal sentence. When the circuit court vacated his judgment and then entered a suspended imposition of sentence, that was an illegal sentence. Thus, there was no other opportunity for the State to raise this issue.

The circuit court also improperly relied on three out of state cases to find the State was barred from filing its motion to correct an illegal sentence. SR 804. But those cases all involve a defendant who did not raise the issue of an illegal sentence during their appeal or did not file an appeal and tried to challenge the sentences later. *See State v. McBride*, 848 So.2d 287, 288 (Fla. 2003); *Majhanovich v. State*, 499 P.3d 995, 997 (Wyo. 2021); *State v. Moncla*, 317 Kan. 413, 416, 531 P.3d 528, 532 (2023).

Because there was no prior case in which the State raised or could have raised the issue of an illegal sentence, the State is not barred by res judicata from raising the issue now.

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[14] When the State filed its Notice of Appeal of the circuit court's order on its Motion to reconsider, this Court found it was not appealable by right as it was not a final order. SR 740.

CONCLUSION

Based upon the arguments above and authorities, the State requests that Pickner's illegal suspended imposition of sentence be reversed and that his ten-year prison sentence, with seven years suspended, be reimposed and that Pickner remain under the continuing jurisdiction of the Board of Pardons and Paroles until the end of his previously imposed parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Brief contains 3,997 words.

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

Dated this 17th day of October 2025.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Wiley Joe Pickner* was served through odyssey file and serve upon Justin L. Bell at jlb@mayadamas.net.

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

APPENDIX

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	)	DECISION & ORDER DENYING STATE'S MOTION TO CORRECT SENTENCE
v.	)	
	)	32CRI18-496
WILEY JO PICKNER DOB: 01/13/1986 DEFENDANT.	)	

The South Dakota Supreme Court (SDSCT) previously issued its Order Dismissing State's Appeal #30762 on most issues stated herein on October 11, 2024. Almost four months later, on February 8, 2025, the State of South Dakota ("State") filed a Motion to Correct Sentence. Defense counsel was appointed. Both parties briefed their arguments. The final reply brief was dated June 9, 2025.

The Court reaffirms and concludes that it had constitutional and statutory authority to reduce or modify Wiley Pickner's ("Defendant's") Amended Judgment of Conviction to a Suspended Imposition of Sentence. The Court further finds that State's motion is barred by the doctrines of res judicata and/or collateral estoppel. Even if the sentence reduction/modification were improper, it was not an illegal sentence that can now be challenged. State's motion is DENIED.

CASE PROCEDURAL HISTORY

On September 18, 2020, Defendant was convicted of Third-Degree Rape (SDCL 22-1(3)), a Class 2 Felony. The Court entered a Judgment of Conviction on January 29, 2021. Defendant was sentenced to 10 years in the Penitentiary with 7 suspended. An Amended Judgment of

Conviction, correcting clerical matters, was signed on February 1, 2021. The Court reserved the right to amend any and all terms at any time.

On January 27, 2023, Defendant filed a Motion for Sentence Reduction to a Suspended Imposition of Sentence pursuant to SDCL 23A-31-1. That motion was filed within 2 years of its imposition.

The Court orally heard and reduced the sentence to a Suspended Imposition of Sentence on March 1, 2023. State's initial motion to reconsider was filed on May 1, 2023. State argued that the Court lacked jurisdiction or authority to reduce, modify, or vacate its sentence to a suspended imposition of sentence. Further, State argued Defendant had already served a penitentiary sentence, was on parole when the sentence change occurred, and a separation of powers violation occurred. At oral arguments, held on February 27, 2024, State confirmed its assertion that a Suspended Imposition of Sentence (SIS) must be granted at an initial sentencing hearing, or it is inherently forever denied for reconsideration. State made this argument despite it having previously in many other criminal cases argued to the court to initially deny a defendant's request for a "suspended imp" "up front" with a claim that a defendant could later request a "suspended imp," if a defendant could demonstrate that he had earned the right to receive one within 2 years of the entry of the judgment.

The court reincorporates its July 9, 2024, decision and now addresses the same or additional arguments made in this recent motion. After SDSCT denied State's appeal, it filed a new Motion to Correct Sentence on February 8, 2025. Briefing was conducted with the final submission received June 9, 2025.

ARUGMENTS AND ANALYSIS

State makes two arguments: First, that once a person is under the supervision of the executive branch, the judicial branch loses jurisdiction to suspend imposition of a sentence and place a person on probation. Second, that a court may not suspend imposition of a sentence after entering a finding of guilt (although, the court is not clear in its FN 2 of State's reply brief if they are withdrawing or now limiting that assertion).

SDCL 23A-31-1 authorizes the Court to **reduce** a sentence **within two years after** its imposition. SDCL 23A-31-1 in relevant part states:

> A court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence. *A court may reduce a sentence:*
> *(1) Within two years after the sentence is imposed.*

As to granting a suspended imposition of sentence, SDCL 23A-27-13 provides:

> Upon receiving a verdict or plea of guilty for a felony not punishable by death or life imprisonment by a person never before convicted of a crime which at the time of conviction thereof would constitute a felony in this state, a court having jurisdiction of the defendant, if satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may, without entering a judgment of guilt, and with the consent of the defendant, suspend the imposition of sentence and place the defendant on probation for such period and upon such terms and conditions as the court may deem best. No person who has previously been granted, whether in this state or any other, a suspended imposition of sentence for a felony, is eligible to be granted a second suspended imposition of sentence for a felony. A court may revoke such suspension at any time during the probationary period and impose and execute sentence without diminishment or credit for any of the probationary period.

As to whether the court has jurisdiction to suspend imposition of a sentence and place a person on probation, it clearly does. State is correct that a person may not be under simultaneous supervision from the judiciary and the executive branch. *See State v. Orr*, 2015 SD 89, 871 NW2d 834. However, *Orr* does not stand for the proposition that a sentencing court has no jurisdiction to modify a sentence during the two years where the circuit court retains jurisdiction for that purpose.

Accordingly, a sentencing court clearly may change supervision from the executive branch back to the judiciary during the two years when court retains sentencing jurisdiction. Indeed, if State's argument is correct, a court could *never* modify a sentence after a conviction if a person is sentenced to incarceration, because it loses jurisdiction over a defendant as soon as a defendant is sentenced. Indeed, *Orr* explicitly recognized that a court may reduce a sentence when under executive branch supervision, it just can't place a defendant under supervision of the executive branch (i.e. incarceration or parole) and the judicial branch (i.e. probation) at the same time. *Id.* at ¶ 11.

As to State's second contention, that a sentencing court may not suspend imposition of a sentence after entry of a finding of guilt, that is plainly incorrect when viewing precedent of the SDSCT. Indeed, SDCL 23A-27-19, states that a circuit court "retains jurisdiction for the purpose of suspending any sentence for a period of two years from the effective date of the judgment of conviction." Since 1921, the SDSCT has held that generic language regarding suspending a sentence includes *both* suspending execution *and* suspending imposition of a sentence. *See State v. Anderson*, 43 S.D. 630, 181 N.W. 839 (1921). Frankly, although this Court certainly had jurisdiction to deny a suspended imposition of sentence when Defendant made a motion for sentencing modification, on a motion where State now alleges this sentence to be illegal, this Court utilizes the reasoning of *State v. Anderson* that SDCL 23A-27-19's language is interpreted to include authority to both suspend imposition of and/or execution of a sentence.

As noted by Defendant, that is why this Court is not alone in taking the action it has done to this point. According to the State Court Administrator's Office, since January 1, 2024, judges in this state have modified a sentence by suspending imposition of a sentence 942 times. Sentencing judges have modified a judgement of conviction and granted a suspended imposition

of sentence in cases where a person pleaded guilty. Sentencing judges have done it in cases where there were stipulated fact trials. Sentencing judges have done it in cases where there was a conviction at trial. Regardless, it is a sentencing technique that has taken place in every circuit of this State. Moreover, such has been reviewed by the Supreme Court without any indication of wrongdoing by the Supreme Court. *See State v. Schmitt,* 2012 S.D. 77, ¶ 45, 825 N.W.2d 889, 900. To claim that such is an "illegal" sentence is without merit.

