

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 31002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ERVIN K. YELLOWROBE,

Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Christina Klinger
Circuit Court Judge

BRIEF OF APPELLANT

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Pete Heidepriem, Purcell, Siegel & Hinrichs, LLP
101 W. 69th Street,
Suite 105
Sioux Falls, SD 57108
Attorney for Appellant

Appellate County, South Dakota 31002
Hughes County State's Attorney
104 E. Capitol Ave.
Pierre, SD 57501

Marty J. Jackley
Sarah L. Thome
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501

Attorneys for Appellee

Notice of Appeal filed on February 19, 2025.

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JURISDICTIONAL STATEMENT

Appellant Ervin K. Yellowrobe appeals the Circuit Court's January 30, 2025, judgment of conviction. AP. 7-8.¹ Mr. Yellowrobe filed his notice of appeal on February 19, 2025. AP. 9. Respectfully, Mr. Yellowrobe asserts the Supreme Court of South Dakota has jurisdiction because the appeal is timely and taken from a judgment of the Circuit Court. See SDCL § 23A-32-15.

¹ In this brief, the Settled Record will be referred to as "SR." and Appellant's Appendix will be referred to as "AP.," both of which will be followed by the appropriate page number(s).

STATEMENT OF ISSUES

Does South Dakota law authorize a Circuit Court to order that a defendant's prison sentence will be consecutive to a federal sentence when the federal sentence has not yet been imposed?

Authorities: SDCL § 22-6-6.1; State v. Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d 655, 658.

STATEMENT OF THE CASE

On June 10, 2024, Ervin K. Yellowrobe walked into a casino with his hand hidden in his sweatshirt, demanded cash, and walked out once the alarm was triggered. What followed was a state court charge, a plea deal, and, on January 28, 2025, a seven-year state sentence that the Circuit Court declared would run *consecutively* to a hypothetical federal term of custody.

Put simply: this appeal centers on whether a Circuit Court has authority to order that its sentence of a defendant will run consecutive to a potential, future sentence in federal court.

On July 2, 2024, a Hughes County grand jury returned an indictment charging Mr. Yellowrobe with attempted robbery (first degree) occurring on or about June 10, 2024. AP. 4. The State and Mr. Yellowrobe entered into a plea agreement. SR. 231, 238. The plea agreement provided: Mr. Yellowrobe pleaded guilty to the attempted robbery charge; the State dismissed the Part II Information; and the State agreed to recommend a sentence no longer than 7.5 years. Id.

The Circuit Court held a change of plea hearing on November 12, 2024. SR. 234. Then the Circuit Court sentenced Mr. Yellowrobe on January 28, 2025. SR. 250. It ordered Mr. Yellowrobe to serve seven years in the State Penitentiary, with credit for 227 days and two years suspended. SR. 260. The Judgment and Conviction signed by the Circuit Court provided “that this sentence shall run consecutively to the Defendant’s current Federal sentence.” AP. 8. The Judgment and Conviction was filed on January 30, 2025. Id. That judgment is the basis for this appeal.

Mr. Yellowrobe filed his notice of appeal on February 19, 2025. AP. 9.

STATEMENT OF FACTS

The Office of the Hughes County State's Attorney filed a criminal complaint against Ervin K. Yellowrobe on June 17, 2024. AP. 1–2. The complaint alleged two counts, attempted robbery (first degree) and aggravated assault occurring on or about June 10, 2024. Id. On July 2, 2024, a Hughes County grand jury returned an indictment charging Mr. Yellowrobe with attempted robbery (first degree). AP. 4. A second charge for aggravated assault was not sustained by the grand jury. AP. 3. Mr. Yellowrobe pleaded not guilty. SR. 213. The State filed a Part II Information for Habitual Offender under SDCL § 22-7-8 alleging that Mr. Yellowrobe met the statutory definition of habitual offender. AP. 5.

At a November 5, 2024, status hearing, the parties notified the Circuit Court that they had entered into a plea agreement. SR. 231–32. The State indicated that Mr. Yellowrobe was on supervised release based on a federal conviction at the time of the offenses alleged in the indictment. Id. Attorney Jason Glodt, Mr. Yellowrobe's prior counsel, noted he "asked [the federal probation office whether it] could give me an idea or—of how much more federal time [Mr. Yellowrobe is] looking at if released on the federal custody." Id. He explained, "[t]hey can't—based on the different level of violations he could be found in violation of, they can't give me a certain date, but it's my understanding it's a considerable amount of time he's looking at under the federal system." Id. In closing the hearing, the Circuit Court stated, "[y]ou need to—if somebody can bring information on the federal and where that stands, that would be much appreciated, and that will determine whether we sentence that day or not." Id.

The Circuit Court set a change of plea hearing for November 12, 2024. SR. 234. Mr. Glodt stated the terms of the plea agreement at the change of plea hearing. SR. 238.

The terms included: Mr. Yellowrobe pleading guilty to attempted robbery (first degree); the State dismissing the Part II Information; and the State agreeing to recommend a sentence no longer than 7.5 years. Id. The Circuit Court read Mr. Yellowrobe an advisement of rights and engaged in a colloquy with him about the rights he waived. Id.

Mr. Glodt addressed the question of a potential federal sentence at the change of plea hearing. Mr. Glodt requested “a suspended execution of [his state] sentence so Mr. Yellowrobe [could] be returned to the federal system where he has a federal hold” Id. “It’s my understanding because of this charge,” he explained, “it’s a violation of his federal probation for assault offense in 2021. He was—received, I believe, a 32 month sentence for that. He was on probation.” Id. Finally, Mr. Glodt noted, “I don’t know how long he’ll be faced with for additional jail time in the federal system, but it’s my understanding he will be sentenced to additional time in the federal system based on that violation.” Id.

At the close of the change of plea hearing, the State recited the factual basis for the guilty plea. SR. 242–43. The recitation included that Mr. Yellowrobe entered Happy Jacks Casino in Pierre, Hughes County, South Dakota, and demanded that a staff member put the casino’s cash into a bag he was holding. Id. The staff member thought Mr. Yellowrobe had a weapon because he put his hand in his sweatshirt and pointed an object at her. Id. She activated an alarm and Mr. Yellowrobe left the scene. Id.

Mr. Yellowrobe's sentencing hearing occurred on January 28, 2025. SR. 250.

Mr. Glodt's sentencing argument discussed the question of a potential federal sentence.

SR. 253. He stated:

Mr. Yellowrobe is also on federal probation, so there's a federal hold on him. We're asking for a suspended execution so he can be put back on the federal system, back on federal probation.

I asked his federal probation officer how much more time he's looking at serving in the federal system. Jennifer Palmer's response is it's really difficult to tell based on the severity of the violation, the aggravating circumstances.

She wouldn't give me a number or a ballpark, but it's my understanding he is facing significant—additional significant federal time depending on what the federal system decides to do with him. But they do have that hold on him, so we would ask that he be put back in the federal system.

Id. Wrapping up his argument, Mr. Glodt again emphasized there is “potentially additional federal time” in store for Mr. Yellowrobe. SR. 255.

The State's sentencing presentation also addressed the potential federal sentence. SR. 256–57. The State noted that the offense of conviction in this case arose while Mr. Yellowrobe was on federal supervision. Id.

The Circuit Court then imposed Mr. Yellowrobe's sentence. SR. 257–60. It ordered Mr. Yellowrobe to serve seven years in the State Penitentiary, with credit for 227 days and two years suspended. Id. Finally, the Court ordered, “I'm going to impose this consecutive to the federal sentences.” Id. The Judgment and Conviction signed by the Circuit Court provided “that this sentence shall run consecutively to the Defendant's current Federal sentence.” AP. 8.

STANDARD OF REVIEW

Whether Mr. Yellowrobe's sentence "was illegal is a question of statutory interpretation" that this Court reviews de novo. See State v. Litschewski, 2011 S.D. 88, ¶ 7, 807 N.W.2d 230, 232 ("Litschewski argues his sentence was illegal under the version of SDCL 22-6-6.1 that was in effect at the time he was sentenced. . . . Whether Litschewski's sentence was illegal is a question of statutory interpretation we review de novo.").

"Statutory interpretation is a question of law, reviewed de novo." State v. Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d 655, 658. "Likewise, whether 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.

If the Court decides it must apply plain error, that standard "requires (1) error, (2) that is plain, (3) affecting substantial rights; and only then may [the Court] exercise [its] discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." State v. Bauer, 2014 S.D. 48, ¶ 17, 851 N.W.2d 711, 717 (internal quotation marks omitted); see SDCL § 23A-44-15 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court.").

ARGUMENT

I. Mr. Yellowrobe received an illegal sentence in violation of SDCL § 22-6-6.1

a. Interpreting SDCL § 22-6-6.1

“The power to sentence comes from statutory and constitutional provisions.” Humpal, 2017 S.D. 82, ¶ 6, 905 N.W.2d at 119. “It is a fundamental rule of statutory construction that the intention of the law is to be primarily ascertained from the language expressed in the statute.” Kauth v. Bartlett, 2008 S.D. 20, ¶ 9, 746 N.W.2d 747, 750. “Words used by the legislature are *presumed* to convey their ordinary, popular meaning.” State v. Arguello, 1996 S.D. 57, ¶ 10, 548 N.W.2d 463, 464 (emphasis in original). “This Court will not enlarge a statute beyond its face where the statutory terms are clear and unambiguous in meaning.” Id.

A circuit court has authority to order that a sentence is consecutive only as prescribed in SDCL § 22-6-6.1. The statute applies only “[i]f a defendant is convicted of two or more offenses, regardless of when the offenses were committed or when the judgment or sentence is entered[.]” Id. In that circumstance, “the judgment or sentence may be that the imprisonment on any of the offenses or convictions may run concurrently or consecutively at the discretion of the court.” Id.

