IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31207

JAMES W. PELDO
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

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

HONORABLE JOHN FITZGERALD, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal was filed on September 2, 2025.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

NO. 31207

JAMES W. PELDO,

Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

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

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

JURISDICTIONAL STATEMENT

Mr. Peldo appeals from the Judgment entered by the Honorable John Fitzgerald in the Fourth Judicial Circuit, on August 20, 2025. Notice of Appeal was timely filed on September 2, 2025. This Court has jurisdiction over these matters under SDCL § 23A-32-2.

STATEMENT OF LEGAL ISSUES

Whether the aggravating factors used by the circuit court when sentencing Mr. Peldo to the penitentiary instead of probation were sufficient to overcome the presumption of probation under SDCL § 22-6-11.

State v. Beckwith, 871N.W.2d 57 (SD 2015)

State v. Flowers, 885 N.W. 2d 783 (SD 2016)

State v. Kuntz, 4 N.W.3d 1 (SD 2024)

State v. Underwood, 890 N.W.2d 240 (SD 2017)

SDCL § 22-6-11

STATEMENT OF THE CASE

On December 30, 2024, the State of South Dakota charged Mr. Peldo by Indictment with Count I: Unauthorized Possession of a Controlled Drug or Substance a class five felony in violation of SDCL § 22-42-5; Count II Second Degree Eluding a class six felony in violation of SDCL 32-33-18.2; and Count III Reckless Driving a class one misdemeanor in violation of SDCL § 32-24-1. Mr. Peldo was also charged with a number of class two misdemeanors and a petty offense via a citation. The State also filed a Part II Information alleging that Mr. Peldo was a habitual offender with two prior felony convictions enhancing the maximum punishment for Count I to a maximum of ten years imprisonment and a fine of twenty thousand dollars. SDCL § 22-6-1(7).

Mr. Peldo pled guilty to Count I and admitted to the Part II information pursuant to a plea agreement that including dismissing the remaining charges in file 46CRI24-1238 and dismissing another file 46CRI25-66 in its entirety. On August 20, 2025, Mr. Peldo was sentenced to four years in the penitentiary.

STATEMENT OF FACTS

On December 25, 2024, law enforcement initiated a traffic stop for speeding. *COP* 12: 2. Law enforcement initially tried to stop Mr. Peldo for going one hundred and three miles per hour on interstate I-90 in Sturgis, South Dakota. *Sent* 8:1. Mr. Peldo attempted to elude law enforcement reaching speeds near one hundred and forty-four miles per hour. *Sent*

8:4. He then left the interstate and proceeded down Vanocker Canyon Road reaching speeds of one hundred and four miles per hour. *Sent* 8:10. He then lost control of his vehicle, crossed over the opposing lane of traffic before entering the ditch and crashing through a fence. *Sent* 8:10-13. Mr. Peldo was eventually located by law enforcement after they deployed a drone where a baggie of methamphetamine was found in his wallet. *Sent* 8:13-15.

STANDARD OF REVIEW

The South Dakota Supreme Court reviews a sentencing court's decision using the abuse of discretion standard of review. *State v. Peltier*, 998 N.W.2d 333, 342 (SD 2023). "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Lanpher*, 7 N.W.3d 308, 317 (SD 2024) (*quoting State v. Caffee*, 996 N.W.2d 351, 360 (SD 2023)). The South Dakota Supreme Court "will not overturn the circuit court's abuse of discretion unless that 'error is demonstrated and shown to be prejudicial error.'" *State v. Mitchell*, 963 N.W.2d 326, 332 (SD 2021) (quoting *State v. Klinetobe*, 958 N.W.2d 734, 740 (SD 2012)).

ARGUMENT

The aggravating factors the circuit court relied upon were insufficient to sentence Mr. Peldo to the penitentiary instead of presumptive probation under SDCL § 22-6-11.

Mr. Peldo was convicted of Unauthorized Possession of a Controlled Drug or Substance a class five felony in violation of SDCL § 22-42-5. He also admitted to the Part II Information, which raised the maximum punishment to that of a class four felony, but the Part II admission has no effect on the underlying crime and does not raise it to a class four

felony. *State v. Flowers*, 885 N.W.2d 783, 785 (SD 2016). The circuit court noted at the sentencing hearing that "when a case is enhanced, but it is a presumption of probation offense, it remains still a probation presumption offense." *Sent* 7:15-16.

The circuit court must identify "aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under" SDCL § 22-6-11 to sentence a defendant to the penitentiary. *State v. Kurtz*, 4 N.W.3d 1, 4 (SD 2024). The aggravating circumstances must be listed in the judgment and stated on the record at the sentencing hearing. *Flowers*, 885 N.W.2d at 785. The circuit court identified three aggravating factors on the record at sentencing; 1) Mr. Peldo's criminal history; 2) the speed Mr. Peldo was driving leading up to and during the traffic stop; and 3) Mr. Peldo getting arrested while on bond while this case was pending. The circuit court listed two aggravating factors in the Judgement of Conviction; 1) Mr. Peldo's criminal history and 2) the speed Mr. Peldo was driving leading up to and during the traffic stop.

There is no statutory definition or explanation of when an aggravating circumstance poses "a significant risk to the public," nor has this Court provided such a definition. *Kurtz*, 4 N.W.3d at 4. "Failure to pay fines, costs, restitution, or attorney fees" is not a "significant risk to the public." *Id.* (*quoting State v. Underwood*, 890 N.W.2d 240 at 242 (SD 2017). "Prior criminal history and probation or parole violations *may* constitute aggravating circumstances posing a significant risk to the public." *Kurtz*, 4 N.W.3d at 4 (*quoting State v. Beckwith*, 871 N.W.2d 57, 60 (SD 2015). However, the criminal history does not need to "demonstrate a risk of violence or career criminality" to create a "significant risk to the public." *Kurtz*, 4 N.W.3d at 4 (*quoting Underwood*, 890 N.W.2d at 242. The "likelihood of not complying with the conditions of probation is an appropriate aggravating circumstance to consider [that] *may* signal a significant risk to the public." *Kurtz*, 4 N.W.3d at 4 (SD 2024) (*quoting Beckwith*, 871

N.W.2d at 60. The sentencing court must tie the defendant's criminal history to public safety concerns. *Kurtz*, 4 N.W.3d at 4 (SD 2024). "Therefore, while it is true that prior felonies and prior probation violations can constitute aggravating circumstances that pose such a risk, it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant risk to the public." *Id.* Sentencing courts should also consider "recent prognostic indicators suggesting the defendant does not presently pose a significant risk to the public." *Kurtz*, 4 N.W.2d at 5.