State responded that just because all the judges are revising some of their initial sentences to a suspended imposition, it doesn't make it legal. However, the court stands by its authority stated herein currently and previously.

As to State's argument that this Court is improperly issuing a pardon, that is also rejected. Truly, the Governor has broad and exclusive pardon power. Although not the case a century ago when the SDSCT decided *Anderson,* the voters of this State amended the constitution twice to grant the circuit courts of this State broad authority to suspend imposition and execution of sentences, subject *only* to the Legislature prohibiting such practices. Nowhere in code has the Legislature prohibited suspending imposition of a sentence after a judgment of conviction is entered. Nowhere in code has the Legislature prohibited suspending imposition of a sentence and transferring jurisdiction back to the judicial branch during the two-year timeframe where a circuit court retains jurisdiction to modify a sentence.

Indeed, not only has the Legislature failed to prohibit such, but it has also explicitly granted broad authority to the Court in "suspending any sentence for a period of two years from the effective date of the judgment of conviction[.]" SDCL 23A-27-19. Even in *Anderson,* the SDSCT found such language to authorize suspending imposition or execution of a sentence. *Anderson* at 840. The Legislature was plainly aware of the Court's reasoning in *Anderson* in using such

language. This Court rejects State's attempt to overturn SDSCT precedent that appears to allow courts to utilize this practice, where a defendant has demonstrated to the court that he has earned the right to ask for the reduction to a suspended imposition. To now remove from the circuit courts their broad sentencing authority, which has been widely utilized by circuit courts throughout the State and not criticized by the SDSCT, would be improper. Frankly in this case, it would be an increase now to his sentence.[1]

In sum, this Court concludes that Defendant remained eligible, after his initial sentencing, under SDCL 23A-31-1, for two (2) years to request and receive, a reduction to a suspended imposition of sentence. SDCL 23A-31-1 clearly authorizes the continuing jurisdiction of the Court to modify his sentence within the statutory timeframe and authority.

State now again has argued that because a suspended imposition is a matter of grace, it is somehow equivalent to a pardon. In making this argument State cites to *State v. Marshall*, 247 N.W.2d 484, 486 (S.D. 1976). This Court agrees that pardons fall within the executive power, however, it does not appear that State appreciated the sentiment of *Marshall*. The Court now refers to its previous analysis and incorporates Defendant's arguments and reasoning set out in its briefings, without restating the same here.

The Court concludes that it did not grant a pardon, grant parole or otherwise. To the contrary, the Court followed its authority to reduce or modify a sentence.

Next, the Court will address Defendant's further reasons to deny State's motion on the doctrines of collateral estoppel and/or res judicata. State argues these doctrines simply do not apply.

[1] In addition to any argument made herein, Defendant did incorporate all previously submitted arguments made by him in the Motion to Reduce Sentence.

The collateral estoppel doctrine "bar[s] relitigation of an essential fact or issue involved in the earlier suit" if a four-part test is satisfied: "(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication?" *Estes v. Millea,* 464 N.W.2d 616, 618 (S.D.1990). Similarly, the SDSCT "appl[ies] four factors to determine whether the doctrine of res judicata [applies]: (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication." *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D. 1993) (citing *Raschke v. DeGraff*, 81 S.D. 291, 295, 134 N.W.2d 294, 296 (1965); *Staab v. Cameron*, 351 N.W.2d 463, 465 (S.D.1984)).

In this case, all the factors stated above weigh in favor of Defendant. As to prong one, the issues raised by State are identical to the issues raised previously. In fact, the initial brief is almost word for word the same regarding the substantive issues. As to the second prong, there was a "final order" by the court on the issue. Although the Supreme Court found the order not to be an "appealable final order" for purposes of an appeal of right, because it was not one of the listed orders in SDCL 23A-32-4 or SDCL 23A-32-5,[2] there is little doubt that that order was "final." As to the third prong, the parties remain the State and Defendant. Lastly, and most relevant, there was a full and fair opportunity to litigate the issues in the prior adjudication.

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[2] Despite there being several other final orders or judgments that may arise in a criminal context, State may only take appeal on the following as a matter of right, pursuant to the Rules of Criminal Procedure: 1) An order that sets aside a verdict and entering judgment of acquittal; 2) an order that sustains a motion to dismiss an indictment or information; 3) an order that grants a motion for arrest of judgment or a motion for a new trial; 4) An order that finds mitigating circumstances to exist in deviating from the mandatory sentencing provisions of § 22-42-2; 5) an order suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding. *See* SDCL 23A-32-4.

The SDSCT has applied these doctrines to a motion to correct an illegal sentence and has found that it prevents recitation of issues that have previously been raised. *See State v. Anderson*, 2005 S.D. 22, ¶¶ 29-30, 693 N.W.2d 675, 683. Although *Anderson* involved the issues being litigated four previous times, it does not matter whether it was litigated four times or one time previously. These issues have been fully litigated by these parties before this Court, and re-litigation of that issue is now barred. Moreover, other jurisdictions have found that a motion to correct an illegal sentence is not a proper mechanism for relitigating issues that were previously considered and denied by the sentencing court. *See State v. McBride*, 848 So.2d 287, 288 (Fla. 2003) (applying collateral estoppel to motion to correct sentence); *Majhanovich v. State*, 499 P.3d 995, 997 (Wyo. 2021) (res judicita applies to a motion to correct illegal sentence); *State v. Moncla*, 317 Kan. 413, 531 P.3d 528 (2023).

Lastly, Defendant argues that even if the court's sentence *was* improper, a suspended imposition of sentence is not an "illegal sentence" which can be challenged by way of a motion to collect an illegal sentence under SDCL 23A-31-31. State disagrees.

Under SDCL 23A-31-1, "[a] court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner ... within two years after the sentence is imposed." However, our SDSCT, and almost every jurisdiction, has limited the application of the class of applicable sentences for which this statute applies. As recognized by State, "'[i]llegal sentences are essentially only those which exceed the relevant statutory maximum limits or violate double jeopardy or are ambiguous or internally contradictory.'" *State v. Cook*, 2015 S.D. 46, ¶ 7, 865 N.W.2d 878, 881. The sentence at hand is not in excess of a statutorily required sentence, it does not violate double jeopardy, and is not ambiguous or internally inconsistent in that it is not "internally ambiguous or self-contradictory to the extent that a reasonable person cannot determine

what the sentence is." *Id.* at ¶ 8. The Court agrees with Defendant that the only action that could violate any of these protections would be to allow State to relitigate these issues and subject State to double jeopardy concerns.

On the other hand, "'[s]entences imposed in an illegal manner are within the relevant statutory limits but are imposed in a way which violates defendant's right' to not have his sentence enhanced once the defendant has left the judicial branch of government and is within the jurisdiction of the executive branch." *Id.* at ¶ 8, n.1. (*quoting State v. Sieler,* 1996 S.D. 114, ¶ 6, 554 N.W.2d 477, 479 (*quoting* 8A James W. Moore, *Moore's Federal Practice* § 35.04[3][a] (2d ed.1995))). However, this Court's modification clearly did not violate Defendant's rights, as it was a change which was to his benefit. Moreover, the motion for sentencing reduction was made within the two-year period where the sentencing court retains jurisdiction over the sentence. *Id.* at ¶ 11 (*citing* SDCL 23A–27–19, –31–1 (Rule 35)). This is in accord with at least some courts' positions that a Rule 35 proceeding to correct an illegal sentence may only be invocated to benefit a defendant, rather than to increase his or her sentence. *See, e.g., Chancellor v. State*, 809 So.2d 700, 702 (Miss. Ct. App. 2001) ("The law that states that there is a fundamental right to be free from an illegal sentence is interpreted to apply to sentences which cause the defendant to endure an undue burden rather than the luxury of a lesser sentence").

In sum, the Court agrees with Defendant that even if this sentence was improper, it was not "illegal" or imposed in an "illegal manner," in a way that can be correct by way a of Rule 35 motion to correct an illegal sentence. In the Florida District Court of Appeals in *Robinson v. State*, 757 So.2d 532, 533 (Fla. Dist. Ct. App. 2000), the court ruled, in dicta, that the trial court improperly withheld an adjudication of a guilt, and imposed probation, but found that a Rule 35

motion to correct a sentence to correct an illegal sentence, because an improper sentence is not necessarily an "illegal sentence" as contemplated by law. The same is true in this case.