“By its plain terms, SDCL 22-6-6.1 only authorizes consecutive sentences for terms of ‘imprisonment[.]’ ” Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658. “[T]he purpose of SDCL 22-6-6.1 is to limit a court’s power to impose consecutive sentences to situations described in the statute.” State v. Krause, 2017 S.D. 16, 894 N.W.2d 382, 388 n.8. “The only consecutive-sentencing situation described in the statute is imposing a sentence of imprisonment consecutive to another sentence. Therefore, in its current form,

SDCL 22-6-6.1 restrains a court's power to consecutively impose sentences other than imprisonment (e.g., a sentence of probation)." Id.

b. Applying SDCL § 22-6-6.1

A circuit court has statutory authority to impose consecutive sentences under the specific terms of SDCL § 22-6-6.1. When a circuit court has (1) a defendant convicted of two or more offenses, it may (2) order that the imprisonment on any of the offenses or convictions run consecutively. Mr. Yellowrobe contends the Circuit Court lacked both of those requirements.

Are there two convictions? The application of SDCL § 22-6-6.1 depends on the "convict[ion] of two or more offenses[.]" In this case, one is Mr. Yellowrobe's conviction for attempted robbery (first degree), which is based on the plea agreement in the Circuit Court. The question then is this: what is the other conviction?

In pronouncing the sentence, the Circuit Court stated it was "going to impose this consecutive to the federal sentences." SR. 260. The Judgment and Conviction the Circuit Court issued provided "that this sentence shall run consecutively to the Defendant's current Federal sentence." AP. 8.

The record on which the Circuit Court based its consecutive sentence order consists of only general comments by the parties about a potential, future sentence coming from a federal court. The record does not contain any documentation on any pending federal criminal case involving Mr. Yellowrobe.

In the November 5, 2024, status hearing, Mr. Glodt mentioned contacting the federal probation office. SR. 231-32. He indicated that office told him they were unable to provide guidance or predictions on whether Mr. Yellowrobe will be receiving another

federal sentence. Id. The Circuit Court acknowledged it lacked evidence on any federal case involving Mr. Yellowrobe by asking the parties to “bring information on the federal and where that stands[.]” Id.

No further evidence was produced at the Circuit Court’s change of plea hearing on November 12, 2024. Again, Mr. Glodt explained that he did not “know how long [Mr. Yellowrobe will] be faced with for additional jail time in the federal system, but it’s my understanding he will be sentenced to additional time in the federal system based on that violation.” SR. 238.

The record evidence did not get further developed at Mr. Yellowrobe’s sentencing hearing on January 28, 2025. Mr. Glodt stated that he spoke with a Jennifer Palmer at the federal probation office, and she told him “it’s really difficult to tell” “how much more time [Mr. Yellowrobe is] looking at serving in the federal system.” SR. 253.

On November 29, 2021, Mr. Yellowrobe was convicted in federal court of assault resulting in substantial bodily injury to an intimate partner.² AP. 23; see United States v. Yellow Robe, CR. 20-30129, Doc. 97 (D.S.D. Nov. 29, 2021). The federal court sentenced him to 32 months of imprisonment and three years of supervised release. AP. 23–25.

On December 15, 2023, the U.S. Probation and Pretrial Services Office filed a

² This Court can take judicial notice of federal court records. See Lange v. Weber, 1999 S.D. 138, 5, 602 N.W.2d 273, 274 n.1 (“State asks this Court to take judicial notice of the federal court records pursuant to SDCL ch 19-8. We do so.”); State v. Olesen, 331 N.W.2d 75, 77 (S.D. 1983) (“A court may generally . . . take judicial notice of an original record in proceedings which are engrafted thereon or ancillary or supplementary thereto [its own records]. Even more recently we pointed out that the records in a criminal case are as fully before the court through judicial notice as they would be if introduced in evidence.”).

petition to revoke Mr. Yellowrobe's supervision based on alleged violations of the conditions of supervised release. AP. 30–32. The alleged violations related to conduct occurring during August–December 2023. Id.

The federal court revoked Mr. Yellowrobe's supervised release on April 1, 2024. AP. 33–39. It sentenced him to three months of imprisonment and 30 months of further supervised release. Id. The judgment on revocation was filed on April 3, 2024. Id. There has been no activity on the public docket since that time. AP. 10–22.

There is no applicable second conviction. The Circuit Court was clear that its sentence would be consecutive to a federal one. The only potentially applicable federal sentences are the federal court's judgment relating to the assault charge on November 29, 2021, or the judgment on revocation handed down on April 1, 2024.

The offense of conviction in the Circuit Court occurred on June 10, 2024. AP. 4. The imprisonment ordered in the federal court's November 29, 2021, sentence concluded before the Circuit Court pronounced Mr. Yellowrobe's sentence in this case. Same for the judgment on revocation issued on April 1, 2024. Mr. Yellowrobe was out of custody and under federal supervision when he committed the offense that resulted in his conviction below. So neither the November 29, 2021, nor the April 1, 2024, convictions fit within the confines of SDCL § 22-6-6.1.

It is possible that Mr. Yellowrobe's conviction in the Circuit Court could provide a foundation for U.S. Probation to pursue a revocation of his supervised release. If that were to occur, several events would need to take place before Mr. Yellowrobe receives an additional conviction and sentence. U.S. Probation would need to determine whether, in its discretion, a revocation of supervised release is supported by sufficient evidence and

necessary as part of the rehabilitative goals of supervised release. See United States v. Johnson, 529 U.S. 53, 59 (2000) (“Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”); Pete Heidepriem, Recalibrate Revocations of Supervised Release, 51 U. Balt. L. Rev. 329, 336 (2022) (“In crafting a sentence, the court tailors conditions of supervised release to ‘reflect its rehabilitative goal.’”) (quoting United States v. Trotter, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018)). If violations of supervised release are proven to the federal court, it would need to assess what grade of violation they are under the U.S. Sentencing Guidelines. See U.S. Sent’g Guidelines Manual § 7B1.1(a)(1)-(3) (U.S. Sent’g Comm’n 2021). Whether the violation is Grade A, B, or C will determine the potential term of imprisonment and further supervised release. See id.

But none of that has happened for Mr. Yellowrobe. The latest activity on his federal case’s docket is the April 2024 judgment on revocation. He was then released from that custody term and attempting to re-enter the community when he committed the offense giving rise to this case and his sentence before the Circuit Court. The fact that further custody time based on a potential violation of supervised release *may* happen is insufficient when SDCL § 22-6-6.1 requires an actual second conviction in order to hand down a consecutive sentence.

What if there were two convictions? The State may argue that there were two convictions under SDCL § 22-6-6.1 because Mr. Yellowrobe was serving a sentence (in the form of supervised release) when this charge and subsequent conviction arose. On that theory, the Circuit Court’s sentence means that it is consecutive to Mr. Yellowrobe’s 30-month term of supervised release as ordered in the April 1, 2024, judgment on

revocation.

That argument fails under the plain language of SDCL § 22-6-6.1. “By its plain terms, SDCL 22-6-6.1 only authorizes consecutive sentences for terms of ‘imprisonment[.]’ ” Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658. In Kramer, the defendant was convicted of three hunting violations. See id. The circuit court ordered that his three separate one-year revocations of hunting privileges for each conviction would run consecutively, so he would be without hunting privileges for three years. See id. The Supreme Court concluded that was an illegal sentence because a revocation of hunting privileges is not a term of imprisonment. See id. “While [SDCL § 22-6-6.1] provides authority for the circuit court to order consecutive terms of imprisonment, which we note the court ordered here and is not disputed, it cannot be interpreted to support an order of consecutive revocations of hunting privileges.” Id.; Arguello, 1996 SD 57, ¶ 7, 548 N.W.2d at 464 (recognizing the purpose of SDCL 22-6-6.1 is to limit a court’s power to impose consecutive sentences to situations described in the statute). “By statute, a sentencing court does not have discretion to impose a sentence of probation consecutive to a term of imprisonment.” Krause, 2017 S.D. 16, ¶ 17, 894 N.W.2d at 388.

Supervised release is not imprisonment. “Supervised release, in contrast to probation, is not a punishment in lieu of incarceration.”³ United States v. Granderson,

³ The transcripts in the Circuit Court reveal that the word “probation” was used in referring to “supervised release.” But they are not interchangeable. Probation is a sentence “in its own right[.]” and “[i]f the defendant violated the terms of the probation that the court ordered, the court could revoke probation and sentence the defendant within the statutory range authorized by the conviction.” Heidepriem, Recalibrate Revocations of Supervised Release, 51 U. Balt. L. Rev. at 336. In a sense, a “term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation

511 U.S. 39, 50 (1994). As noted above, the core of supervised release is the rehabilitation of a person as they transition from imprisonment and re-enter the community. See Trotter, 321 F. Supp. 3d at 346 (citing S. Rep. No. 98-225, at 124 (1983)) (“[T]he primary goal of [Supervised Release] is to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.”). In contrast, “imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a). Just as in Kramer, where the Court strictly interpreted SDCL § 22-6-6.1 as requiring multiple terms of imprisonment, the Court here should find that the Circuit Court’s sentence cannot be understood as consecutive to Mr. Yellowrobe’s supervised release term.

c. Other jurisdictions also prohibit this type of consecutive sentencing

In McGuire, the Supreme Court of Montana addressed a situation where the lower court issued a sentence that would run consecutive to a sentence that had yet to be imposed. See State v. McGuire, 860 P.2d 148, 149 (Mont. 1993). The lower court “was without authority to order McGuire to serve his term of incarceration consecutive to another sentence not yet imposed.” Id. The McGuire court explained that “sound sentencing principles preclude a court from imposing a sentence consecutive to one not yet imposed.” Id. That is because, “[b]y definition, a consecutive sentence does not begin until the sentence to which it is consecutive has been satisfied.” Id. So “a sentence

since those purposes will have been served to the extent necessary by the term of imprisonment.” Id.

ordered to run consecutively to one which has not been imposed creates problems of implementation.” Id. Additionally, “when a court orders a sentence to run consecutively to one not yet imposed, the court does so without knowing the length of the future sentence; therefore, it lacks an adequate basis for the exercise of its discretion.” Id. And “[f]inally, the imposition of consecutive sentences under these circumstances interferes with the sentencing discretion of the court which will impose the future sentence.” Id.