There are two aggravating factors the circuit court both addressed on the record at the sentencing hearing and in the judgment: Mr. Peldo's criminal history, specifically his two prior felony convictions and speeding and other driving related infractions during a high-speed car chase that led to Mr. Peldo's possession of a controlled substance charge.

Criminal History

Mr. Peldo has two previous felony convictions for possession of a controlled substance: a 2018 case from Lawrence County, South Dakota and a 2022 case from Meade County (46CRI22-223). Mr. Peldo was granted a suspended imposition of sentence in the 2018 Lawrence County file. This conviction does not appear in Mr. Peldo's e-Court's records, which leads appellant counsel to believe that Mr. Peldo successfully completed his probation in this file. Mr. Peldo had one probation violation in Meade County file 46CRI22-223. Mr. Peldo's sentence was modified to include participation and successful completion of the Northern Hills Drug Court Program. Mr. Peldo did not violate his probation again in this file and did graduate from the Northern Hills Drug Court Program.

Mr. Peldo's two prior felony convictions are a double-edged sword: on the one hand they indicate that he is capable of being successful on probation and therefore is a good candidate for probation, on the other hand they indicate a risk of recidivism on Mr. Peldo's

behalf. The circuit court must show that the recidivism risk poses a significant danger to the public. *Kurtz*, 4 N.W.3d at 4.

The circuit court made no such findings either on the record during the sentencing hearing or in the written judgment of conviction. The judgment of conviction states "defendant's criminal history – including two previous felonies." The record from the sentencing hearing referencing a 2018 possession of a controlled substance conviction and another possession of a controlled substance conviction in 2022, probation violations, and the sentence modification to drug court which the circuit court notes is "the most stringent program they have in the probationary species of punishments." *Sent* 9: 9-17. The circuit court did not state on the record how these prior felony convictions or probation violation pose a significant threat to the community. The only reference to how public safety is threatened relates to the current possession of a controlled substance conviction where the circuit court states, "this is not a situation where you're sitting at home watching TV and the police come inside and find some methamphetamine residue." *Sent* 9:8-12. "This is – you're driving a vehicle in a way that endangered the public." *Id.* The circuit court's statement regarding Mr. Peldo's current conviction for possession of a controlled substance does not explain how Mr. Peldo's criminal history itself poses a significant threat to public safety.

There is no way for appellant counsel to review the facts leading to Mr. Peldo's 2018 possession of a controlled substance given that the file is sealed due to the suspended imposition of sentence. However, a review of Meade County file indicates that Mr. Peldo was initially pulled over for failing to maintain his driving lane, was subsequently arrested for driving on a revoked driver's license, the methamphetamine and drug paraphernalia was found during a search incident to an arrest. Mr. Peldo's probation violation was a result of testing positive for methamphetamine while on probation. The entirety of Mr. Peldo's felony

criminal history is related to his addiction to methamphetamine. Mr. Peldo has never been convicted or even accused of distributing methamphetamine or any other drug. His drug use leads others to traffic methamphetamine, but he is not directly involved in anyway other than as a consumer. Mr. Peldo asserts that the circuit court failed to articulate how his criminal history poses a significant threat to the community and therefore should not be considered an aggravating factor. Mr. Peldo further asserts that the circuit court could not articulate how his criminal history is a significant threat because it does not pose a significant threat.

Additionally, Mr. Peldo's criminal history of two prior felony possession of a controlled substance convictions and one prior probation violation pale in comparison to the other defendant's who have appealed their penitentiary sentences under SDCL § 22-6-11 before this Court. Defendant Martin had been convicted of seven prior felonies, one of which was considered a violent crime. *State v. Martin*, 19 N.W.3d 9, 13 (SD 2025). Defendant Feucht's criminal history consisted of a third-degree burglary conviction and multiple convictions for possession of a controlled substance. *State v. Feucht*, 5 N.W.3d 561, 564 (SD 2024). Defendant Feucht was also initially charged with two counts of possession of a controlled substance with the intent to distribute. *Id.* Defendant Underwood had two prior felonies, one of which was grand theft (which this Court indicated is not a victimless crime), with multiple parole violations and had a felony distribution case dismissed. *Underwood*, 890 N.W.2d at 242. Defendant Roedder had five prior felony convictions for conspiracy to commit armed robbery, two drug possession charges and two drug distribution charges. *State v. Roedder*, 923 N.W.2d 537, 541 (SD 2019). Defendant Beckwith had two prior felony convictions, one of which involved him violently resisting a law enforcement officer. *Beckwith*, 871 N.W.2d at 60. Defendant Whitfield had three prior felonies. *State v. Whitfield*,

862 N.W.2d 133, 140 (SD 2015). Defendant Whitfield was originally charged with possession of a controlled substance with the intent to distribute. *Id.* at 135. Defendant's Martin, Feucht, and Roedder all had significantly more prior felony convictions than Mr. Peldo. Defendant's Martin and Roedder both also had convictions for either violent crimes or conspiring to commit violent crimes. Mr. Peldo has never been convicted of a violent crime. Defendant's Feucht, Underwood, Roedder, and Martin all either had a prior drug distribution conviction, had a drug distribution charge dismissed as part of a plea bargain, or had a drug distribution charged dismissed after a jury trial. Mr. Peldo has never been charged with drug distribution. Defendant Beckwith is the defendant that is most similarly situated to Mr. Peldo because they both have only two prior felony convictions. However, Defendant Beckwith, in addition to a conviction for violently resisting a law enforcement officer, refused to participate in his Pre-Sentence Investigation (PSI) before sentencing. *Beckwith*, 871 N.W.2d at 58. Mr. Peldo participated with court services in the PSI process. Mr. Peldo's criminal history has significantly less prior felony convictions than other defendant's that have appealed a penitentiary conviction under SDCL § 22-6-11 before this Court. No violent crimes or allegations of drug distribution like some of the other defendant's that have appealed a penitentiary conviction under SDCL § 22-6-11 before this Court. Mr. Peldo's criminal history consists of charges consistent with a man battling a methamphetamine addiction and demonstrate that he can be successful on probation. Therefore, Mr. Peldo asks this Court to order the circuit court to resentence him without including his criminal history as an aggravating factor.