Moreover, the SDSCT has repeatedly found that "[[a]] trial court may not use SDCL 23A-31-1 to increase the length of a sentence." *State v. Bucholz*, 403 N.W.2d 400, 402 (S.D. 1987) (*State v. Tibbetts*, 333 N.W.2d 440 (S.D.1983) (*citing State v. Ford*, 328 N.W.2d 263 (S.D.1982)); see also *State v. Thayer*, 2006 S.D. 40, ¶ 13, 713 N.W.2d 608, 613 ("More importantly, State's reliance on this statute is mistaken. SDCL 23A–31–1 may not be used to increase a defendant's sentence").

Although there have been repeated cases which have litigated whether a defendant has started to serve a sentence, the underlying holding of *Bucholz* withstands - State cannot use a SDCL 23A-31-1 to increase a sentence. *See Ford*, 328 N.W.2d 263 (S.D.1982). This Court agrees that it would be manifestly unjust to increase Defendant's sentence here, when the SDSCT has stated, in very plain terms, that the a "*trial court may not use SDCL 23A-31-1 to increase the length of a sentence.*" That would be the result if the court were to grant what State is asking it to do.

In conclusion, Defendant has earned the suspended imposition. Defendant continues to pay restitution and follow all supervision. The Court did not give that privilege "up front," but rather made him earn it under the authority of the law. The Court denies State's motion.

Dated this 28th day of July, 2025.

BY THE COURT

M. Bridget Mayer

M. Bridget Mayer
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

APPEAL NO. 31154

STATE OF SOUTH DAKOTA,

Appellant,

-vs-

WILEY JOE PICKNER,

Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE WILEY JOE PICKNER

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ORDER GRANTING PETITION FOR INTERMEDIATE APPEAL
ENTERED SEPTEMBER 5, 2025

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South Dakota Supreme Court:

PRELIMINARY STATEMENT

For the convenience of the Court, Appellant will adopt the following abbreviations for use in its Appellate Brief. Appellee Wiley Jo Pickner will be referred to as "Wiley" or "Pickner." Appellee the State of South Dakota will be referred to as the "State." Reference to the Settled Record will be indicated by "SR ___." Reference to transcripts will be made by citation to Settled Record.

JURISDICTIONAL STATEMENT

On July 28, 2025, the Honorable M. Bridget Mayer, Circuit Court Judge, Sixth Circuit, entered an order entitled Decision and Order Denying State's Motion to Correct Sentence. SR 797-806. The Notice of Entry was filed on the same day. SR 807. The State filed a Petition for Permission to File an Intermediate Appeal on July 31, 2025, and this Court granted permission for the intermediate appeal to proceed on September 5, 2025. SR 827-28. This Court has jurisdiction over this appeal pursuant to SDCL 23A-32-22.

STATEMENT OF LEGAL ISSUES

I. **WHETHER THE STATE RELITIGATING ISSUES BY WAY OF A RULE 35 MOTION WHEN PREVIOUSLY DECIDED BY THE CIRCUIT COURT IS BARRED BY THE DOCTRINE OF RES JUDICATA?**

The circuit court found that the State's Motion pursuant to SDCL 23A-31-1 (Rule 35) was barred by res judicata and/or collateral estoppel.

Authority:
Healy Ranch, Inc. v. Healy, 2022 S.D. 43, 978 N.W.2d 786
State v. Anderson, 2005 S.D. 22, 693 N.W.2d 675
Brown v. State, 803 P.2d 887 (Alaska Ct. App. 1990)

II. **WHETHER THE CIRCUIT COURT HAD CONSTITUTIONAL AND STATUTORY AUTHORITY TO SUSPEND IMPOSITION OF WILEY'S SENTENCE?**

The circuit court found it had authority and jurisdiction to enter a suspended imposition of sentence.

Authority:
SD Const. Art. V, § 5
SDCL 23A-31-1
SDCL 23A-27-19
State v. Anderson, 43 S.D. 630, 181 N.W. 839 (1921)
State v. Schmitt, 2012 S.D. 77, 825 N.W.2d 889

III. **WHETHER THE CIRCUIT COURT'S SUSPENDED IMPOSITION OF SENTENCE CAN BE CHALLENGED BY WAY OF A MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO SDCL 23A-31-1.**

The circuit court found that even if the sentence reduction/modification were improper, it was not an illegal sentence that can be challenged pursuant to SDCL 23A-31-1.

Authority:
SDCL 23A-31-1
State v. Simonsen, 2024 S.D. 21, 5 N.W.3d 843
State v. Bucholz, 403 N.W.2d 400 (S.D. 1987)
State v. Tibbetts, 333 N.W.2d 440 (S.D.1983)
State v. Thayer, 2006 S.D. 40, 713 N.W.2d 608

STATEMENT OF THE CASE AND FACTS

The facts in this matter are undisputed and straightforward. On September 18, 2020, Wiley was found guilty of third-degree rape pursuant to SDCL 22-22-1(3). SR 199. He was sentenced to ten years in the penitentiary with seven years suspended and the Court entered a Judgment of Conviction on January 29, 2021. SR 202. An Amended Judgment of Conviction, correcting clerical matters, was signed and filed on February 1, 2021. SR 340. As part of both judgments, the circuit court reserved the right to amend any and all terms at any time. SR 202, 340. Wiley did not appeal his conviction or

sentence. The State also did not appeal or object to the judgment which authorized the circuit court to amend the judgment "any and all terms at any time."

Instead, he focused on improving himself. The Affidavit of Counsel filed by Wiley's counsel details the growth that Wiley has experienced since his conviction, both in custody and out of custody, and both in relation to being a law-abiding citizen and as to his spiritual and mental well-being. SR 355-443. He was a model incarcerated person, parolee, and now is a model probationer and leader in his church. *Id.* That growth and positive development for him, his family, and his community continues today.

On January 27, 2023, Wiley filed a motion to reduce his sentence to a suspended imposition of sentence. SR 344. The State resisted. SR 609. The circuit court orally heard and entered an oral order to modify (but not vacate) the sentence to a suspended imposition of sentence on March 1, 2023. SR 628. Wiley's counsel emailed a proposed order to the circuit court and the State. The State requested that the circuit court delay the signing of that proposed order in order to be allowed to file a motion to reconsider its oral pronouncement. SR 486-489. The request was granted. State's motion and memorandum to reconsider was filed on May 1, 2023. *Id.* State argued that the circuit court lacked jurisdiction or authority to reduce, modify, or vacate its sentence to a suspended imposition of sentence. SR 492-501. Further, State argued Wiley had already served a penitentiary sentence, was on parole when the sentence change occurred, and a separation of powers violation occurred. *Id.* In short, the State argued essentially the exact same arguments that were made in this case. At the final oral arguments, held on February 27, 2024, the State reaffirmed its assertion that a suspended imposition of sentence must be granted at any initial sentencing hearing, or it is forever denied from

reconsideration. SR 640-736. This circuit court considered these arguments and explicitly rejected them. SR 535-543. Thereafter, this Court entered an Order Suspending Imposition of Sentence on July 9, 2024. SR 544-548.

The State then filed a notice of Appeal claiming an appeal as a matter of right. SR 549-540. That appeal was dismissed. SR 740. The State then brought the exact same arguments (almost word for word), as specifically ruled on by the circuit court previously, but under a motion to correct an illegal sentence. SR 747. The circuit court once again rejected these arguments. SR 797. The State then filed a motion for a discretionary appeal, which was granted. SR 827.

ARGUMENTS AND AUTHORITY

I. INTRODUCTION

The State, having failed to convince the circuit court by arguing a motion to reduce a sentence on the merits, then on a motion to reconsider the motion, then having a direct appeal dismissed, subjected Wiley Pickner to defend against a SDCL 23A-31-1 motion, commonly referred to as a Rule 35 motion. A Rule 35 motion allows a circuit court to correct an "illegal sentence" or "a sentence imposed in an illegal manner."