The Court of Appeals of Iowa has approvingly cited the McGuire decision. See State v. Kohl, 683 N.W.2d 127 (Iowa Ct. App. 2004) (finding McGuire distinguishable but noting that if the lower court had given such a consecutive sentence “[i]t may in fact have exceeded its sentencing authority”); see also State v. Wolfblack, 2024 MT 166, ¶ 13, 417 Mont. 376, 381, 553 P.3d 9, 13 (“Changing the terms of the initial sentence by making it consecutive to a sentence not in existence in 2003 constituted an illegal sentencing provision[.]”) (citing McGuire).

d. Conclusion

The Circuit Court’s sentence of Mr. Yellowrobe is illegal because it exceeds the Court’s statutory authority to order consecutive sentences under SDCL § 22-6-6.1. When a circuit court has (1) a defendant convicted of two or more offenses, it may (2) order that the imprisonment on any of the offenses or convictions run consecutively. In this case, the Circuit Court lacked both of those requirements. There were not two or more offenses of conviction because the Circuit Court’s sentence in this case is the only conviction applicable to Mr. Yellowrobe. He was not and is not serving a federal custody sentence. The Circuit Court cannot order its sentence to be consecutive under SDCL § 22-6-6.1 with respect to a potential, future federal sentence. Further, there are not two

terms of imprisonment to run consecutively even if Mr. Yellowrobe's supervised release is considered a conviction under SDCL § 22-6-6.1. Supervised release is not imprisonment, and the plain language of the statute requires two terms of imprisonment.

II. Mr. Yellowrobe can challenge his sentence in this direct appeal

Based on the record below, the State may attack Mr. Yellowrobe's direct appeal by claiming that it fails under plain error review and that it is procedurally improper. Those arguments fail.

a. Plain error

Mr. Yellowrobe maintains that this Court should conduct a de novo review. See Litschewski, 2011 S.D. 88, ¶ 7, 807 N.W.2d at 232 ("Litschewski argues his sentence was illegal under the version of SDCL 22-6-6.1 that was in effect at the time he was sentenced. . . . Whether Litschewski's sentence was illegal is a question of statutory interpretation we review de novo."). Yet it is true Mr. Glodt did not lodge an objection to the Circuit Court's consecutive sentence order.

Even under the plain error standard, Mr. Yellowrobe has made a sufficient showing for this Court to remand for resentencing. First, there is an error because the sentence is illegal as it exceeds the Circuit Court's statutory authority; and second, the error is plain because there is no federal sentence on which to base a consecutive state sentence. Cf. State v. Jones, 2012 S.D. 7, ¶ 15, 810 N.W.2d 202, 206 (finding error that was plain when events violated the Court's precedent).

The error affects Mr. Yellowrobe's substantial rights because the practical effect of the Circuit Court's sentence is that his date of release from custody is unknown. It is not certain, but it is possible that, while at the State Penitentiary serving his sentence, the

federal court revokes his supervised release and sentences him to custody. Under the Circuit Court's judgment, Mr. Yellowrobe's sentence would be paused until he finishes his federal sentence on the revocation. In this sense, the duration of Mr. Yellowrobe's sentence is undetermined and enlarged in violation of SDCL § 22-6-6.1. This prejudices Mr. Yellowrobe because even though he was sentenced to imprisonment before the Circuit Court, he cannot know when that sentence will end. South Dakota law recognizes the importance of accurately calculating an inmate's release date and total sentence length. See SDCL § 24-15A-16 ("The department must establish the sentence discharge date for each inmate based on the total sentence length, minus court ordered jail time credit."). The Department of Corrections is unable to make that calculation for Mr. Yellowrobe because of the sentencing error below.

Subjecting a South Dakota citizen to an illegal sentence seriously affects the fairness, integrity, and public reputation of judicial proceedings, as it is critical for criminal sentencing proceedings to operate within the authority provided by statute. Cf. State v. Dillon, 2001 S.D. 97, ¶ 22, 632 N.W.2d 37, 46 (finding plain error based on illegal sentence, remanding for resentencing).

b. Rule 35 motion

Relatedly, the State may argue that Mr. Yellowrobe should have brought a Rule 35 motion prior to this direct appeal. Pursuant to SDCL § 23A-31-1 (Rule 35), a defendant can bring a motion to correct their sentence. But this Court has not directly held that a Rule 35 motion is a prerequisite to challenging an illegal sentence. The Court made no mention of a Rule 35 motion being required in State v. Meyers, when it invalidated a sentence for violating SDCL § 22-6-6.1. See State v. Meyers, 1997 S.D.

115, 571 N.W.2d 847, 848 (“The burglary judgment is remanded for deletion of the language ordering consecutive service of the burglary sentence and clarification that the burglary sentence must be served *prior* to the escape sentence.”) (emphasis in original). In at least three other decisions from this Court, it has remanded for resentencing consistent with SDCL § 22-6-6.1 without holding a Rule 35 motion was a necessary predicate. See, e.g., Arguello, 1996 S.D. 57, ¶ 13, 548 N.W.2d at 465 (remanding for resentencing based on SDCL § 22-6-6.1, no mention of Rule 35 motion); State v. Flittie, 318 N.W.2d 346, 349 (S.D. 1982) (same); State v. Shull, 331 N.W.2d 284, 288 (S.D. 1983) (same).

These cases demonstrate that a Rule 35 motion is an optional—but not required—mechanism for a defendant to challenge an illegal sentence.

CONCLUSION

SDCL § 22-6-6.1 lets a court stack sentences only when two convictions already carry two concrete prison terms. By linking Mr. Yellowrobe’s state sentence to a federal term that has not been—and may never be—imposed, the Circuit Court stepped outside that statutory boundary. Because supervised release is not “imprisonment” and a potential revocation is not a second conviction, the consecutive-sentence clause is void.

Based on the discussion above, Mr. Yellowrobe respectfully requests that the Court hold that the Circuit Court’s sentence violates SDCL § 22-6-6.1 and the case must be remanded for resentencing.

REQUEST FOR ORAL ARGUMENT

Mr. Yellowrobe respectfully requests the opportunity for oral argument before the Court.

Dated this 5th day of June, 2025.

**HEIDPRIEM, PURTELL
SIEGEL & HINRICHS, LLP**

/s/ Pete Heidepriem

Pete Heidepriem (pete@hpslawfirm.com)

101 W. 69th Street, Suite 105

Sioux Falls, SD 57108

Ph: (605) 679-4470

Fax: (605)-679-4379

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. I prepared this brief using Microsoft Word 2016, and it contains 4,876 words from the Statement of the Case through the Conclusion. I relied on the word count of Microsoft Word 2016 in order to prepare this certificate.

Dated this 5th day of June, 2025.

BY /s/ Pete Heidepriem
Pete Heidepriem

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Appellant's Brief and all appendices were electronically filed with the Clerk of the Supreme Court via Odyssey File and Serve and on counsel:

Casey Jo Deibert
Hughes County State's Attorney
104 E. Capitol Ave.
Pierre, SD 57501
Casey.Deibert@co.hughes.sd.us

Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501
atgservice@state.sd.us

Attorneys for Appellee

The undersigned further certifies that the original copy of Appellant's Brief and Appendix in the case were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, State Capitol, 500 East Capitol, Pierre, SD, 57501, by U.S. mail, first class postage prepaid

Dated this 5th day of June, 2025.

BY /s/ Pete Heidepriem
Pete Heidepriem

APPENDIX

1. Criminal complaint, 32CRI24-262	Appendix 001-002
2. Dismissal of count two, 32CRI24-262	Appendix 003
3. Indictment, 32CRI24-262	Appendix 004-005
4. Part II information, 32CRI24-262	Appendix 006-007
5. Judgment of conviction, 32CRI24-262	Appendix 008-009
6. Federal docket, <u>United States v. Yellow Robe</u> , 20-cr-30129	Appendix 010-022
7. Judgment in a criminal case, <u>United States v. Yellow Robe</u> , 20-cr-30129	Appendix 023-029
8. Petition to revoke, <u>United States v. Yellow Robe</u> , 20-cr-30129	Appendix 030-032
9. Judgment in a criminal case, <u>United States v. Yellow Robe</u> , 20-cr-30129	Appendix 033-039

[illegible]

IN MAGISTRATE COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

-VS-

ERVIN KENNETH YELLOWROBE, JR.,
(DOB: 4/14/1980)
Defendant.