Second-Degree Eluding

The other aggravating factor relied upon by the circuit court are the speeds and other traffic infractions committed by Mr. Peldo leading up to and during the high-speed car chase

that led to his current possession of a controlled substance charge. Mr. Peldo was originally charged with second-degree eluding in violation of SDCL § 32-33-18.2. A conviction for second degree eluding would also result in a presumptive probationary sentence under SDCL § 22-6-11 as it is not listed as an exception under the statute. One of the elements of second-degree eluding is that "the driver operates the vehicle in a manner that constitutes an inherent risk of death or serious bodily injury to any third person." SDCL § 32-33-18.2.

The very elements of the crime of second-degree eluding require a finding of "inherent risk of death or serious bodily injury." The circuit court was not wrong when it stated in the judgement of conviction that speeding one hundred and three miles per hour in a seventy-five mile per hour zone, reaching speeds in excess of one hundred and forty-four miles per hour while passing multiple vehicles, traveling one hundred and four miles per hour on a rural two lane road before crossing over the oncoming lane of traffic, crashing through a ditch and fence *posed* a significant risk to the public. The distinction between an inherent risk as an element of the crime and posing a significant danger to the community is that an inherent risk as an element of the crime is past tense while posing a significant danger to the community is forward looking.

The circuit court could easily argue that Mr. Peldo's actions were both a past tense inherent risk of danger and posed, a future tense, significant threat to the community if his criminal history included multiple convictions for second-degree eluding or there was some indication that Mr. Peldo was likely to engage in similar behavior in the future. But that is not the case. Mr. Peldo felony criminal history consists only of two prior possession of a controlled substance convictions. Mr. Peldo asks this court to rule that the activities leading to the second-degree eluding charge are not a sufficient aggravating factor because there is

no indication outlining that Mr. Peldo poses a future significant danger to the community as a result of these actions.

Arrest While on Bond

There is one aggravating factor that was addressed by the circuit court on the record at the sentencing hearing that was not listed in the judgment, Mr. Peldo being charged with an additional crime while on bond in this matter. The remedy in the past to correct aggravating factors that appear on the record but not in the judgment has been for the Court to remand the matter back to the circuit court ordering the circuit court to file an amended judgment listing the aggravating factors. *State v. Flowers*,885 N.W.2d 783, 785 (SD 2016). Mr. Peldo chooses to address this factor as if it appeared in the written judgment to alleviate the necessity of remanding and reappealing the circuit court's sentence.

There is no precedent stating that a bond violation is an aggravating factor for enhancement. However, bond violations do draw parallels to probation violations in that a new violation of the law, which is alleged in Mr. Peldo's case, shows a likelihood of not successfully completing probation. There is a key distinction between an alleged bond violation and a probation violation and that is a finding of guilt. A court must find by a preponderance of the evidence that an individual was on probation and likely committed the alleged infraction for a probation violation. There was no finding of guilt in Mr. Peldo's new file while on bond in this file because the new file was dismissed as part of a plea agreement. The most the circuit court has is probable cause that Mr. Peldo committed a new crime while on bond in this matter. The difference in the standard of proof between a probation violation and an alleged bond violation necessitate that an alleged bond violation is not a sufficient aggravating factor. Mr. Peldo asks this court to rule that an alleged bond violation

is not a sufficient aggravating factor to sentence a defendant to the penitentiary instead of presumptive probation under SDCL § 22-6-11.

Prejudicial Error

The circuit court sentencing Mr. Peldo to the penitentiary based on the aggravating factors it found is a prejudicial error because absent those errors Mr. Peldo could not have been sent to prison under SDCL § 22-6-11. An error is prejudicial when, "in all probability . . . [it] produced some effect upon the final result and affected the rights of the party assigning it." *State v. Smith*, 599 N.W.2d 344, 353 (SD 1999) *quoting Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251, 258 (SD 1976) *quoting K &E Land and Cattle, Inc v. Mayer*, 330 N.W.2d 529, 533 (SD 1993). The aggravating factors, as outlined above, are insufficient to sentence Mr. Peldo to prison under the statutory scheme of SDCL § 22-6-11. Mr. Peldo cannot be sentenced to the penitentiary statutorily without sufficient aggravating factors; therefore, his penitentiary sentence is a prejudicial error.

Conclusion

Mr. Peldo asks this Court to rule that the circuit court abused its discretion because his criminal history does not rise to the level of an aggravating factor due to the low number of prior felony convictions and lack of violent criminal history or drug distribution charges. Mr. Peldo asks this Court to rule that the circuit court abused its discretion because the facts surrounding the second-degree eluding action is not an aggravating factor because they fail to demonstrate a future significant danger to the community. And Mr. Peldo asks the Court to rule that the circuit court abused its discretion because an allegation of a bond violation supported only by probable cause is not an aggravating factor due to the burden of proof and lack of a finding of guilt. Additionally, Mr. Peldo asks this Court to rule that his penitentiary sentence is a prejudicial error given the lack of aggravating factors to deviate

from presumptive probation under SDCL § 22-6-11. Mr. Peldo requests this Court remand his case back to the circuit court for sentencing with instructions to sentence him to a probationary term with a suspended execution of sentence.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Brief contains about 3,907 words and 16 pages. I certify that the word processing software used to prepare this brief is Microsoft Word (Version 16.103.3).