The State never truly clarifies whether it is alleging that Wiley's sentence was "illegal" or "was imposed in an illegal manner," however Wiley submits that the State's argument cannot be rationally construed to be that Wiley's sentence was illegal, in that, the State does not argue that the circuit court could never have granted a suspended imposition of sentence for Wiley for the offense in which he was found guilty. Instead, the State is arguing that the suspended imposition of sentence was granted in an illegal manner, in that it was imposed after a judgment of conviction was entered and after

Wiley was under the jurisdiction of the Board of Pardons and Paroles. Having had its argument rejected three times by the circuit court, the State asks this Court to overturn a century of its precedent and find that circuit courts do not have the authority to suspend imposition of a sentence within two years of when a judgment of conviction is entered.

It does so, even though the process that the State now claims to be "illegal" is a common practice for circuit courts around the state to further encourage defendants to be successful during and after prison sentences, parole, and probation, has been advocated for by the State in several other cases throughout the state, and which allows for sentencing judges to make decisions regarding whether to grant a suspended imposition with a more complete picture of the person who is seeking a suspended imposition of sentence. This Court should reject the State's extreme tactics.

II. THE STATE RELITIGATING ISSUES BY WAY OF A RULE 35 MOTION WHEN PREVIOUSLY DECIDED BY THE CIRCUIT COURT IS BARRED BY THE DOCTRINE OF RES JUDICATA.

a. Standard of Review.

"[A] decision on the question of res judicata is reviewed de novo." *Farmer v. S. Dakota Dep't of Revenue & Regul.*, 2010 S.D. 35, 781 N.W.2d 655, 659 (*citing In re L.S.*, 2006 SD 76, ¶ 21, 721 N.W.2d 83, 89).

b. Argument.

The State argues that there was no prior adjudication, so res judicata cannot apply. That simply is not in line with the majority rule regarding Rule 35 motions in post-conviction proceedings. In such cases, the majority rule has been that even though a Rule 35 motion is filed in the same case file as a criminal conviction, Rule 35 does not

authorize a party to re-litigate issues that were previously litigated prior to the issuance of a sentence.[1]

This court has recently reviewed res judicata in detail in *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, 978 N.W.2d 786, reasoning:

> "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774 (citation omitted). We have previously defined these two concepts in the following terms:
>
> > Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]
>
> *Id.* (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 894 n.1, 79 L. Ed. 2d 56 (1984)).
>
> The difference between issue and claim preclusion is largely "one of degree and emphasis[.]" 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (3d ed. 2021) (Wright & Miller). However, "claim preclusion[ ] is broader than the issue preclusion function of collateral estoppel." *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990). For example, claim preclusion "precludes relitigation of a claim ... actually litigated *or which could have been properly raised.*" *Nelson v. Hawkeye Sec. Ins. Co.*, 369 N.W.2d 379, 381 (S.D. 1985) (emphasis added) (citation omitted). But issue preclusion "prevents relitigation *only of issues actually litigated* in a prior proceeding." *Id.* (emphasis added). What is prohibited, then, under claim preclusion is the cause of action itself, but under issue preclusion, it "is the particular issue or fact common to both actions." *Bollinger v. Eldredge*, 524 N.W.2d 118, 122 (S.D. 1994) (*quoting Golden v. Oahe Enters., Inc.*, 90 S.D. 263, 275, 240 N.W.2d 102, 109 (S.D. 1976)).

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[1] The mechanism to enforce such a rule is generally by a state applying the doctrine of res judicata. However, some have instead applied the law of the case doctrine, and allowing for a challenge to an "illegal sentence" not allowing a challenge to a sentence in an illegal manner. *See People v. Tolbert*, 216 P.3d 1, 6 (Colo. App. 2007). Wiley would submit that the State's challenge is to the manner in which the suspended imposition of sentence was imposed, and not that a suspended imposition of sentence is an illegal sentence, and if so, the law of the case doctrine would also bar the State's Rule 35 motion.

Res judicata arguments are analyzed under a well-established four-part test:

> (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Dakota, Minn. & E. R.R. Corp. v. Acuity, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661; *see also Lippold v. Meade Cnty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 28, 906 N.W.2d 917, 925, as modified on denial of reh'g (Mar. 13, 2018).

Id. at ¶¶ 40-42

In this case, all of the factors weigh in favor of Wiley. As to prong one, the issues raised by the State are identical to the issues raised previously by the State when the trial court granted Wiley's motion to reduce his sentence and impose a suspended imposition. In fact, the State's trial court brief was almost word for word the same regarding the substantive issues. Compare SR 492 to SR 747. As to the second prong, there was a "final order" by the circuit court on the issue. Although the Supreme Court found the order not to be an "appealable final order" for purposes of an appeal of right, because it was not one of the listed orders in SDCL 23A-32-4 or SDCL 23A-32-5,[2] there is little doubt that that order was "final." As to the third prong, the parties remain the State of South Dakota and Wiley Pickner. Lastly, there was a full and fair opportunity to litigate the issues in the prior litigation.

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[2] Despite there being several other final orders or judgments that may arise in a criminal context, the State may only take appeal on the following as a matter of right, pursuant to the Rules of Criminal Procedure: 1) An order that sets aside a verdict and entering judgment of acquittal; 2) an order that sustains a motion to dismiss an indictment or information; 3) an order that grants a motion for arrest of judgment or a motion for a new trial; 4) An order that finds mitigating circumstances to exist in deviating from the mandatory sentencing provisions of § 22-42-2; 5) an order suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding. *See* SDCL 23A-32-4.

Although some courts have found that claim preclusion applies to Rule 35 motions to correct an illegal sentence, *see Majhanovich v. State*, 499 P.3d 995, 997 (Wyo. 2021), Wiley does not argue that claim preclusion applies to Rule 35 motions to correct an illegal sentence.[3] Indeed, the whole purpose of a Rule 35 motion is to allow a court to modify an illegal sentence which "could have been" litigated but was not. However, Wiley submits that the majority rule is that issue preclusion applies to Rule 35 motions, which has been long understood a majority of courts. As the Court of Appeals of Alaska has reasoned:

> We conclude that where a party thoroughly litigates an issue and has his or her appeal resolved on the merits, the trial court can dismiss the claim.
>
> This interpretation of the rule comports with the ABA Standards concerning the effect of the finality of judgments on post-conviction remedies. *ABA Standards for Criminal Justice* § 22–6.1, at 22–62 (2d ed. 1986). The standard states:
>
> > (a) Any issue that has been fully and finally litigated in the proceedings leading to the judgment of conviction should not be relitigated in postconviction proceedings.
> >
> > (i) An issue should be deemed fully and finally litigated when the highest court of the state to which a defendant could appeal as of right has ruled on the merits of the question.
>
> This approach also comports with the Uniform Post–Conviction Procedure Act of 1980 which revised the 1966 act from which Alaska's rule is copied. 11 ULA 477, § 8 at 528 (1974). The 1980 Rule provides in section 12:
>
> > (a) An application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding. 11 ULA § 12, at 250 (1974 & Supp.1987).

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[3] Indeed, the State did advocate that claim preclusion apples in a Rule 35 motion in *State v. Kramer*, 2008 S.D. 73, 754 N.W.2d 655, arguing that the issue could have been raised and appealed in the underlying action. The Court correctly rejected that argument.