CRI 24-262

CRIMINAL COMPLAINT FOR

**COUNT 1: ATTEMPTED ROBBERY -
1ST DEGREE**

A Class 2 Felony

(Maximum possible punishment is 1/2)

A VIOLATION OF SDCL 22-4-1, SDCL 22-30-1, SDCL 22-30-6 AND SDCL 22-30-7

COUNT 2: AGGRAVATED ASSAULT

A Class 3 Felony

A VIOLATION OF SDCL 22-18-1.1(5)

The undersigned being duly sworn upon oath charges:

That on or about the 10th day of June, 2024, in the County of Hughes, State of South Dakota, ERVIN KENNETH YELLOWROBE, JR. did commit the public offenses of:

COUNT 1: Attempted Robbery – 1st Degree, SDCL 22-4-1, SDCL 22-30-1, SDCL 22-30-6, and SDCL 22-30-7, in that ERVIN KENNETH YELLOWROBE, JR. did intentionally attempt to take personal property, regardless of value, in the possession of another from the other's person or immediate presence, and against the other's will, by means of force or fear of force and by use of a dangerous weapon or by use of a physical object simulating a dangerous weapon, a Class 2 Felony;

COUNT 2: Aggravated Assault, SDCL 22-18-1.1(5), in that ERVIN KENNETH YELLOWROBE, JR. did attempt by physical menace with a deadly weapon to put another in fear of imminent serious bodily harm, a Class 3 Felony;

contrary to the statutes in such case made and provided against the peace and dignity of the State of South Dakota.

That the complainant states that this complaint is based upon a Uniform Traffic Ticket and a Pierre Police Probable Cause Affidavit.

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUN 17 2024

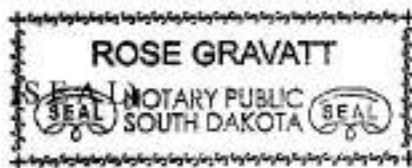
By K. J. Stroman Clerk
Deputy

PAGE 2

Dated this 17th day of June, 2024.


Casey Jo DePort, Complainant

Subscribed and sworn to before me this 17th day of June, 2024.




Notary Public
My Commission Expires: 3/28/2029

STATE OF SOUTH DAKOTA)
) SS
 COUNTY OF HUGHES)

IN CIRCUIT COURT
 SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
 Plaintiff,)

DISMISSAL

vs.)

FILE NO. C24-262

Ervin Yellowrobe Jr.)
 Defendant.)

Pursuant to SDCL 23A-44-2, _____, (Deputy)

State's Attorney, dismisses the following that has been filed in this complaint/indictment/information:

☐ All counts on the above charge

☐ Count 1

☒ Count 2

☐ Count 3

☐ Count 4

☐ _____

For the following reason: Not Sustained at Grand Jury

Dated this 2nd day of July, 2024.

By: Carey Jo Dubut

White - Clerk of Court

Yellow - State's Attorney

Pink - Defendant

STATE OF SOUTH DAKOTA)
)
 : SS
 COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)

INDICTMENT FOR:

Plaintiff,)

COUNT 1: ATTEMPTED ROBBERY –
 FIRST DEGREE

vs.)

(SDCLS 22-30-1, 22-30-6,
 22-30-7, & 22-4-1)

ERVIN KENNETH YELLOWROBE, JR.,)
 DOB: 04/14/1980)

1/2 of a Class 2 Felony

Defendant.)

COUNT 1: AGGRAVATED ASSAULT
 (SDCL22-18-1.1)
 Class 3 Felony

32Cr24-262

THE HUGHES COUNTY GRAND JURY CHARGES:

COUNT 1:

That on or about the 10th day of June, 2024, in Hughes County, South Dakota, ERVIN KENNETH YELLOWROBE, JR. did commit the public offense of **ATTEMPTED ROBBERY – FIRST DEGREE**, in that Defendant did attempt to intentionally take personal property regardless of the value, in the possession of another, from their person or immediate presence, and against their will, by means of fear of some immediate injury to their person and use of a dangerous weapon, unless the property was taken pursuant to process or otherwise pursuant to law, in violation of SDCLS 22-30-1, 22-30-6, 22-30-7, & 22-4-1 a Class 2 felony; and contrary to the statute in such case made and provided for against the peace and dignity of the State of South Dakota.

COUNT 2:

NB That on or about the 10th day of June, 2024, in Hughes County, South Dakota, ERVIN KENNETH YELLOWROBE, JR. did commit the public offense of **AGGRAVATED ASSAULT**, in that Defendant did attempt by physical menace with a deadly weapon, to put another in fear of imminent serious bodily harm, in violation of SDCL 22-18-1.1(5), a Class 3 Felony; and contrary to the statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 2nd day of July, 2024, at Pierre, Hughes County, South Dakota.

A True Bill

"A True Bill"

THIS INDICTMENT IS MADE WITH CONCURRENCE OF AT LEAST SIX GRAND JURORS.

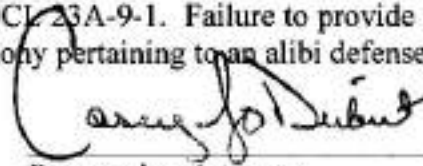
Jan A. Sears
 Grand Jury Foreperson

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY: Cole Martin, T.E. (DOB: 01/01/1982)

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

NOTICE OF DEMAND FOR
ALIBI DEFENSE

The undersigned prosecuting attorney in the above matter, hereby states that the alleged offense was committed at Pierre, South Dakota on or about the 10th day of June, 2024. I hereby request that Defendant or their attorney serve upon me a written notice of their intention to offer a defense of alibi within ten days as provided in SDCL 23A-9-1. Failure to provide such notice of an alibi defense may result in exclusion of any testimony pertaining to an alibi defense.

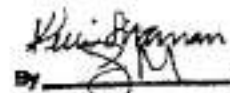


Prosecuting Attorney

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUL 02 2024

By  Clerk
Deputy

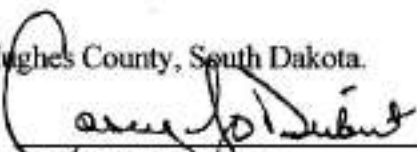
STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	PART II INFORMATION
PLAINTIFF,	)	FOR HABITUAL OFFENDER
	)	(SDCL § 22-7-8)
VS.	)	(Three or more felonies, one crime of violence)
	)	
ERVIN KENNETH YELLOWROBE, JR.,	)	
DOB: 04/14/1980	)	32Cri24-262
DEFENDANT.	)	

Casey Jo Deibert, as prosecuting attorney, in the name of and by the authority of the State of South Dakota, upon her oath informs this Court, that ERVIN KENNETH YELLOWROBE, JR. is alleged to be a Habitual Offender, as that term is defined by SDCL 22-7-8 in that Defendant has on three or more prior occasions been convicted of a felony, with at least one prior felony being a crime of violence, said felonies being as follows:

1. That on or about March 6, 2012, Defendant was convicted of the felony crime of Arson – Second Degree, in Hughes County, South Dakota;
2. That on or about March 6, 2012, Defendant was convicted of the felony crime of Burglary – Third Degree, in Hughes County, of South Dakota;
3. That on or about November 29, 2021, Defendant was convicted of the felony crime of Assault – Substantial Injury, in Pierre, South Dakota;

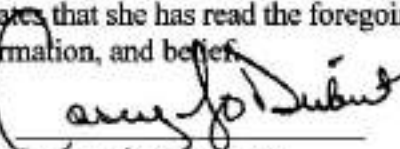
and, contrary to the statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 2nd day of July, 2024, in Pierre, Hughes County, South Dakota.

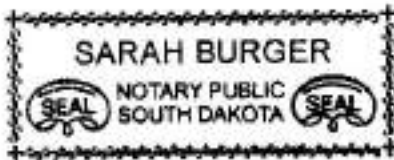

 Prosecuting Attorney

STATE OF SOUTH DAKOTA	)
	) SS.
COUNTY OF HUGHES	)

I, Casey Jo Deibert, being first duly sworn, states that she has read the foregoing Information, and the same is true to her own best knowledge, information, and belief.


 Prosecuting Attorney

Subscribed and sworn to before me, a notary public, this 2nd day of July, 2024.




Notary Public

My Commission Expires:

August 3, 2024

WITNESSES KNOWN TO THE STATE AT THE TIME AND THE FILING OF THIS INFORMATION:

Hughes County Clerk of Courts
Hughes County State's Attorney's Office
Hughes County Sheriff's Office

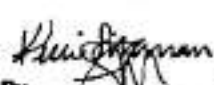
U.S. District Court
U.S. Attorney's Office
United State's Marshall Service

South Dakota DCI

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUL 02 2024

 Clerk
By _____ Deputy

STATE OF SOUTH DAKOTA	)		IN CIRCUIT COURT
	: SS		
COUNTY OF HUGHES	)		SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)		
	)		
Plaintiff,	)	JUDGMENT OF CONVICTION	
	)		
vs.	)		
	)	32Cri24-262	
ERVIN KENNETH YELLOWROBE, JR.,	)		
DOB: 04/14/1980	)		
	)		
Defendant.	)		

An Indictment was filed with this Court on the 2nd day of July, 2024, charging Defendant with Attempted Robbery – First Degree (SDCLS 22-30-1, 22-30-6, 22-30-7, and 22-4-1), 1/2 of a Class 2 Felony.

Defendant was arraigned on said Indictment and received a copy thereof on the 12th day of November, 2024. Defendant, Defendant's attorney, Jason Glodt, and Casey Jo Deibert, prosecuting attorney, appeared at Defendant's arraignment. The Court advised Defendant of all of the constitutional and statutory rights pertaining to the charges that had been filed against Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial. Defendant pled guilty to Attempted Robbery – First Degree (SDCLS 22-30-1, 22-30-6, 22-30-7, and 22-4-1), 1/2 of a Class 2 Felony, said offense having been committed on or about the 10th day of June, 2024.