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 4, 2025, a true and correct copy of Appellant's Brief in the matter of The State of South Dakota v. James W. Peldo, was served via electronic mail upon the individuals listed below:

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SIGNED AND DATED this 4th day of December 2025.

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

STATE OF SOUTH DAKOTA)) ss. COUNTY OF MEADE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT COURT NO. 46CRI24-001238
STATE OF SOUTH DAKOTA, Plaintiff, vs. JAMES PELDO, Defendant.	JUDGMENT OF CONVICTION

DOB: 08/05/1984

SDHP 24-07080

An Indictment was filed with this Court on the 30th day of December, 2024, charging that on December 25, 2024, Defendant committed the crime(s) of: COUNT I: UNAUTHORIZED POSSESSION OF CONTROLLED DRUG OR SUBSTANCE (SDCL 22-42-5); COUNT II: SECOND DEGREE ELUDING (SDCL 32-33-18.2); AND COUNT III: RECKLESS DRIVING (SDCL 32-24-1). A Part II Information for Habitual Offender was filed on December 30, 2024, alleging two (2) previous felony convictions.

The Defendant was arraigned and advised of the contents of said Indictment and Part II Information and received copies thereof in open Court at Sturgis, Meade County, South Dakota, on the 8th day of January, 2025. The Defendant, Defendant's attorney, Adam Bryson; and Kay E Luther, Deputy State's Attorney, appeared at the Defendant's arraignment. The Defendant had been advised of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty to the charge(s) and denied the Part II Information for Habitual Offender.

On the 11th day of June, 2025, the Defendant, Defendant's attorney, Adam Bryson, and Kay E Luther, Deputy State's Attorney, appeared before this Court for a Change of Plea Hearing. The Defendant pled guilty to the charge(s) of: COUNT I: UNAUTHORIZED POSSESSION OF CONTROLLED DRUG OR SUBSTANCE (SDCL 22-42-5), **a Class 5**

Felony, and admitted to the Part II Information for Habitual Offender, enhancing the charge to a **Class 4 Felony** for sentencing purposes. The State dismissed the remaining charges.

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

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of: COUNT I: UNAUTHORIZED POSSESSION OF CONTROLLED DRUG OR SUBSTANCE (SDCL 22-42-5), enhanced to **a Class 4 Felony.**

SENTENCE

On the 20th day of August, 2025, a sentencing hearing was scheduled before the Honorable John Fitzgerald. The Court found, pursuant to SDCL 22-6-11, that aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation, to wit: 1) Facts of this case – Christmas morning, on I-90, speeding 103/75 mph zone, pursuit, the Trooper is traveling at speeds up to 144 mph and still unable to catch up to the Defendant, Defendant passed multiple vehicles during the pursuit, traveling at speeds of approximately 104 mph on Vanocker Canyon Rd., crashes through a fence, attempts to flee; and 2) Defendant's criminal history – including two previous felonies. The Defendant appeared personally and through counsel, Adam Bryson, who appeared telephonically, and Kay E Luther, Deputy State's Attorney, appeared on behalf of the State. The Court asked the Defendant whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence, and it is hereby:

ORDERED that the Defendant is sentenced to a term of **four (4) years** in the South Dakota State Penitentiary there to be fed, clothed, maintained, and provided the necessities of life; and it is further

ORDERED that the Defendant shall abide by the rules of the parole board and the department of corrections while on parole; and it is further

ORDERED that supervision of the Defendant's sentence be under the Department of Corrections, Board of Pardons & Paroles, pursuant to SDCL 23-27; to include the following:

1. Defendant shall pay a fine in the amount of **$252.78** to the Meade County Clerk of Courts, 1425 Sherman St., Sturgis, SD 57785;
2. Defendant shall pay court costs in the amount of **$116.50** to the Meade County Clerk of Courts, 1425 Sherman St., Sturgis, SD 57785;
3. Defendant shall pay court-appointed attorney's fees in the amount of **$1,039.91** to the Meade County Auditor, 1300 Sherman St., Suite #126, Sturgis, SD 57785;
4. Defendant shall pay to the Meade County Clerk of Courts (for reimbursements to the South Dakota Drug Control Fund, in c/o of Office of the Attorney General, 1302 E. Hwy. 14, Suite 2, Pierre, SD 57501) for the costs of urinalysis and/or testing and/or buy money in the amounts of **$60.00** (drug costs);
5. Defendant shall pay prosecution costs in the amount of **$10.72** (shipping) to the Meade County Clerk of Courts, 1425 Sherman St., Sturgis, SD 57785, to be paid to the City of Sturgis/Sturgis Police Department;
6. Defendant shall receive credit for **five (5) days** already served in the Meade County Jail;
7. Defendant shall pay to the Meade County Clerk of Courts (for reimbursements to the South Dakota Drug Control Fund, in c/o of Office of the Attorney General, 1302 E. Hwy. 14, Suite 2, Pierre, SD 57501) for the costs of urinalysis and/or testing and/or buy money in the amounts of **$60.00** (drug costs for file 46CRI25-66);

ORDERED Defendant's sentence is deemed to commence on the 20th day of August, 2025; and it is further

NOTICE OF APPEAL

You, James Peldo, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15 and 23A-32-16 which you must exercise by filing a notice of appeal with the Meade County Clerk of Courts, and serving a copy of the same upon the Attorney General of the State of South Dakota and the Meade County State's Attorney and filing proof of such service, within thirty (30) days from the date that this Judgment is signed, attested and filed with said Clerk.

ORDERED that this Judgment of Conviction is effective as of the 20th day of August, 2025.

BY THE COURT:

Hon. John Fitzgerald
4th Circuit Court Judge

Attest:
Donovan, Kirsten
Clerk/Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31207

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES WAYNE PELDO,

Defendant and Appellant.