Brown v. State, 803 P.2d 887, 889 (Alaska Ct. App. 1990), *abrogated on other ground by David v. State*, 372 P.3d 265 (Alaska Ct. App. 2016); *see also State v. Moncla*, 317 Kan. 413, 531 P.3d 528, (2023) (applying res judicata to a successive illegal-sentence motion when it was previously raised prior to a final order on the merits); *State v. McBride*, 848 So.2d 287, 288 (Fla. 2003) (applying collateral estoppel to motion to correct sentence); *State v. Moncla*, 317 Kan. 413, 531 P.3d 528, (2023) (same). Indeed, this Court has previously applied res judicata to a motion to correct an illegal sentence and has found that it prevents recitation of issues that have previously been raised. *See State v. Anderson*, 2005 S.D. 22, ¶¶ 29-30, 693 N.W.2d 675, 683. Although Anderson involved the issues being litigated four previous times, it does not matter whether it was litigated four times or one time previously. These issues have been fully litigated by these parties before the circuit court, and re-litigation of the issue by way of a Rule 35 motion is now barred.[4]

The State argues that this issue was not litigated previously, arguing "[w]hen the circuit court vacated his judgment and then entered a suspended imposition of sentence, that was an illegal sentence. Thus, there was no other opportunity for the State to raise this issue." Appellant's Brief at 17. However, this is not accurate. The State fully litigated these issues when Wiley brought his motion for sentence reduction. Indeed, the State argued its position before the circuit court on the original hearing at the motion on March 1, 2023. SR 565. The State then submitted lengthy briefing on the issue. SR 492, which raised the same legal issues that were raised in the Rule 35 Motion. The circuit court then held another hearing on the motion on February 27, 2024, and the state once

[4] Similarly, this Court has applied both issue preclusion and claim preclusion to habeas proceedings. *Ceplecha v. Sullivan*, 2023 S.D. 63, ¶ 42, 998 N.W.2d 351, 361

again argued its position. SR 640. The circuit court rejected the arguments made and entered its Order Granting Suspended Imposition on July 9, 2024. SR 544. The State filed a Notice of Appeal on July 16, 2024, SR 549, but this Court dismissed the appeal because state law did not authorize the State to appeal such an order, despite it being a final order. SR 740. Then, on February 28, 2025, the State made a motion to correct an illegal sentence, raising the exact same issues that were previously rejected by the circuit court. SR 747.

While it is true that the Supreme Court has not reviewed this issue on the merits prior to the Rule 35 motion being brought, the State did file a Notice of Appeal and attempted to appeal the issue knowing a final order was entered. However, the Legislature failed to give the State the ability to appeal such a final order, and the appeal was dismissed. Moreover, regardless of what some other states require, this Court has never required an appeal in applying res judicata, as long as the issue was previously raised before the circuit court. And, it should not allowed here, especially when a notice of appeal was previously filed and this Court chose to decline to review the same.

Indeed, the State should be careful of what it wishes for in this appeal. If the Court rules that res judicata does not bar successive litigation by way of a Rule 35 motion in this case, it also would not apply in the far more common Rule 35 motion brought by a criminal defendant. The Court should apply res judicata and find that the State is barred from relitigating this matter by way of a Rule 35 motion, since the State previously raised and litigated the issues before the Circuit Court, and they had already been rejected.

III. THE CIRCUIT COURT HAD CONSTITUTIONAL AND STATUTORY AUTHORITY TO SUSPEND IMPOSITION OF WILEY'S SENTENCE

a. Standard of Review

Whether a sentence was imposed in an illegal manner is a question of law reviewed de novo. *State v. Simonsen*, 2024 S.D. 21, ¶ 11, 5 N.W.3d 843, 846 (citing *State v. Cook*, 2015 S.D. 46, ¶ 6, 865 N.W.2d 878, 880).

b. *Argument*.

The State correctly argues that a circuit court's authority to impose a sentence is provided by both "statutory and constitutional grounds." *State v. Humpal*, 2017 S.D. 82, ¶ 6, 905 N.W.2d 117, 119. The applicable constitutional provision which authorizes a court to impose a suspended imposition of sentence is South Dakota Constitution Article V, § 5. *See State v. Oban*, 372 N.W.2d 125, 129 (S.D. 1985). South Dakota Constitution Article V, § 5, states:

> The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature, and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court.
>
> The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.
>
> The circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law.
>
> ***Imposition or execution of a sentence may be suspended by the court empowered to impose the sentence unless otherwise provided by law.***

Id. (emphasis added). Based on the plain language of Article V, § 5, a circuit court has the authority to suspend imposition or execution of a sentence unless prohibited by the

state legislature. The language explicitly giving a circuit court this broad authority to suspend both imposition and execution of a sentence was added to the Constitution in 1972. 1972 South Dakota Session Laws Ch. 2, § 5, approved Nov. 7, 1972.

Pursuant to this authority, the Legislature has explicitly authorized circuit courts to modify sentences and suspend execution and imposition of sentences in certain circumstances. Specifically, SDCL 23A-31-1 generally allows for a court to reduce a sentence "[w]ithin two years after the sentence is imposed". Moreover, SDCL 23A-27-19, states, in pertinent part:

> The sentencing court retains jurisdiction for the purpose of suspending any sentence for a period of two years from the effective date of the judgment of conviction, notwithstanding the fact that the time for an appeal from such judgment is limited to a shorter period of time.

Id. "Both statutes provide the circuit court with jurisdiction for a period of two years from the date of the entry of the judgment of conviction to consider a motion to reduce a sentence." *See State v. Edelman*, 2022 S.D. 7, ¶ 13, 970 N.W.2d 239, 242

The constitutional language now found in our Constitution was not always there, and a review of relevant caselaw and subsequent constitutional amendments is necessary to fully understand the current text and meaning of South Dakota Constitution Article V, § 5 and SDCL 23A-27-19.

In 1921, the South Dakota Supreme Court first addressed the power of a circuit court to suspend imposition and execution of a sentence after a conviction. In *State v. Anderson*, 43 S.D. 630, 181 N.W. 839 (1921), the Court interpreted South Dakota Code Section 4968, which stated:

> All courts having jurisdiction to try offenses under the laws of this state, and the judges thereof, shall have power to suspend sentences of persons

> convicted of crime under the laws of this state, during good behavior, subject to such conditions as the court of judge thereof may impose.

Similar to the case at hand, the Attorney General argued that the statute was unconstitutional because that statute violated the separation of powers doctrine because the Governor had the sole authority to pardon. *See Anderson, 181 N.W. at 840.*

Based on the original constitutional language, the *Anderson* court agreed with the Attorney General. In doing so, it reasoned that South Dakota Code Section 4968, by use of the word "suspend", authorized the sentencing court to both suspend imposition and execution of a sentence, reasoning:

> In what sense is the word "suspend" used in the above statute? If it is used as synonymous to "postpone," then it does not confer upon the defendant the power to do what he attempted to do in the order before us. It is only by giving the word "suspend," as used in said section, the limited meaning of the postponing or interrupting the execution of a sentence already imposed, that the defendant could find therein any authority for making such order. It will therefore be seen that, while such word is clearly susceptible of either construction, so that, under it, ***a court or judge would have the apparent right to suspend the imposition of a sentence and also the right to suspend the execution of a sentence***, the real question now before us, under the facts of the present case, is whether such section, if construed as intending to give the power to suspend the execution of a sentence, is constitutional.

Anderson, 181 N.W. 839 at 840 (1921). However, the Court explicitly found that the statute was not constitutional as to the indefinite right of a sentencing judge to enter a suspending execution of a sentence after a conviction, because language that is now in Article V, § 5 (explicitly authorizing a suspended sentence), was not included.

Indeed, in reaction to the *Anderson* decision, language was added to the State Constitution in 1930 which explicitly added the same. Specifically, Article V, § 5, as in effect in 1930, stated:

> The Legislature may empower all courts having jurisdiction to try offenses under the laws of this state, and the judges thereof, to suspend sentences of persons convicted, for the first time, of a crime under the laws of this state, during good behavior, and subject to such conditions and restitution as the court ordered the judge thereof may impose.

Id. After adoption by the voters, the South Dakota Supreme Court once again revisited the issues addressed by the Court in *Anderson*, but now in light of the new constitutional language. There, the Supreme Court ruled that the new constitutional language abrogated the holding in *Anderson* that South Dakota Code Section 4968 was unconstitutional.

Then, the 1972 Amendment passed and even more explicitly authorized and both suspended imposition of and execution of sentences. Further, the current Constitutional Amendment is worded as giving a sentencing court broader authority, as such allows a circuit court to suspend imposition and execution of sentences unless prohibited by the Legislature. 1972 South Dakota Session Laws Ch. 2, § 5, approved Nov. 7, 1972.

This language gives extremely broad constitutional authority for circuit courts to suspend both execution and imposition of sentences. However, the Legislature has placed certain restrictions on suspended impositions and executions of sentences. Specifically, looking at language applicable to this case, a person is barred from receiving a suspended imposition of sentence if the felony is punishable by life or death or had a prior conviction for a felony at the time the verdict was entered and a plea of guilty was made. *See* SDCL 23A-27-13. However, neither of those conditions are present.