It is the determination of this Court that Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing, and intelligent; that Defendant was represented by competent counsel; that 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 Defendant is guilty of Attempted Robbery – First Degree (SDCLS 22-30-1, 22-30-6, 22-30-7, and 22-4-1), 1/2 of a Class 2 Felony.

SENTENCE

On the 28th day of January, 2025, the Court asked Defendant, if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

ORDERED that the Defendant shall be committed to the custody of the South Dakota Department of Corrections for placement at an appropriate facility for seven (7) years, with two (2) years suspended, on the charge of Attempted Robbery – First Degree (SDCLS 22-30-1, 22-30-6, 22-30-7, and 22-4-1), 1/2 of a Class 2 Felony.

AGGRAVATING FACTORS:

The aggravating factors that exist which pose a significant risk to the public and require a departure from probation are:

- The Defendant has a lengthy criminal history.
- The Defendant is on Federal Probation.
- This is the Defendant's fifth felony conviction.

It is further

ORDERED that the Defendant shall receive credit for two hundred twenty-seven (227) days previously served. It is further

ORDERED that the Defendant shall pay court costs of \$116.50; and, court-appointed attorney fees submitted by Jason Glodt (payable to Hughes County Auditor, Second Floor, 104 E. Capitol Ave., Pierre, SD 57501), while on parole and on a schedule prescribed by Defendant's Parole Officer. It is further

ORDERED that this sentence shall run consecutively to the Defendant's current Federal sentence.

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

DATED 1/30/2025 10:26:22 AM

BY THE COURT:



Christina Klinger
Circuit Court Judge

Attest:
Sitzman, Kelli
Clerk/Deputy



NOTICE OF RIGHT TO APPEAL

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

**U.S. District Court
District of South Dakota (Central Division)
CRIMINAL DOCKET FOR CASE #: 3:20-cr-30129-RAL-1**

Case title: USA v. Yellow Robe

Date Filed: 10/14/2020

Date Terminated: 11/29/2021

Assigned to: Chief Judge Roberto A. Lange
Referred to: US Magistrate Judge Mark A.
Moreno

Defendant (1)

Ervin Yellow Robe

TERMINATED: 11/29/2021

represented by **Randall B. Turner**

Federal Public Defender's Office

101 South Pierre Street, Third Floor

Pierre, SD 57501

(605) 224-0009

Fax: (605) 224-0010

Email: randy_turner@fd.org

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Designation: Federal Public Defender

A. Jason Rumpca

Riter, Rogers, Wattier & Northrup, LLC

319 South Coteau Avenue

PO Box 280

Pierre, SD 57501

(605) 224-5825

Fax: (605) 224-7102

Email: j.rumpca@riterlaw.com

TERMINATED: 12/20/2023

Designation: CJA Appointment

John M. Duffy

Federal Public Defender's Office

101 South Pierre Street, Third Floor

Pierre, SD 57501

(605) 224-0009

Fax: (605) 224-0100

Email: john_duffy@fd.org

TERMINATED: 06/14/2021

Designation: Federal Public Defender

Pending Counts

18 U.S.C. §§ 1153 and 113(a)(7) ASSAULT
RESULTING IN SUBSTANTIAL BODILY

Disposition

32 months imprisonment; 3 years
supervised release; \$100.00 special

INJURY TO AN INTIMATE PARTNER
(2)

assessment

Highest Offense Level (Opening)

Felony

Terminated Counts

18 U.S.C. §§ 1153 and 113(a)(3) ASSAULT
WITH A DANGEROUS WEAPON
(1)

Disposition

Dismissed

Highest Offense Level (Terminated)

Felony

Complaints

None

Disposition

Plaintiff

USA

represented by **Wayne A. Venhuizen**
U.S. Attorney's Office (Pierre, SD)
225 South Pierre Street, Suite 337
PO Box 7240
Pierre, SD 57501
605-224-5402
Email: wayne.venhuizen@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Assistant US Attorney

Brian Murphy
U.S. Attorney's Office (Pierre, SD)
225 South Pierre Street
PO Box 7240
Pierre, SD 57501
(605) 225-5402
Email: brian.murphy4@usdoj.gov
TERMINATED: 03/04/2025
Designation: Assistant US Attorney

Troy R. Morley
U.S. Attorney's Office (Pierre, SD)
225 South Pierre Street, Suite 337
PO Box 7240
Pierre, SD 57501
(605) 224-5402
Fax: (605) 224-8305
Email: troy.morley@usdoj.gov
TERMINATED: 12/19/2023
Designation: Assistant US Attorney

Date Filed	#	Docket Text
10/14/2020	<u>1</u>	INDICTMENT (personal identifiers redacted) as to Ervin Yellow Robe (1) count(s) 1, 2. (Attachments: # <u>1</u> Sealed Charging Document) NOTICE REGARDING COOPERATOR INFORMATION: All plea agreements and sentencing memoranda contain a sealed supplement which includes either a statement there was cooperation or a statement there was no cooperation. It is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government. (CLR) (Entered: 10/15/2020)
01/20/2021	<u>3</u>	Application for Writ of Habeas Corpus ad Prosequendum by USA as to Ervin Yellow Robe. (Attachments: # <u>1</u> Proposed Order Writ of Habeas Corpus Ad Prosequendum) (Morley, Troy) (Entered: 01/20/2021)
01/20/2021	<u>4</u>	WRIT OF HABEAS CORPUS AD PROSEQUENDUM granting <u>3</u> Application for Writ of Habeas Corpus Ad Prosequendum as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on January 20, 2021. (CJH) (Entered: 01/20/2021)
02/01/2021		Attorney update in case as to Ervin Yellow Robe. Attorney John M. Duffy for Ervin Yellow Robe added., Set/Reset Hearings as to Ervin Yellow Robe:(Initial Appearance set for 2/4/2021 at 01:45 PM in Pierre Courtroom 1 - Room 436* before US Magistrate Judge Mark A. Moreno..) (CJH) (Entered: 02/01/2021)
02/04/2021	<u>5</u>	Final BAIL Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Nielsen, Jenna) (Entered: 02/04/2021)
02/04/2021	<u>6</u>	REQUEST for Disclosure by USA as to Ervin Yellow Robe . (Morley, Troy) (Entered: 02/04/2021)
02/04/2021	<u>7</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Initial Appearance as to Ervin Yellow Robe held on 2/4/2021. TEXT ORDER. Pursuant to the Due Process Protections Act, the Court confirms the United States' obligation to disclose to the defendant all exculpatory evidence--that is, evidence that favors the defendant or casts doubt on the United States' case, as required by <i>Brady v. Maryland</i>, 373 U.S. 83 (1963) and its progeny, and ORDERS the United States to do so. Failure to disclose exculpatory evidence in a timely manner may result in consequences, including, but not limited to, exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, disciplinary action, or sanctions by the Court. (Court Reporter: FTR) (CJH) (Entered: 02/04/2021)
02/04/2021	8	Oral Motion to Continue Detention Hearing by Ervin Yellow Robe. (CJH) (Entered: 02/04/2021)
02/04/2021	9	ORDER granting 8 Oral Motion to Continue Detention Hearing. The Defendant, having appeared for an initial appearance before this Court with counsel and moved for a continuance pursuant to 18 U.S.C. Section 3142(f), and the Court having concluded that good cause exists for granting same, now, therefore, it is hereby ORDERED that Defendant shall be committed to the custody of the United States Marshal and shall be brought before the Court for a detention hearing to be set at a later date and time after consultation with counsel.

		Text Order of Temporary Detention entered as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on February 4, 2021. (CJH) (Entered: 02/04/2021)
02/04/2021		Set/Reset Hearings as to Ervin Yellow Robe: Arraignment set for 2/5/2021 at 03:30 PM in Pierre Courtroom 1 - Room 436* before US Magistrate Judge Mark A. Moreno. Detention Hearing set for 2/5/2021 at 03:30 PM in Pierre Courtroom 1 - Room 436* before US Magistrate Judge Mark A. Moreno. (CJH) (Entered: 02/04/2021)
02/04/2021	<u>10</u>	CJA 23 Financial Affidavit signed by Ervin Yellow Robe. (CJH) (Entered: 02/04/2021)
02/04/2021	<u>11</u>	TEXT ORDER Appointing Federal Public Defender as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on February 4, 2021. (CJH) (Entered: 02/04/2021)
02/04/2021	<u>12</u>	NOTICE OF ATTORNEY APPEARANCE: John M. Duffy appearing for Ervin Yellow Robe. (Duffy, John) (Entered: 02/04/2021)
02/04/2021	<u>13</u>	REQUEST for 404(b) by Ervin Yellow Robe . (Duffy, John) (Entered: 02/04/2021)
02/04/2021	<u>14</u>	REQUEST for 609(b) by Ervin Yellow Robe . (Duffy, John) (Entered: 02/04/2021)
02/05/2021	<u>15</u>	First Addendum re <u>5</u> Final Bail Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Nielsen, Jenna) (Entered: 02/05/2021)
02/05/2021	<u>16</u>	SCHEDULING AND CASE MANAGEMENT ORDER as to Ervin Yellow Robe. Suppression Voluntariness Motion due by 3/2/2021. Motions due by 3/30/2021. Plea Agreement due by 3/30/2021. Pretrial Conference set for 4/12/2021 at 02:00 PM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Jury Trial set for 4/13/2021 at 09:00 AM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 02/05/2020. (LH) (Entered: 02/05/2021)
02/05/2021	<u>17</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Arraignment as to Ervin Yellow Robe (1) Count 1,2 held on 2/5/2021 Plea Entered: Not Guilty, Detention Hearing as to Ervin Yellow Robe held on 2/5/2021. (Court Reporter: FTR) (CJH) (Entered: 02/05/2021)
02/05/2021	<u>18</u>	Oral Motion to Release Defendant Pending Trial by Ervin Yellow Robe. (CJH) (Entered: 02/05/2021)
02/05/2021	<u>19</u>	ORDER denying 18 Oral Motion to Release Defendant Pending Trial. A detention hearing was held. Based on the findings made on the record, it is hereby ORDERED that Defendant shall be committed to the custody of the United States Attorney General or his designated representative for confinement in an appropriate corrections/detention facility pending trial or until further order of a judicial officer of this District (without prejudice to his right to seek reconsideration). It is further ORDERED that while in custody, Defendant shall be afforded a reasonable opportunity for private consultation counsel. It is further ORDERED that on order of a court of the United States or on request of an attorney for the Plaintiff, the person in charge of the corrections/detention facility shall deliver Defendant to the United States Marshals Service for the purpose of an appearance in connection with the instant criminal matter or any other federal court proceeding.