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

THE HONORABLE JOHN FITZGERALD
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed September 2, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31207

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES WAYNE PELDO,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, James Wayne Peldo, is known as "Defendant" or "Peldo." Appellee, the State of South Dakota, is known as "State." References to documents are as follows:

Settled Record (Meade County Crim. File 24-1238) ..... SR

Appellant's Brief..... AB

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

JURISDICTIONAL STATEMENT

Peldo appeals from the Judgment of Conviction issued by the Honorable John Fitzgerald on August 20, 2025. SR:89-92. Peldo filed his Notice of Appeal on September 2, 2025. SR:93. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY DEPARTING FROM PRESUMPTIVE PROBATION?

The circuit court found aggravating circumstances existed and sentenced Peldo accordingly.

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

State v. Underwood, 2017 S.D. 3, 890 N.W.2d 240

State v. Beckwith, 2015 S.D. 76, 871 N.W.2d 57

State v. Whitfield, 2015 S.D. 17, 862 N.W.2d 133

STATEMENT OF THE CASE AND FACTS[1]

On December 25, 2024, Trooper James Linn, was on patrol and sitting in a stationary position on Interstate 90, near mile marker 29. SR:4. Trooper Linn observed a black Chevrolet Camaro traveling towards him, and he clocked the vehicle going 103 miles-per-hour (mph) in a 75-mph zone. *Id.* Linn pulled out behind the vehicle, and he observed the vehicle accelerate away from him. *Id.* The vehicle moved to the left lane to pass a car that was in the right lane. *Id.* As Linn was trying to catch up, the vehicle exited I-90 on Exit 30 eastbound off-ramp. *Id.* Linn saw the vehicle re-enter I-90. *Id.* He activated his emergency lights and siren and initiated a pursuit. *Id.* The vehicle exited the interstate at Exit 32 and passed another vehicle on the ramp. *Id.* It then failed to stop at the stop sign at the bottom of the ramp. The vehicle ran over a stop sign as

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

it turned right. *Id.* The vehicle traveled approximately 8.4 miles, repeatedly surpassing 100 mph and demonstrating an inability to stay within the roadway boundaries. *Id.* The vehicle eventually left the roadway and went into the ditch and through a fence. *Id.*

Trooper Linn located the vehicle with his drone. *Id.* Law enforcement approached the vehicle to conduct a felony stop. *Id.* The vehicle was empty. *Id.* Again, using a drone, Trooper Linn located the driver underneath a tree. *Id.* Law enforcement approached the person and took him into custody without further incident. *Id.* He was identified by his South Dakota Driver's License as James Peldo. SR:5.

While searching the driver, they located a dispensary bag with raw marijuana and a small Ziplock baggie with a white, crystal-like residue. *Id.* The crystal-like residue tested presumptively positive for methamphetamine. *Id.* Peldo was read his Miranda rights which Peldo waived. *Id.* Peldo stated that he was out for a joyride following a bad break up. *Id.* Peldo also said he was smoking marijuana after the pursuit while he was hiding under a tree. *Id.*

On December 30, 2024, a Meade County grand jury issued an Indictment charging Peldo with one count of Unauthorized Possession of a Controlled Substance, a Class 5 felony, in violation of SDCL 22-42-5, one count of Second-Degree Eluding, a Class 6 felony, in violation of SDCL 32-33-18.2 and Reckless Driving, a Class 1 misdemeanor, in violation of SDCL 32-24-1. SR:13-14. That same day, the State filed a

Part II Information for Habitual Offender, alleging Peldo had been convicted of two prior felonies, both of which were for the Possession of a Controlled Substance. SR:15. Peldo was also cited for Use or Possession of Drug Paraphernalia, Failure to report accident to Police Officer, Failure to Stop at Stop Intersection, Speeding, Illegal Lane Change and Seat Belt Violation which were all dismissed under the Plea Agreement.

Peldo appeared before the circuit court on June 11, 2025, where he was advised of his rights. SR:163. Peldo's attorney advised the court of Peldo's intention to plead to Count I of the Indictment which was the Ingestion of a Controlled Substance charge and to admit the Part II Information. Pursuant to the plea agreement, the State would dismiss the remaining charges in File 24-1238 and would also dismiss circuit court File 25-66[2] in its entirety. SR:169. Both sides would be free to comment. SR:170.

Peldo indicated his understanding that the circuit court had not agreed to any particular sentence and was free to impose any sentence it felt appropriate. *Id.* He also indicated his understanding of the maximum sentence possible with the admission to the Part II Information. *Id.* Peldo then entered his guilty plea and admission accordingly. SR:173.

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[2] Peldo was charged with an additional drug charge while out on bond which was dismissed through the plea agreement.

Peldo appeared for sentencing on August 20, 2025. The circuit court made a finding of several aggravating factors on the record. SR:184. The "most" aggravating factor according to the circuit court was the speeding and pursuit of Peldo by law enforcement which placed a substantial risk to the public. *Id.* The circuit court noted that I-90 is the most heavily trafficked highway in the State. *Id.* The circuit court also stated that Peldo was traveling at speeds in excess of 100 mph and his vehicle left the roadway and went through a fence before he abandoned his vehicle to hide from law enforcement. SR:185.

The circuit court also stated as aggravating circumstances that Peldo had an extensive drug criminal history and attained a new felony drug arrest while out on bond. SR:186. Peldo previously graduated from drug court on a 2018 case that imposed the strictest probation conditions. *Id.* Since then, he has committed two additional felonies, making him an unsuitable candidate for probation. *Id.*

The circuit court imposed a four-year sentence in the state penitentiary, granting credit for time served, and expressly found that a probationary sentence would pose a substantial risk to public safety. SR:187.

The court entered a Judgment of Conviction on August 20, 2025. SR:89. The Judgment of Conviction stated that the court found aggravating circumstances existed that posed a significant risk to the

public which required a departure from presumptive probation, including:

1. It was Christmas morning.
2. High rate of speed (over 100 mph).
3. Pursuit by law enforcement.
4. Defendant passed several vehicles during the pursuit.
5. Crashed through a fence and attempted to flee.
6. Two previous drug felonies.

SR:90.

ARGUMENT

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DEPARTING FROM PRESUMPTIVE PROBATION.