Boiled down, the State makes two arguments: First, a circuit court may not suspend imposition of a sentence after entering a judgment of conviction including a finding of guilt; and, second, that once a person is under the supervision of the executive branch, the judicial branch loses jurisdiction to suspend imposition of a sentence and

place a person on probation. However, upon further examination, these arguments don't withstand scrutiny.

As to the State's first contention, a circuit court may not suspend imposition of a sentence after entry after entering a judgment of conviction, that is plainly flawed when viewing precedent of the Court. Indeed, SDCL 23A-27-19, states that a circuit court "retains jurisdiction for the purpose of suspending any sentence for a period of two years from the effective date of the judgment of conviction." Since 1921, the Supreme Court has held that generic language regarding suspending a sentence includes *both* suspending execution *and* suspending imposition of a sentence. *See State v. Anderson*, 43 S.D. 630, 181 N.W. 839 (1921). The State simply ignores the reasoning in *Anderson*, as it has the entire court of this litigation. And, that language is highly important, because the Legislature and people of this state amended the Constitution to give a circuit court the ability to suspend sentences after a conviction shortly after *Anderson* was decided.

Further, SDCL 23A-31-1, in pertinent part reads: "A court may reduce a sentence: (1) within two years after the sentence is imposed[.]" Wiley agrees with the "states" definition The ordinary use of the phrase "reduce a sentence" means the "lessening of a sentence or the severity of a punishment." https://thelawdictionary.org/reduction-of-sentence/ (last visited October 7, 2025).

The State argues that this is not a "reduction" in sentence, but instead vacating the judgment. However, that is not accurate. Wiley remains subject to supervision and punishment under the suspended imposition of sentence, including that ability for the suspended imposition to be revoked. Indeed, a suspended imposition of judgment never vacates a conviction, as SDCL 23A-27-14 states that it "shall not be deemed a conviction

for purposes of disqualifications or disabilities imposed by law upon conviction of a crime" it remains deemed a conviction for several other reasons. For example, it remains deemed a conviction for purposes of the habitual offender law. SDCL 23A-27-15. It remains a conviction for purposes of being defined as a "recidivist sex offender." SDCL 22-24B-19.3. In the Eighth Circuit, it remains a conviction for purposes of federal law. *United States v. Craddock*, 593 F.3d 699, 701 (8th Cir. 2010). It remains a conviction for purposes of a commercial driver's license. *See generally Jans v. Dep't of Pub. Safety*, 2021 S.D. 51, 964 N.W.2d 749. It remains a conviction for purposes of financial aid funded by the State of South Dakota for certain offenses. *See* SDCL 13-55-29. Indeed, if you are in High School, it remains a conviction for purposes of eligibility to play football or attend a debate tournament. *See* SDCL 13-32-9.2.

There is no dispute that granting a motion to suspend the imposition of sentence greatly reduces a sentence. And it leads to a resulting of an offense not being "deemed" a conviction for some purposes, yet it undisputedly remains a "conviction" for other purposes. But, to the extent it remains a conviction for any purpose at all, it is not vacating the judgment, and it is not a pardon. Instead, it is doing what the plain language of SD Const. Art. V, § 5, authorizes for the exact reasons the voters amended the constitution twice. Although different in many aspects, a circuit court's constitutional authority to suspend imposition and execution of a sentence, even after conviction, is on equal footing as the Governor's constitutional power to pardon, and has been approved and expanded by the voters of this state two times, and in its current form, is authorized unless prohibited by the legislature.

As to whether the circuit court has jurisdiction to suspend imposition of a sentence and place a person on probation, it clearly does. The State is correct that a person may not be under supervision from the judiciary and the executive branch at the same time. *See State v. Orr*, 2015 SD 89, 871 NW2d 834. However, *Orr* does not stand for the proposition that a sentencing court has no jurisdiction to modify a sentence during the two years where the circuit court retains jurisdiction. Accordingly, a court clearly may change supervision from the executive branch back to the judiciary during the two years a court retains sentencing jurisdiction. Indeed, if the State's argument is correct, a court could *never* modify a sentence after a conviction if a person is sentenced to incarceration, because it loses jurisdiction over a defendant as soon as a defendant is sentenced. Indeed, *Orr* explicitly recognized that a court may reduce a sentence when under executive branch supervision, it just can't place a defendant under supervision of the executive branch (i.e. incarceration or parole) and the judicial branch (i.e. probation) at the same time. *Id.* at ¶ 11.

Indeed, that is why the circuit court is far from alone in taking the action it has done to this point. According to the State Court Administrator's Office, since January 1, 2024, judges in this state have modified a sentence by suspending imposition of a sentence 942 times. SR 775. Sentencing judges have done it in cases where a person pleaded guilty. Sentencing judges have done it in cases where there were stipulated fact trials. Sentencing judges have done it in cases where there was a guilty plea. But, regardless, it is a sentencing technique that has taken place in every circuit of the state. And such has been reviewed by this Court without any indication of wrongdoing by the Supreme Court. *See State v. Schmitt,* 2012 S.D. 77, ¶45, 825 N.W.2d 889.

Wiley does not dispute the State's contention that this Court is not bound by the precedent of circuit courts. But, the fact that the actions of the circuit court are so often utilized by circuit courts is evidence of the circuit court's reasoning being persuasive. Moreover, Wiley does not dispute that this Court did not directly review this question in *Schmitt*. However, if such is so blatantly illegal, one would suspect this Court to have addressed that in its decision. To claim that such is an "illegal" sentence is without merit.

It is true that the Governor, under our Constitution has broad and exclusive pardon power. Although not the case a century ago when the Supreme Court decided *Anderson*, the voters of this state have amended the constitution twice to grant the circuit courts of this state broad authority to suspend imposition and execution of sentences, subject *only* to the Legislature prohibiting such practices. Nowhere in code has the Legislature prohibited suspending imposition of a sentence after a judgment of conviction is entered. Nowhere in code has the Legislature prohibited suspending imposition of a sentence and transferring jurisdiction back to the judicial branch during the two-year timeframe where a circuit court retains jurisdiction to modify a sentence. Indeed, not only has the Legislature failed to prohibit such, it has explicitly granted broad authority to a circuit court in "suspending any sentence for a period of two years from the effective date of the judgment of conviction[.]" SDCL 23A-27-19. Even in *Anderson,* prior to the voters expanding the authority of a circuit court to suspend imposition of a sentence, the Supreme Court found such language to authorize suspending imposition or execution of a sentence. *Anderson*, 181 N.W. 839 at 840 (1921). The Legislature was plainly aware of this Court's reasoning in *Anderson* in using such language. This Court should reject the State's attempt to overturn a century of Supreme Court precedent and now strip circuit

courts of their broad sentencing authority, which has been widely utilized by circuit courts throughout the state and not criticized by the Supreme Court, even when the opportunity was presented to do so.

IV. EVEN IF IMPROPER, WILEY'S SENTENCE IS NOT AN "ILLEGAL SENTENCE" WHICH CAN BE CHALLENGED BY WAY OF A MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO SDCL 23A-31-1.

a. Standard of Review

Whether a sentence was imposed in an illegal manner is a question of law reviewed de novo. *State v. Simonsen*, 2024 S.D. 21, ¶ 11, 5 N.W.3d 843, 846 (citing *State v. Cook*, 2015 S.D. 46, ¶ 6, 865 N.W.2d 878, 880).

b. *Argument.*

Maybe the most important issue in this appeal is that this Court has repeatedly held that "a trial court may not use SDCL 23A-31-1 to increase the length of a sentence." *State v. Bucholz*, 403 N.W.2d 400, 402 (S.D. 1987) *(citing State v. Tibbetts*, 333 N.W.2d 440 (S.D.1983); *State v. Ford*, 328 N.W.2d 263 (S.D.1982)); *see also State v. Thayer*, 2006 S.D. 40, ¶ 13, 713 N.W.2d 608, 613 ("More importantly, the State's reliance on this statute is mistaken. SDCL 23A-31-1 may not be used to increase a defendant's sentence."). Although the State argues by way of out of state authority that the State may bring a Rule 35 motion, it never addresses the circuit court's reasoning that, even assuming the State may bring such a motion, that it cannot be used to increase a defendant's sentence. There is no disagreement that the State may bring a Rule 35 motion to decrease a defendant's sentence, but the State simply ignores this Court's precedent and the reasoning by the circuit court and fails to address it at all in the Appellant's Brief. *State v. Hoxsie*, 1997 S.D. 119, ¶ 14, 570 N.W.2d 379, 382 ("Failure

to raise and brief an issue on appeal waives this Court's review of the issue."). Wiley should win this appeal on this issue alone.