		Text Order of Detention entered as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on February 5, 2021. (CJH) (Entered: 02/05/2021)
02/05/2021	<u>20</u>	Warrant Returned Executed on 2/1/2021 in case as to Ervin Yellow Robe. (CLR) (Entered: 02/08/2021)
02/05/2021	<u>21</u>	Writ of Habeas Corpus ad Prosequendum as to Ervin Yellow Robe Returned Unexecuted. (CLR) (Entered: 02/08/2021)
02/08/2021	<u>22</u>	Stipulation for Entry of Standing Discovery Order as to Ervin Yellow Robe. (Morley, Troy) (Entered: 02/08/2021)
02/09/2021	<u>23</u>	TEXT ORDER REGARDING DISCOVERY. Upon the foregoing Stipulation <u>22</u> and for good cause shown, it is hereby ORDERED that any discovery materials, including but not limited to statements and summaries of interviews of witnesses furnished by the prosecution to the defense, shall not be used by the Defendant or the attorney for the Defendant for any purpose other than in direct relationship to this case. Without permission of the Court, defense counsel shall not photocopy the materials or provide them to any third party, except to make copies for use of the defense counsel in this case, an investigator, or expert witness. No further dissemination of discovery material shall be made, and under no circumstances shall such material be available to any employee of any attorney who was previously convicted of a felony but not restored to his or her civil rights. Any and all copies of discovery materials shall be returned to defense counsel at the completion of the case so that they can be destroyed by defense counsel. Defense counsel shall otherwise keep the items furnished in the possession of defense counsel, and the materials shall not be given to the Defendant or anyone else without the permission of the Court. Defense counsel may allow the Defendant to read the discovery materials, but only in the presence of defense counsel, the defense investigator, or a defense expert. It is further ORDERED that all discovery materials not previously destroyed shall be returned to attorneys for the United States of America immediately upon final disposition of the case. This text order entered as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on February 9, 2021. (CJH) (Entered: 02/09/2021)
03/05/2021	<u>24</u>	Unopposed MOTION for Continuance pursuant to 18:3161 by Ervin Yellow Robe. (Duffy, John) (Entered: 03/05/2021)
03/05/2021	<u>25</u>	Informed CONSENT to Continuance signed by Ervin Yellow Robe. (Duffy, John) (Entered: 03/05/2021)
03/16/2021	<u>26</u>	ORDER granting <u>24</u> Motion for Continuance pursuant to 18:3161 as to Ervin Yellow Robe (1) and SCHEDULING ORDER: Suppression Voluntariness Motion due by 4/13/2021. Motions due by 5/11/2021. Plea Agreement due by 5/11/2021. Pretrial Conference set for 5/24/2021 at 02:00 PM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Jury Trial set for 5/25/2021 at 08:30 AM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 03/16/2021. (LH) (Entered: 03/16/2021)
05/05/2021	<u>27</u>	Unopposed MOTION for Continuance pursuant to 18:3161 by Ervin Yellow Robe. (Duffy, John) (Entered: 05/05/2021)
05/05/2021	<u>28</u>	Informed CONSENT to Continuance signed by Ervin Yellow Robe. (Duffy, John) (Entered: 05/05/2021)

05/05/2021	<u>29</u>	Invocation of Rights under the Fifth and Sixth Amendments signed by Ervin Yellow Robe. (Duffy, John) (Entered: 05/05/2021)
05/18/2021	<u>30</u>	ORDER granting <u>27</u> Motion for Continuance pursuant to 18:3161 as to Ervin Yellow Robe (1) and SCHEDULING ORDER: Suppression Voluntariness Motion due by 5/25/2021. Motions due by 6/15/2021. Plea Agreement due by 6/15/2021. Pretrial Conference set for 6/28/2021 at 02:00 PM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Jury Trial set for 6/29/2021 at 08:30 AM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 05/18/2021. (LH) (Entered: 05/18/2021)
05/25/2021	<u>31</u>	MOTION to Suppress by Ervin Yellow Robe. (Duffy, John) (Entered: 05/25/2021)
05/25/2021	<u>32</u>	MEMORANDUM in Support by Ervin Yellow Robe re <u>31</u> MOTION to Suppress . (Duffy, John) (Entered: 05/25/2021)
06/01/2021	<u>34</u>	RESPONSE by USA as to Ervin Yellow Robe re <u>31</u> MOTION to Suppress filed by Ervin Yellow Robe, <u>32</u> Memorandum in Support of Motion filed by Ervin Yellow Robe (Attachments: # <u>1</u> Attachment Audio & Transcript place holder, # <u>2</u> Attachment Advice of Rights signed form) (Morley, Troy) (Entered: 06/01/2021)
06/08/2021		Set/Reset Hearings as to Ervin Yellow Robe: Ex Parte Motion Hearing set for 6/14/2021 at 01:15 PM in Pierre Bankruptcy Courtroom - Room 210 before US Magistrate Judge Mark A. Moreno. (SF) (Entered: 06/08/2021)
06/14/2021		Attorney update in case as to Ervin Yellow Robe. Attorney A. Jason Rumpca for Ervin Yellow Robe added. Attorney John M. Duffy terminated. (SF) (Entered: 06/14/2021)
06/15/2021	<u>37</u>	Clerk's Notice of Activating CJA Privileges as to Ervin Yellow Robe. When reviewing the attached document, please note this Court is a NextGen Court. (SAC) (Entered: 06/15/2021)
06/16/2021	<u>38</u>	REQUEST for Notice Pursuant to Fed R. Evid 404(b) by Ervin Yellow Robe . (Rumpca, A.) (Entered: 06/16/2021)
06/16/2021	<u>39</u>	REQUEST for Notice Pursuant to Fed R. Evid 609(b) by Ervin Yellow Robe . (Rumpca, A.) (Entered: 06/16/2021)
06/16/2021	<u>40</u>	REQUEST for Notice Pursuant to Fed R. Evid 807(b) by Ervin Yellow Robe . (Rumpca, A.) (Entered: 06/16/2021)
06/16/2021	<u>41</u>	REQUEST for Disclosure by Ervin Yellow Robe . (Rumpca, A.) (Entered: 06/16/2021)
06/18/2021	<u>42</u>	MOTION for Continuance pursuant to 18:3161 by Ervin Yellow Robe. (Rumpca, A.) (Entered: 06/18/2021)
06/18/2021	<u>43</u>	WAIVER of Speedy Trial signed by Ervin Yellow Robe. (Rumpca, A.) (Entered: 06/18/2021)
06/21/2021	<u>44</u>	ORDER granting <u>42</u> Motion for Continuance pursuant to 18:3161 as to Ervin Yellow Robe (1) and SCHEDULING ORDER: Suppression Voluntariness Motion due by 7/13/2021. Motions due by 8/10/2021. Plea Agreement due by 8/10/2021. Pretrial Conference set for 8/23/2021 at 02:00 PM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Jury Trial set for 8/24/2021 at 08:30 AM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 06/21/2021. (LH) (Entered: 06/21/2021)
06/22/2021	<u>45</u>	REQUEST for Disclosure by USA as to Ervin Yellow Robe . (Morley, Troy) (Entered: 06/22/2021)