A. Standard of Review

"Sentencing courts 'exercise broad discretion when deciding the extent and kind of punishment to be imposed.'" *State v. Toavs*, 2017 S.D. 93, ¶ 6, 906 N.W.2d 354, 356 (quoting *State v. Bausch*, 2017 S.D. 1, ¶ 39, 889 N.W.2d 404, 415, *cert. denied*, 583 U.S. 836 (2017)). Therefore, this Court will "generally review a circuit court's decision regarding sentencing for abuse of discretion." *Toavs*, 2017 S.D. 93, ¶ 6, 906 N.W.2d at 356. In addition, this Court will "apply the abuse of discretion standard in reviewing a sentencing court's decision to depart from presumptive probation." *State v. Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d 57, 59.

"An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *State v. Delehoy*, 2019 S.D.

30, ¶ 22, 929 N.W.2d 103, 109 (quoting *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616). "Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d at 358 (quoting *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61).

In determining an appropriate sentence, the circuit court should "acquire a thorough acquaintance with the character and history of the man before it" which includes an examination of a defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *State v. Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d 133, 140 (citing *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412).

B. The trial court did not abuse its discretion when it sentenced Peldo to four years in prison.

Peldo pleaded guilty to Ingestion of Controlled Substance, a Class 5 felony in violation of SDCL 22-42-5.1, and admitted to the Part II Information. SR:173. Peldo's plea implicated SDCL 22-6-11[3], which mandates the circuit court to

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[3] "[T]he habitual offender statutes operate to increase the defendant's *sentence*, but do not substantively change the class of the principal felony." *Rowley v. S.D. Bd. Of Pardons & Paroles*, 2013 S.D. 6, ¶ 10, 826 N.W.2d 360, 364. (emphasis added). Therefore, while the possible sentence for Peldo's Ingestion charge was enhanced to that of a Class 4

(continued . . .)

> sentence an offender convicted of a Class 5 . . . to a term of probation. . . . The sentencing court may impose a sentence other than probation or a fully suspended state incarceration sentence *if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section. If a departure is made, the judge shall state on the record at the time of sentencing the aggravating circumstances and the same shall be stated in the dispositional order* [.]

SDCL 22-6-11 (emphasis added).

"The statute is clear: a defendant is entitled to a sentence of probation upon a conviction for certain crimes *unless* 'the court finds aggravating circumstances exist that pose a significant risk to the public[.]'" *Whitfield*, 2015 S.D. 17, ¶ 19, 862 N.W.2d at 140 (citing SDCL 22-6-11) (emphasis in original).

In analyzing whether a circuit court abused its discretion in finding aggravating circumstances to depart from presumptive probation, this Court should look at the totality of the circumstances considered by the circuit court. *Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d at 60-61. "What constitutes aggravating circumstances posing 'a significant risk to the public' is not defined by statute." *State v. Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d 1, 5. "Likewise, this Court has not provided a definition of this phrase, perhaps because it is not one that can be precisely defined." *Id.* This Court's "precedent, however, offers some guidance as to what this

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felony with the admission of the Part II Information, the charge was still considered a Class 5 felony for purposes of the presumptive probation statute.

Court has or has not deemed to be aggravating circumstances constituting a significant risk to the public." *Id.*

In *Underwood*, the circuit court cited ten aggravating circumstances when sentencing the defendant to four years in prison on a possession of controlled substance charge. *State v. Underwood*, 2017 S.D. 3, ¶ 8, 890 N.W.2d at 242. On appeal, this Court rejected Underwood's argument that a circumstance is not aggravating unless it demonstrates "a risk of violence or career criminality." *Id.* This Court did agree that some of the circumstances listed by the circuit court were not aggravating circumstances justifying a departure from presumptive probation (such as Underwood's failure to pay fines, costs, restitution, or attorney fees). *Id.* ¶ 7, 890 N.W.2d at 242. However, this Court affirmed the sentence after considering the other aggravating circumstances, including Underwood's "five-page rap sheet" with two felony convictions, multiple parole violations, involvement in the distribution of a controlled substance, and "complete disdain for court orders and supervised release." *Id.* ¶ 9, 890 N.W.2d at 242-43.

In *Beckwith*, the defendant pleaded guilty to possession of a controlled substance, and the circuit court found three aggravating factors that warranted a departure from presumptive probation: "(1) failure to cooperate with the CSO during the presentence investigation; (2) two prior felonies; and (3) making an *Alford* plea when the evidence reflected that Beckwith was aware of his wrongdoing." *Beckwith*, 2015

S.D. 76, ¶ 5, 871 N.W.2d at 59. Beckwith argued on appeal that the stated aggravating circumstances were insufficient to establish "a significant risk to the public." *Id.* ¶ 7, 871 N.W.2d at 59.

This Court affirmed Beckwith's sentence[4], holding that "[t]aken in their totality, the foregoing aggravating circumstances demonstrate that placing Beckwith on probation would have posed a significant risk to the public." *Id.* ¶ 15, 871 N.W.2d at 60-61.

> First, Beckwith deprived the CSO and the court of the information necessary to determine an appropriate sentence. Granting probation without such information would, by itself, pose a serious risk to the public. Second, Beckwith had prior felonies (one of which led to a probation violation) showing a long history of illegal drug usage. Beckwith also demonstrated a willingness to use violence against a law enforcement officer. Finally, his conduct at the time of the arrest and the circumstances of his plea reflected his failure to acknowledge culpability and remorse for his acts.