Although there have been repeated cases which have litigated whether a defendant has started to serve a sentence, the underlying holding of *Bucholz* withstands: The State cannot use a SDCL 23A-31-1 to increase a sentence. 328 N.W.2d 263 (S.D.1982). Indeed, it would be manifestly unjust to increase Wiley's sentence in this case, when it has been repeatedly held, in very plain terms, that a *"trial court may not use SDCL 23A-31-1 to increase the length of a sentence."* That is what the State is attempting to do, and it should be rejected.

The basis for this repeatedly holding is consistent with this Court's other precedent regarding Rule 35 Motions. Under SDCL 23A-31-1, "[a] court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner ... within two years after the sentence is imposed." However, this Court, and the Supreme Court of almost every jurisdiction, has limited the application of the class of applicable sentences for which this statute applies. As recognized by this Court, "'[i]llegal sentences are essentially only those which exceed the relevant statutory maximum limits or violate double jeopardy or are ambiguous or internally contradictory.'" *State v. Cook,* 2015 S.D. 46, ¶ 7, 865 N.W.2d 878, 881. The sentence at hand is not more than the statutorily authorized sentence, it does not violate double jeopardy, and it is not ambiguous or internally inconsistent in that it is not "internally ambiguous or self-contradictory to the extent that a reasonable person cannot determine what the sentence is." *Id.* at ¶ 8.

On the other hand, "'[s]entences imposed in an illegal manner are within the relevant statutory limits, but are imposed in a way which violates defendant's right' to not have his sentence enhanced once the defendant has left the judicial branch of government and is within the jurisdiction of the executive branch." *Id.* at ¶ 8, n.1 (*quoting State v. Sieler,* 1996 S.D. 114, ¶ 6, 554 N.W.2d 477, 479 (*quoting* 8A James W. Moore, *Moore's Federal Practice* § 35.04[3][a] (2d ed.1995))). However, this modification clearly did not violate the defendant's rights, as it was a change which was to his benefit at his request and did not "enhance" his sentences. Indeed, the motion for sentencing reduction was made within the two-year period where the sentencing court retains jurisdiction over the sentence. *Id.* at ¶ 11 (*citing* SDCL 23A–27–19, –31–1 (Rule 35)).

Lastly, even if this sentence was improper, it was not "illegal" or imposed in an "illegal manner," in a way that can be correct by way a of Rule 35 motion to correct an illegal sentence. Indeed, that was the holding of the Florida District Court of Appeals in *Robinson v. State*, 757 So. 2d 532, 533 (Fla. Dist. Ct. App. 2000). There, the Court reasoned, in dicta, that the trial court improperly withheld an adjudication of a guilt, and imposed probation, but found that a Rule 35 motion to correct a sentence to correct an illegal sentence, because an improper sentence is not necessarily an "illegal sentence" as contemplated by law. Even if the State is correct that the sentence was not proper which would not survive scrutiny on direct appeal (had the court had jurisdiction), it was not "illegal" or imposed in an "illegal manner" in the sense that granting a Rule 35 motion is appropriate.

CONCLUSION

Wiley respectfully requests that this Court enter its order affirming the circuit court.

REQUEST FOR ORAL ARGUMENT

Appellant, by and through his counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 16th day of December, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date above written one electronic copy of the Brief of Appellant and all appendices in the above-entitled action was electronically served on:

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The undersigned further certifies that one original of the Brief of Appellant in the above-entitled action was mailed by US Mail, First Class, to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the date above written.

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CERTIFICATE OF COMPLIANCE

Justin L. Bell, attorney for Appellant, hereby certifies on the date above written that the foregoing Brief of Appellant complies with the type-volume limitation imposed by SDCL 15-26A-66(2). Proportionally spaced typeface Times New Roman has been used. Brief of Appellant does not exceed 32 pages. This brief contains 6,337 words exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel. Counsel relied on the word count of Microsoft Word, the word processing software used to prepare this Brief at font size 12, Times New Roman, and left justified.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31154

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

WILEY JOE PICKNER,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Order Granting Petition for Intermediate Appeal
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STATE OF SOUTH DAKOTA

No. 31154

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant

v.

WILEY JOE PICKNER,

Defendant and Appellee.

PRELIMINARY STATEMENT

In this brief, Appellant, the State of South Dakota, is referred to as "State." Appellee, Wiley Joe Pickner, is referred to as "Pickner."

Settled Record
(Hughes County Criminal File No. (18-496)..... SR

State's Appellant's Brief..... AB

Pickner's Appellee Brief ..... PB

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

The State relies on its Jurisdictional Statement and Statement of the Case and Facts included in the State's opening brief.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT HAD AUTHORITY AND JURISDICTION TO ENTER A SUSPENDED IMPOSITION OF SENTENCE AFTER PICKNER ALREADY SERVED HIS PRISON TERM?

The circuit court held it had authority and jurisdiction to enter a suspended imposition of sentence after Pickner served his prison term.

SDCL 23A-27-13

SDCL 23A-27-19

II. WHETHER THE STATE CAN CHALLENGE THE CIRCUIT COURT'S ORDER SUSPENDING IMPOSITION OF SENTENCE?

The circuit court found the State was barred from challenging Pickner's sentence.

State v. Waldner, 381 N.W.2d 273 (S.D. 1986)

SDCL 23A-31-1

SDCL 23A-32-22

ARGUMENTS

The State contends that most of Pickner's arguments in his brief are addressed in the State's brief. The State limits this reply to new matters raised in Pickner's brief.

I. THE CIRCUIT COURT LACKED AUTHORITY AND JURISDICTION TO ENTER A SUSPENDED IMPOSITION OF SENTENCE AFTER PICKNER ALREADY SERVED HIS PRISON TERM.

The State agrees that circuit courts have the authority to suspend an imposition of sentence. However, where the disagreement arises is *when* the suspended imposition can be entered. A circuit court cannot

grant a suspended imposition of sentence after a judgment has been entered, and the defendant has served his prison sentence. For the reasons argued in the State's opening brief, Pickner's post-sentence suspended imposition opposes the plain wording of SDCL 23A-27-13, creates an impermissible mechanism for judicial pardon, and violates the separation of powers doctrine.

Pickner relies on SDCL 23A-27-19 to argue that circuit courts "retain jurisdiction for the purpose of suspending any sentence for a period of two years from the effective date of judgment of conviction." SDCL 23A-27-19, PB 15. But there is a difference between suspending a sentence and entering a suspended imposition of sentence. A suspended sentence occurs when the circuit court imposes a sentence, but the defendant either does not serve that sentence immediately or only serves a portion of the sentence. SDCL 23A-27-18. The remaining suspended portion of the sentence is only imposed if the defendant does not meet the requirements as set forth by the court. *Id.* On the other hand, a suspended imposition of sentence involves no finding of guilt, and the defendant is placed on probation. SDCL 23A-27-13. If the defendant abides by the terms of probation, the criminal matter is sealed. SDCL 23A-27-14, SDCL 23A-27-17

While SDCL 23A-27-19 grants the circuit court jurisdiction to suspend a sentence it does not have jurisdiction to enter a suspended imposition of sentence after it entered a finding of guilt and imposed a

prison sentence. In fact, the requirement for a suspended imposition of sentence—that no finding of guilt be entered—makes it impossible for the circuit court to enter a suspended imposition after a defendant has been sentenced to prison.