06/29/2021	<u>46</u>	MOTION for Furlough by Ervin Yellow Robe. (Rumpca, A.) (Entered: 06/29/2021)
06/29/2021		Set/Reset Hearings as to Ervin Yellow Robe: Motion Hearing set for 6/29/2021 at 03:00 PM in Pierre Courtroom 1 - Room 436 before US Magistrate Judge Daneta Wollmann. Defendant and Attorneys will appear in Pierre; Judge Wollman will appear from chambers via video. (SF) (Entered: 06/29/2021)
06/29/2021	<u>47</u>	Minute Entry for proceedings held before US Magistrate Judge Daneta Wollmann: Motion Hearing as to Ervin Yellow Robe held on 6/29/2021 re <u>46</u> MOTION for Furlough filed by Ervin Yellow Robe.. (Court Reporter: FTR) (SF) (Main Document 47 replaced on 6/29/2021) (SF). (Entered: 06/29/2021)
06/29/2021	<u>48</u>	ORDER granting <u>46</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Daneta Wollmann on 6/29/2021. (SC) (Entered: 06/29/2021)
07/06/2021	<u>49</u>	Stipulation for Entry of Standing Discovery Order as to Ervin Yellow Robe. (Morley, Troy) (Entered: 07/06/2021)
07/07/2021	<u>50</u>	TEXT ORDER REGARDING DISCOVERY. Upon the foregoing Stipulation <u>49</u> and for good cause shown, it is hereby ORDERED that any discovery materials, including but not limited to statements and summaries of interviews of witnesses furnished by the prosecution to the defense, shall not be used by the Defendant or the attorney for the Defendant for any purpose other than in direct relationship to this case. Without permission of the Court, defense counsel shall not photocopy the materials or provide them to any third party, except to make copies for use of the defense counsel in this case, an investigator, or expert witness. No further dissemination of discovery material shall be made, and under no circumstances shall such material be available to any employee of any attorney who was previously convicted of a felony but not restored to his or her civil rights. Any and all copies of discovery materials shall be returned to defense counsel at the completion of the case so that they can be destroyed by defense counsel. Defense counsel shall otherwise keep the items furnished in the possession of defense counsel, and the materials shall not be given to the Defendant or anyone else without the permission of the Court. Defense counsel may allow the Defendant to read the discovery materials, but only in the presence of defense counsel, the defense investigator, or a defense expert. It is further ORDERED that all discovery materials not previously destroyed shall be returned to attorneys for the United States of America immediately upon final disposition of the case. This text order entered as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 7/7/2021. (SF) (Entered: 07/07/2021)
07/13/2021	<u>51</u>	MOTION for Furlough by Ervin Yellow Robe. (Rumpca, A.) (Entered: 07/13/2021)
07/14/2021	<u>52</u>	ORDER granting <u>51</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 07/14/2021. (VMM) (Entered: 07/14/2021)
07/14/2021	<u>53</u>	ORDER FIXING HEARING ON MOTION as to Ervin Yellow Robe. Suppression Hearing set for 7/26/2021 at 01:15 PM in Pierre Courtroom 1 - Room 436 before US Magistrate Judge Mark A. Moreno. Signed by US Magistrate Judge Mark A. Moreno on 7/14/2021. (SF) Modified on 7/22/2021 (SF). (Entered: 07/14/2021)
07/20/2021	<u>54</u>	MOTION to Extend as to <u>34</u> Response, by Ervin Yellow Robe. (Rumpca, A.) (Entered: 07/20/2021)

07/21/2021	<u>55</u>	ORDER granting <u>54</u> Motion to Extend as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 7/21/2021. (SF) (Entered: 07/21/2021)
07/21/2021	<u>56</u>	REPLY by Ervin Yellow Robe to <u>31</u> MOTION to Suppress filed by Ervin Yellow Robe (Rumpca, A.) (Entered: 07/21/2021)
07/26/2021	<u>57</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Motion Hearing as to Ervin Yellow Robe held on 7/26/2021 re <u>31</u> MOTION to Suppress filed by Ervin Yellow Robe.. (Court Reporter: Cheryl Hook) (SF) (Entered: 07/26/2021)
07/26/2021	<u>58</u>	ORAL MOTION for temporary furlough by Ervin Yellow Robe. (SF) Modified to change event type on 7/26/2021 (VMM). (Entered: 07/26/2021)
07/26/2021	<u>59</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Motion Hearing as to Ervin Yellow Robe held on 7/26/2021 re <u>58</u> ORAL MOTION for temporary furlough filed by Ervin Yellow Robe.. (Court Reporter: FTR) (SF) (Entered: 07/26/2021)
07/26/2021	<u>60</u>	ORDER granting <u>58</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 07/26/2021. (VMM) (Entered: 07/26/2021)
07/26/2021	<u>61</u>	EXHIBIT LIST as to Ervin Yellow Robe re <u>57</u> Motion Hearing held on 7/26/21 before US Magistrate Judge Mark A. Moreno. (SKK) (Entered: 07/26/2021)
07/26/2021	<u>62</u>	EXHIBITS offered by USA as to Ervin Yellow Robe during <u>57</u> Motion Hearing on 7/26/21 before US Magistrate Judge Mark A. Moreno. The offering party must review its attached exhibits to determine if redactions are required. If redactions are required, the offering party must electronically file its documentary exhibits offered and/or received into evidence during the trial or evidentiary hearing, including ALL redacted documents and ALL documents that do not require redaction, within 21 days using the Redacted Trial/Hearing Exhibits event. This requirement excludes exhibits that were sealed when offered and/or received. If no redactions are necessary, the attached exhibits will be unrestricted in 21 days on 8/17/2021. (SKK) (Main Document 62 replaced on 7/29/2021 to delete extra pages attached to exhibit 1a per chambers) (SAC). Modified on 9/8/2021 to remove restriction (SAC). (Entered: 07/26/2021)
07/27/2021	<u>63</u>	PLEA AGREEMENT signed by Ervin Yellow Robe. (Rumpca, A.) (Entered: 07/27/2021)
07/27/2021	<u>64</u>	STATEMENT of Factual Basis as to Ervin Yellow Robe. (Rumpca, A.) (Entered: 07/27/2021)
07/27/2021	<u>65</u>	SEALED PLEA AGREEMENT SUPPLEMENT signed by Ervin Yellow Robe. The filing attorney MUST manually serve an exact copy of this document and a copy of the NEF receipt screen on the appropriate case participants. (Rumpca, A.) (Entered: 07/27/2021)
07/27/2021	<u>66</u>	MOTION for Reconsideration of Release by Ervin Yellow Robe. (Rumpca, A.) (Entered: 07/27/2021)
07/27/2021		Set/Reset Hearings as to Ervin Yellow Robe: Change of Plea Hearing set for 7/29/2021 at 11:00 AM in Pierre Courtroom 1 - Room 436 before US Magistrate Judge Mark A. Moreno. (SF) (Entered: 07/27/2021)
07/27/2021		Terminate Deadlines and Hearings as to Ervin Yellow Robe. (LH) (Entered: 07/27/2021)
07/29/2021	<u>67</u>	Second Addendum re <u>5</u> Final Bail Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Novak, Carol) (Entered: 07/29/2021)

07/29/2021	<u>68</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Change of Plea Hearing as to Ervin Yellow Robe held on 7/29/2021. Plea Entered: GUILTY Counts: 2. (Court Reporter: Connie Heckenlaible) (SF) (Entered: 07/29/2021)
07/29/2021	<u>69</u>	REPORT AND RECOMMENDATIONS on Defendant's Change of Plea as to Ervin Yellow Robe Signed by US Magistrate Judge Mark A. Moreno on 07/29/2021. (VMM) (Entered: 07/29/2021)
07/29/2021	<u>70</u>	CONSENT signed by Ervin Yellow Robe. (VMM) (Entered: 07/29/2021)
07/30/2021	<u>71</u>	ORDER adopting <u>69</u> Report and Recommendations on Plea of Guilty as to Ervin Yellow Robe (1) Sentencing set for 10/5/2021 at 10:00 AM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Draft PSR due by 8/24/2021. Objections to draft PSR due by 9/7/2021. Final PSR due by 9/21/2021.. Signed by Chief Judge Roberto A. Lange on 07/30/2021. (VMM) Modified on 7/30/2021 (VMM). (Main Document 71 replaced on 8/2/2021) (VMM). (Entered: 07/30/2021)
08/03/2021	<u>72</u>	ORDER Setting Conditions of Release as to Ervin Yellow Robe Signed by US Magistrate Judge Mark A. Moreno on 08/03/2021. (Attachments: # <u>1</u> No Contact List) (VMM) (Entered: 08/03/2021)
08/13/2021	<u>73</u>	(FILED IN ERROR) SEALED Victim Impact Statement as to Ervin Yellow Robe. The filing attorney MUST manually serve an exact copy of this document and a copy of the NEF receipt screen on the appropriate case participants. (Morley, Troy) Modified on 8/18/2021 (SAC). (Entered: 08/13/2021)
08/13/2021	<u>74</u>	SEALED Victim Impact Statement as to Ervin Yellow Robe. The filing attorney MUST manually serve an exact copy of this document and a copy of the NEF receipt screen on the appropriate case participants. (Morley, Troy) (Entered: 08/13/2021)
08/24/2021	<u>75</u>	DRAFT Presentence Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. Objections to draft PSR due by 9/7/2021. (Novak, Carol) (Entered: 08/24/2021)
09/03/2021	<u>76</u>	SEALED OBJECTIONS by Defendant re <u>75</u> DRAFT Presentence Report as to Ervin Yellow Robe. The filing attorney MUST manually serve an exact copy of this document and a copy of the NEF receipt screen on the appropriate case participants. (Rumpca, A.) (Entered: 09/03/2021)
09/07/2021		USA has No Objections re <u>75</u> DRAFT Presentence Report as to Ervin Yellow Robe. (Morley, Troy) (Entered: 09/07/2021)
09/08/2021		Notice of Unrestricting <u>62</u> Restricted Trial/Hearing Exhibits offered by USA as to Ervin Yellow Robe. (SAC) (Entered: 09/08/2021)
09/21/2021	<u>77</u>	FINAL PRESENTENCE REPORT as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Novak, Carol) (Entered: 09/21/2021)
09/21/2021	<u>78</u>	ADDENDUM to <u>77</u> FINAL Presentence Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Novak, Carol) (Entered: 09/21/2021)
09/21/2021	<u>79</u>	Recommended Special Conditions as to Ervin Yellow Robe. (Novak, Carol) (Entered: 09/21/2021)
09/21/2021	<u>80</u>	AMENDED ADDENDUM to <u>77</u> FINAL Presentence Report as to Ervin Yellow Robe. In a multi-defendant case, access to this document is restricted to counsel of record for the defendant and government counsel. (Novak, Carol) (Entered: 09/21/2021)