Id. "Considering these circumstances, the circuit court did not abuse its discretion in departing from presumptive probation." *Id.*

In *Whitfield*, the defendant was sentenced to five years in the state penitentiary with two years suspended after being convicted for possession of a controlled substance. *Whitfield*, 2015 S.D. 17, ¶ 1, 862 N.W.2d at 140. The circuit court based its departure from presumptive probation on the defendant's prior criminal convictions (including that it

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[4] The circuit court in *Beckwith* stated the aggravating circumstances on the record at the time of sentencing, but did not restate them in the dispositional order. Although this Court affirmed the sentence, it remanded the matter to the circuit court for the sole purpose of restating the aggravating circumstances in the judgment. *Beckwith*, 2015 S.D. 76, ¶ 19, 871 N.W.2d at 62.

was his fourth felony conviction), the number of substances found in his possession, his non-conducive nature to probation, his parole violations in Texas, and difficulty supervising the defendant as he had a transient lifestyle. *Id.* ¶ 9, 862 N.W.2d at 137. Whitfield argued that the aggravating circumstances identified by the circuit court "do not amount to a significant risk to public safety that would justify departure from a probation sentence." *Id.* ¶ 21, 862 N.W.2d at 140. This Court affirmed the sentence, finding that "[b]ased on our review of the record and the court's reasons for departing from a sentence of probation, we cannot say the court abused its discretion" and that "Whitfield pose[d] a significant risk to the public." *Id.* ¶ 23, 862 N.W.2d at 140.[5]

In *State v. Moran*, 2015 S.D. 14, 862 N.W.2d 107, the defendant pleaded guilty to possession of a controlled substance and was given a five-year penitentiary sentence. The aggravating circumstances in support of the departure from presumptive probation were that the possession charge was the defendant's third felony in eight years with prior felonies for first degree robbery and possession of a controlled substance, the defendant had a history of failing to comply with conditional release, he violated probation on each of his two prior felony

[5] As in *Beckwith*, the circuit court in *Whitfield* stated the aggravating circumstances on the record at the time of sentencing but failed to include them in the dispositional order. This Court remanded the case to the circuit court to amend the dispositional order to include the aggravating circumstances considered at the sentencing hearing but affirmed the conviction and sentence in all other respects. *Whitfield*, 2015 S.D. 17, ¶ 24, 862 N.W.2d at 141.

convictions, he committed the underlying felony while on probation, he had previously participated in three treatment programs, and that two firearms, drugs, and drug paraphernalia were found in the vehicle at the time of his arrest. *Id.* ¶ 12, 862 N.W.2d at 111.

Moran argued that he did not enter his plea voluntarily, knowingly, or intelligently, as he did so based on the belief that he would receive probation under SDCL 22-6-11. Therefore, this Court addressed the issue of whether a circuit court must notify a defendant prior to sentencing that it intends to depart from the presumptive sentencing requirements of SDCL 22-6-11, thus allowing the defendant the opportunity to present evidence and argument in mitigation of the aggravating circumstances. This Court found that there was no such notification requirement in SDCL 22-6-11. It also found that the circuit court complied with the requirements of SDCL 22-6-11. *Moran*, 2015 S.D. 14, ¶ 12, 862 N.W.2d at 111. The sentence was ultimately affirmed. *Id.* ¶ 23, 862 N.W.2d at 113.

Finally, in *State v. Hernandez*, 2014 S.D. 16, 845 N.W.2d 21, the circuit court sentenced the defendant to five years in the state penitentiary with three years suspended for a fourth offense driving under the influence conviction. In doing so, the circuit court found that there were aggravating circumstances, including the defendant's number of DUI convictions, felony convictions, failure to appear at a prior sentencing hearing, repeated attempts to undergo treatment and not

following through, and statements by the defendant at sentencing that the court considered to not evidence a true change and intention to change his behavior, but rather simply to seek lenience from the court. *Id.* ¶ 12, 845 N.W.2d at 23. This Court affirmed the conviction and sentence. *Id.* ¶ 14, 845 N.W.2d at 23.

In the present case, the aggravating circumstances cited by the circuit court at both the sentencing hearing and in the judgment are analogous to those upheld in *Underwood*, *Beckwith*, *Whitfield*, *Hernandez*, and *Moran*. There was no dispute between the parties that SDCL 22-6-11 applied to Peldo.

Before issuing its sentence, the circuit court familiarized itself with Peldo by reviewing Peldo's PSI as well as hearing arguments from both parties. SR:181-83. Neither party raised objections to the PSI. *Id.* The circuit court found that Peldo was a substantial risk to the general public. SR:187. At the sentencing hearing, the circuit court found aggravating circumstances existed that pose a significant risk to the public, including Peldo's criminal history, prior probation violations, and a new felony arrest while on bond, all of which showed that Peldo is a substantial risk to the general public. SR:187.

"[I]t is not a foregone conclusion that all defendants with lengthy criminal histories or a history of noncompliance categorically pose a significant risk to the public." *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. However, "sentencing involves considering the totality of the

circumstances as to *the individual* defendant before the court, and this same governing principle applies when a court makes its ultimate determination whether to depart from the otherwise mandated presumptive probation." *Id.* (emphasis in original). The circuit court looked specifically at Peldo's criminal history, his history of noncompliance with probation, and the facts that led to his current charge, as well as the fact that he picked up a new felony charge while out on bond for the current charge.

Considering the totality of the circumstances in this particular case, the circuit court did not abuse its discretion in finding aggravating circumstances exist that pose a significant risk to the public. In addition, the circuit court did make a specific finding in the written judgment that Peldo was "a significant risk to the public." SR:90.

"Generally, we will not disturb a sentence that is within the statutory maximum." *State v. Yeager*, 2019 S.D. 12, ¶ 16, 925 N.W.2d 105, 111. The maximum penalty that Peldo faced with the admission to the Part II Information was 10 years in the state penitentiary, a fine of $20,000, or both. SR:187, SDCL 22-6-1(6). The circuit court sentenced Peldo to 4 years in prison. SR:7 No monetary penalty was imposed beyond court costs and testing fees. *Id.* The sentence that the circuit court imposed is within the permissible range of choices and well below the statutory maximum faced by Peldo. Therefore, the sentence imposed should not be disturbed.