Put simply, when entering a suspended imposition of sentence, the circuit court does not enter a judgment of guilt. SDCL 23A-27-13. And the defendant is placed on probation. *Id.* Neither of those things happened here. Instead, the court entered a judgment of guilt and sentenced Pickner to prison. SR 340-41. Pickner served his time. And once complete, under the guise of a reduction of sentence, the circuit court vacated its prior judgment and entered an Order Suspending Imposition of Sentence. SR 544-47.

Because the requirements of SDCL 23A-27-13 were not met, the circuit court did not have the authority to grant Pickner a suspended imposition of sentence. If the circuit court wanted to consider and eventually grant Pickner a suspended imposition of sentence, it needed to do so *before* entering a finding of guilt and sentencing him to prison.

Pickner disputes the State's contention that a suspended imposition is not a reduction in sentence but a vacation of sentence. PB 15. He claims that "a suspended imposition of judgment never vacates a conviction," and that "it remains deemed a conviction of several other reasons." PB 15-16. But this ignores the very language of SDCL 23A-27-13 which explicitly states that the circuit court does not enter a

judgment of guilt when granting a suspended imposition. And his argument also ignores the fact that the circuit court *did* vacate his original conviction. SR 545-46.

The circuit court did not reduce Pickner's sentence. Without a lawful mechanism to do so, it vacated the original judgment when it entered a suspended imposition of sentence.

II. THE STATE CAN CHALLENGE THE CIRCUIT COURT'S ORDER SUSPENDING IMPOSITION OF SENTENCE.

SDCL 23A-31-1 provides that an illegal sentence can be corrected at any time and an illegally imposed sentence may be corrected within two years. Further, SDCL 23A-32-22 provides both the State and a defendant the ability to appeal orders concerning motions to correct an illegal sentence or illegally imposed sentences.

Pickner argues the State failed to address the fact that SDCL 23A-31-1 cannot be used to increase a defendant's sentence. PB 19-20. Pickner completely missed the mark on the State's argument. The State agrees that SDCL 23A-31-1 cannot be used to increase a sentence. The issue raised is that the circuit court entered an illegal sentence, which is something the State can challenge under SDCL 23A-32-22. Because the sentence is an illegal sentence, that sentence is not a valid sentence. *See State v. Waldner*, 381 N.W.2d 273, 275 (S.D. 1986). Therefore, the illegal sentence should be vacated, and the original sentence should stand. The State is not advocating for an increase in Pickner's sentence but is asking for this Court to vacate the illegally imposed suspended

imposition of sentence, leaving Pickner with his original judgment and sentence.

In a similar vein, Pickner suggests his understanding of the State's challenge is that his sentence was imposed in an illegal manner, not that the sentence was illegal. PB 6, fn. 1. The State clearly argued that "[b]ecause the circuit court lacked authority or jurisdiction to enter a suspended imposition of sentence, when the circuit court did so for Pickner, it entered an illegal sentence." AB 14. Of course, circuit courts have the ability to grant suspended impositions of sentence. It was Pickner's suspended imposition, granted after his prison sentence and which vacated his conviction, which is unlawful for the reasons the State raised.[1]

Pickner also argues the State is barred by res judicata from challenging the circuit court's sentence. PB 5-10. For an action to be barred by res judicata, four elements must be satisfied:

> (1) the *issue* in the prior adjudication must be *identical to the present issue*, (2) there must have been a final judgment on the merits in the *previous* case, (3) the parties in the two actions must be the same or in privity, and (4) there must

[1] Sentences imposed in an illegal manner violate a defendant's right not to have his sentence enhanced and exceed the statutory maximum allowed. *State v. Thayer*, 2006 S.D. 40, ¶ 14, 713 N.W.2d 608, 613. While the State does not relinquish the possibility this Court find Pickner's sentence was imposed in an illegal manner, the State focused on the illegal sentence argument in it's opening brief because Pickner's post-sentence suspended imposition doesn't enhance his sentence or necessarily exceed the statutory maximum for his crime. Rather, it opposes the plain wording of SDCL 23A-27-13, creates an impermissible mechanism for judicial pardon, and violates the separation of powers doctrine—creating a legally impossible choice.

> have been a full and fair opportunity to litigate the issues in the prior adjudication.

Detmers v. Costner, 2023 S.D. 40, ¶ 14, 994 N.W.2d 445, 452 (quoting *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 42, 978 N.W.2d 786, 799) (emphasis added). As argued in the State's opening brief, none of these factors were met. AB 15-17.

At the outset, South Dakota law treats a first direct appeal as part of the original criminal proceeding, not as successive litigation. There has only been one original criminal proceeding relevant here. For the reasons in the State's opening brief and as illustrated more below, Pickner cannot prevail on the res judicata argument.

First, the issue raised now cannot possibly be "identical to the issues raised previously by the State when the trial court granted [Pickner's] motion to reduce his sentence and impose a suspended imposition." PB 7. It is true the State argued against that motion, but the legal issue then was the motion for a reduction of sentence. Certainly, the bases for the State's disagreement with the circuit court's decision overlap, but the legal issue being appealed and that this Court is considering now is the illegality of the sentence—surely something that could not have been adjudicated before the sentence was entered.

Second, though Pickner argues there was a final order by the circuit court on the issue, the merits of the issue raised before this Court were not disposed of in a previous case. PB 7. It is true there are some "special class[es] of cases in the sense that a single action can

contain multiple, discrete 'proceeding[s],' each of which results in a final order." *Matter of Est. of Smeenk*, 2024 S.D. 23, ¶ 23, 6 N.W.3d 250, 255 (citing *In re Estate of Petrik*, 2021 S.D. 49, ¶ 17, 963 N.W.2d 766, 770; *In re Estate of Geier*, 2012 S.D. 2, ¶ 13, 809 N.W.2d 355, 359). And it is true this Court does not "foster successive appeals of individual orders without any consequence or durable effect." *Smeenk*, 2024 S.D. 23, ¶ 26, 6 N.W.3d at 256. But a criminal case is not in this "special class of cases," nor has this Court been met with "successive appeals" on this issue or even for this case. Again, there is no prior case.

Third, though Pickner and the State have consistently been the only parties involved in his underlying criminal file, once more—there is no prior case to compare to.

And finally, Pickner argues this issue was fully litigated when Pickner brought his motion for a sentence reduction. PB 7, 9. But, as stated, the State could not have brought a motion to correct an illegal sentence until after the suspended imposition of sentence was imposed. What the State did at the trial court level was create a thorough record of all the bases the suspended imposition should not have been granted, allowing thorough review by this Court on appeal. Res judicata's claim preclusion cannot possibly suggest that if an issue is fully litigated at the trial court level, it cannot be reviewed before this Court on the matter's first direct appeal. Under Pickner's rationale, the State should have no opportunity to challenge an unlawful sentence, without any

chance of appealing to this Court, virtually rendering SDCL 23A-32-22 useless. *See* PB 9-10. That would be akin to arguing a defendant was barred by res judicata to challenge a motion to suppress in a criminal appeal because he argued for it multiple times and received an adverse ruling from the trial court. Pickner's argument points out that the State made a thorough record for appellate review, but his suggestion that this fact obstructs its appeal is off base.

Pickner warns "the State should be careful of what it wishes for in this appeal." PB 10. He suggests "[i]f the Court rules that res judicata does not bar successive litigation by way of a Rule 35 motion in this case, it also would not apply in the far more common Rule 35 motion brought by a criminal defendant." PB 10. But Pickner appears to be confused on the procedural posture of this case. The State isn't raising a Rule 35 motion with this Court. Again, a direct appeal is not successive litigation. The State is appealing the circuit court's order denying its circuit court Rule 35 motion—a mechanism that has always been in place, for the State and for defendants, since SDCL 23A-32-22 was enacted.

Because the sentence was an illegal sentence, the State can bring the issue before this Court under SDCL 23A-32-22. This is a direct appeal—not successive litigation of a previous case—so res judicata does not bar the State from doing so.

CONCLUSION

The State requests that Pickner's illegal suspended imposition of sentence be reversed and that his ten-year prison sentence, with seven years suspended, be reimposed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's Reply Brief contains 2,003 words.

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

Dated this 13th day of January 2026.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 13, 2026, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Wiley Joe Pickner* was served through odyssey file and serve upon Justin L. Bell at jlb@mayadamas.net.

/s/ Erin E. Handke
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