Peldo requests that this Court find that the circuit court abused its discretion because Peldo's criminal history did not rise to the level of an aggravating factor due to the low number of prior felony convictions and lack of violent criminal history or drug distribution charges. AB:11. Peldo also argues that the circuit court abused its discretion by relying on a bond violation while this case was pending is not an aggravating factor because it was only a probable cause finding and not a conviction. *Id.* Finally, Peldo asks this Court to find the penitentiary sentence was a prejudicial error because of the lack of aggravating factors to support a deviation presumptive probation. AB:12. However, as explained above, there is nothing to be remedied regarding Peldo's sentence. The circuit court found aggravating circumstances existed that posed a significant risk to the public and required a departure from a presumptive fully suspended state incarceration sentence. The circuit court stated them on the record at the sentencing hearing, and included them in the judgment of conviction, as required by SDCL 22-6-11. In addition, there was no abuse of discretion by the circuit court in its finding of such aggravating circumstances.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that Peldo's sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,437 words.

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

Dated this 20th day of January, 2026.

/s/ Marya Tellinghuisen
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of January, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. James Wayne Peldo* was served electronically through Odyssey File and Serve upon L. Adam Bryson at adam@brysonlawoffice.com.

/s/ Marya Tellinghusien
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31207

JAMES W. PELDO
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

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

HONORABLE JOHN FITZGERALD, CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Notice of Appeal was filed on September 2, 2025.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

NO. 31207

JAMES W. PELDO,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

The State is correct in asserting that "Sentencing courts 'exercise broad discretion when deciding the extent and kind of punishment imposed.'" *State v. Toavs*, 906 N.W.2d 354, 356 (*quoting State v. Bausch*, 889 N.W.2d 404, 415 (SD 2017) Appellee's Brief 6. The Circuit Court's "broad discretion" is tempered by SDCL § 22-6-11 which mandates that individuals convicted of specific lower-level felonies are presumptively sentenced to probation. This case, boiled down to its base element, comes down to whether Mr. Peldo's criminal history is significant enough for the Circuit Court to deviate from the presumption of probation in sentencing Mr. Peldo.

Criminal History

Mr. Peldo's criminal history is less severe than the parade of criminal defendants who have appealed their sentence on the grounds of SDCL § 22-6-11. Mr. Peldo has two prior felony convictions, both for possession of a controlled substance. Mr. Peldo successfully completed probation both times. The first time Mr. Peldo was granted a suspended imposition of sentence. The second time Mr. Peldo had one probation violation. He was

then ordered to complete drug court, which he did. Mr. Peldo has successfully completed probation both times that he was placed on it. He does not have a "history of noncompliance with probation." Appellee Brief 14.

It is true that the aggravating circumstances as it relates to criminal history cited in Mr. Peldo's case existed in the decisions cited in State's brief also existed in *Underwood*, *Beckwith*, *Whitfield*, *Hernandez*, and *Moran*. However, the distinction between Mr. Peldo and those other defendants is that they all had additional aggravating factors pertaining to their criminal history. Defendant Underwood had a prior felony with a victim (grand theft). *State v. Underwood*, 890 N.W.2d 240, 242 (SD 2017). Mr. Peldo's two felony convictions are victimless. Defendant Underwood had multiple parole violations. *Id.* Mr. Peldo had one probation violation. Defendant Underwood had a felony distribution charge dismissed as part of his plea deal. *Id.* Mr. Peldo has never been charged or accused of drug distribution. Defendant Beckwith had two prior felony convictions, but one of them was for violently resisting a law enforcement officer. *State v. Beckwith*, 871 N.W.2d 57, 60 (SD 2015). Mr. Peldo has never been convicted or accused of violently resisting law enforcement. Defendant Whitfield had three prior felony convictions. *State v. Whitfield*, 862 N.W.2d 133, 140 (SD 2015). Mr. Peldo only had two prior felony convictions. Defendant Whitfield also had a charge for possession of a controlled substance with the intent to distribute dismissed as part of his plea agreement. *Id.* As previously state, Mr. Peldo has never been charged or accused of distributing drugs. Defendant Hernandez was convicted of driving under the influence at least three times within a ten-year period. *State v. Hernandez*, 845 N.W.2d 21, 22 (SD 2014). Mr. Peldo does not have a history of DUI convictions. Additionally, Defendant Hernandez failed to appear for sentencing and had a bench warrant for his arrest for seven months. *Id.* at 23. Defendant Moran's case does not list the aggravating factors; however, he was

originally charged with possession with the intent to distribute as well as possession of a firearm by a felon. *State v. Moran*, 862 N.W.2d 107, 109 & 110 (SD 2015). Mr. Peldo again, has not been charged or accused with distribution. He also has not been charged or accused of possession of a firearm by a felon. Mr. Peldo's criminal history is less extensive then any of the other criminal defendants this Court has previously held had sufficient aggravating factors to override the presumption of probation.

Current Charge

Mr. Peldo's position regarding the events leading to his arrest were outlined in his original brief. The charge of second-degree eluding requires a finding of "inherent risk of death or serious bodily injury." Mr. Peldo does not believe that the Circuit Court showed that the actions outlined in the charge of second-degree eluding show a significant future risk to the community.

Conclusion

Mr. Peldo again asks this Court to rule that the circuit court abused its discretion because his criminal history does not rise to the level of an aggravating factor due to the low number of prior felony convictions and lack of violent criminal history or drug distribution charges. Mr. Peldo asks this Court to rule that the circuit court abused its discretion because the facts surrounding the second-degree eluding action is not an aggravating factor because it failed to demonstrate a future significant danger to the community. And Mr. Peldo asks the Court to rule that the circuit court abused its discretion because an allegation of a bond violation supported only by probable cause is not an aggravating factor due to the burden of proof and lack of a finding of guilt. Additionally, Mr. Peldo asks this Court to rule that his penitentiary sentence is a prejudicial error given the lack of aggravating factors to deviate from presumptive probation under SDCL § 22-6-11. Mr. Peldo requests this Court remand

his case back to the circuit court for sentencing with instructions to sentence him to a probationary term with a suspended execution of sentence.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Brief contains about 1,391 words and 9 pages. I certify that the word processing software used to prepare this brief is Microsoft Word (Version 16.106).

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The undersigned hereby certifies that on December 4, 2025, a true and correct copy of Appellant's Brief in the matter of The State of South Dakota v. James W. Peldo, was served via electronic mail upon the individuals listed below:

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