10/01/2021	<u>81</u>	SEALED LETTER of Support as to Ervin Yellow Robe. The filing attorney MUST manually serve an exact copy of this document and a copy of the NEF receipt screen on the appropriate case participants. (Rumpca, A.) (Entered: 10/01/2021)
10/05/2021	<u>83</u>	Minute Entry for proceedings held before Chief Judge Roberto A. Lange: Status Conference as to Ervin Yellow Robe held on 10/5/2021. (Court Reporter: Connie Heckenlaible) (DLC) (Entered: 10/05/2021)
10/13/2021	<u>86</u>	MOTION for Subpoena(s) by Ervin Yellow Robe. (Rumpca, A.) (Entered: 10/13/2021)
10/14/2021	<u>87</u>	ORDER granting <u>86</u> Motion for Subpoena(s) as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 10/14/2021. (SF) (Entered: 10/14/2021)
10/15/2021	<u>88</u>	AMENDED ORDER GRANTING MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM as to Ervin Yellow Robe Signed by US Magistrate Judge Mark A. Moreno on 10/15/2021. (SAC) (Entered: 10/15/2021)
10/15/2021	<u>89</u>	Subpoena Duces Tecum Issued for SD Department of Corrections. (cc: USMS) (SAC) (Entered: 10/15/2021)
11/04/2021	<u>90</u>	Application for Writ of Habeas Corpus ad Prosequendum by USA as to Ervin Yellow Robe. (Attachments: # <u>1</u> Proposed Order)(Morley, Troy) (Entered: 11/04/2021)
11/04/2021	<u>91</u>	ORDER granting <u>90</u> Application for Writ of Habeas Corpus ad Prosequendum and WRIT ISSUED as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 11/4/2021. (SLT) (Entered: 11/04/2021)
11/12/2021	<u>92</u>	ORDER RESCHEDULING SENTENCING HEARING as to Ervin Yellow Robe. Sentencing set for 11/29/2021 at 01:00 PM in Pierre Courtroom 1 - Room 436 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 11/10/2021. (SLT) (Entered: 11/12/2021)
11/16/2021	<u>93</u>	Writ of Habeas Corpus ad Prosequendum as to Ervin Yellow Robe Returned Unexecuted. (SLT) (Entered: 11/16/2021)
11/16/2021	<u>94</u>	Warrant Returned Executed on 11/10/2021 in case as to Ervin Yellow Robe. (SLT) (Entered: 11/16/2021)
11/29/2021	<u>96</u>	Minute Entry for proceedings held before Chief Judge Roberto A. Lange: Sentencing held on 11/29/2021 for Ervin Yellow Robe (1), Count(s) 1, Dismissed; Count(s) 2, 32 months imprisonment; 3 years supervised release; \$100.00 special assessment. (Court Reporter: Cheryl Hook) (DLC) (Main Document 96 replaced on 11/29/2021) (DLC). (Entered: 11/29/2021)
11/29/2021	<u>97</u>	JUDGMENT AND COMMITMENT as to Ervin Yellow Robe (1), Count(s) 1, Dismissed; Count(s) 2, 32 months imprisonment; 3 years supervised release; \$100.00 special assessment Signed by Chief Judge Roberto A. Lange on 11/29/2021. (Attachments: # <u>1</u> Statement of Reasons) (SLT) (Entered: 11/29/2021)
01/20/2022	<u>98</u>	CJA 20 as to Ervin Yellow Robe: Authorization to Pay Anselem Jason Rumpca. Amount: \$7,963.06, Voucher #0869.1306055. Signed by Chief Judge Roberto A. Lange. (KG) (Entered: 01/20/2022)
07/21/2022	<u>99</u>	TEXT ORDER for Return of Physical Exhibit Number 1 submitted on behalf of Government during <u>59</u> Motion Hearing held on 7/26/21. This exhibit must be retained consistent with D.S.D. Crim. LR 57.3. Signed by Chief Judge Roberto A. Lange on 7/21/22. (SKK) (Entered: 07/21/2022)
07/21/2022	<u>100</u>	RECEIPT for Return of Physical Exhibits. Exhibits 1 admitted during <u>59</u> Motion Hearing on behalf of USA have been returned to Attorney Troy R. Morley. (SLT) (Entered: 07/21/2022)

		07/21/2022)
12/15/2023	<u>107</u>	PETITION to Revoke SUPERVISED RELEASE and, REQUEST for WARRANT as to Ervin Yellow Robe. (Attachments: # <u>1</u> Proposed Warrant) (slb) Modified on 12/22/2023 (SLT). (Entered: 12/15/2023)
12/19/2023	<u>110</u>	Notice of Withdrawal and Substitution of Attorney as to USA. Attorney Wayne A. Venhuizen added. Attorney Troy R. Morley terminated. (Venhuizen, Wayne) Modified on 4/1/2024 to remove restriction (SKK). (Entered: 12/19/2023)
12/20/2023		Attorney update in case as to Ervin Yellow Robe. Attorney Randall B. Turner for Ervin Yellow Robe added. Attorney A. Jason Rumpca terminated., Set/Reset Hearings as to Ervin Yellow Robe:(Initial Appearance on Revocation Proceedings set for 12/20/2023 at 01:45 PM in Pierre Courtroom 1 before US Magistrate Judge Mark A. Moreno.) (SF) (Entered: 12/20/2023)
12/20/2023	<u>111</u>	NOTICE OF ATTORNEY APPEARANCE: Randall B. Turner appearing for Ervin Yellow Robe. (Turner, Randall) (Entered: 12/20/2023)
12/20/2023	<u>112</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Initial Appearance re Revocation of supervised release as to Ervin Yellow Robe held on 12/20/2023 (Court Reporter: FTR) (SF) (Entered: 12/20/2023)
12/20/2023	<u>113</u>	TEXT ORDER FOR REVOCATION DISCOVERY. The Court Orders the Probation Office to simultaneously provide any discovery it has in its possession relating to the alleged violation(s) in the revocation petition to counsel for both parties as to Ervin Yellow Robe. Signed by US Magistrate Judge Mark A. Moreno on 12/20/2023. (SF) (Entered: 12/20/2023)
12/20/2023	<u>114</u>	CJA 23 Financial Affidavit signed by Ervin Yellow Robe. (SF) (Entered: 01/03/2024)
12/20/2023	<u>115</u>	TEXT ORDER Appointing Federal Public Defender as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 12/20/2023. (SF) (Entered: 01/03/2024)
01/05/2024	<u>116</u>	Unopposed MOTION for Furlough by Ervin Yellow Robe. (Turner, Randall) (Entered: 01/05/2024)
01/08/2024	<u>117</u>	ORDER granting <u>116</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 1/8/2024. (SF) (Entered: 01/08/2024)
01/10/2024	<u>118</u>	Warrant Returned Executed on 12/19/2023 in case as to Ervin Yellow Robe. (SAC) (Entered: 01/10/2024)
01/11/2024		Set/Reset Hearings as to Ervin Yellow Robe: Preliminary Hearing set for 1/18/2024 at 01:15 PM in Pierre Bankruptcy Courtroom before US Magistrate Judge Mark A. Moreno. (SF) (Entered: 01/11/2024)
01/12/2024	<u>119</u>	First AMENDED Petition to Revoke SUPERVISED RELEASE as to Ervin Yellow Robe. The Defendant is in federal custody or was served a summons. (mls) (Entered: 01/12/2024)
01/16/2024		Set/Reset Hearings as to Ervin Yellow Robe: Initial Appearance on Revocation Proceedings set for 1/18/2024 at 01:15 PM in Pierre Bankruptcy Courtroom before US Magistrate Judge Mark A. Moreno. (SF) (Entered: 01/16/2024)
01/17/2024		Set/Reset Hearings as to Ervin Yellow Robe: Revocation Hearing set for 1/18/2024 at 01:15 PM in Pierre Bankruptcy Courtroom before US Magistrate Judge Mark A. Moreno. (SF) (Entered: 01/17/2024)

01/17/2024	<u>120</u>	SEALED Document as to Ervin Yellow Robe. (pursuant to Chambers) (ARW) (Entered: 01/17/2024)
01/17/2024	<u>121</u>	Unopposed MOTION for Release from Custody <i>to Attend Treatment</i> by Ervin Yellow Robe. (Turner, Randall) (Entered: 01/17/2024)
01/18/2024	<u>122</u>	Minute Entry for proceedings held before US Magistrate Judge Mark A. Moreno: Revocation Hearing as to Ervin Yellow Robe held on 1/18/2024, Detention Hearing as to Ervin Yellow Robe held on 1/18/2024, Initial Appearance re Revocation of supervised release as to Ervin Yellow Robe held on 1/18/2024 (Court Reporter: FTR) (SF) (Entered: 01/18/2024)
01/18/2024	<u>123</u>	REPORT AND RECOMMENDATIONS on Admission(s) to Revocation Petition re <u>119</u> Amended Petition to Revoke as to Ervin Yellow Robe. Signed by US Magistrate Judge Mark A. Moreno on 1/18/2024. (SF) (Entered: 01/18/2024)
01/19/2024	<u>124</u>	REVOCATION SENTENCING SCHEDULING ORDER terminating <u>123</u> Report and Recommendations on Admission(s) to Petition to Revoke as to Ervin Yellow Robe (1). Final Hearing re Revocation of Supervised Release set for 2/12/2024 at 11:00 AM in Pierre Courtroom 1 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 1/19/24. (SKK) (Entered: 01/19/2024)
01/19/2024	<u>125</u>	ORDER AUTHORIZING RELEASE FOR SUBSTANCE ABUSE TREATMENT (IRECOVER) granting <u>121</u> Motion for Release from Custody as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 1/18/2024. (ARW) (Entered: 01/19/2024)
01/23/2024	<u>126</u>	MOTION to Continue <i>Sentencing</i> by Ervin Yellow Robe. (Turner, Randall) (Entered: 01/23/2024)
01/24/2024	<u>127</u>	ORDER granting <u>126</u> Motion to Continue as to Ervin Yellow Robe (1). Final Hearing re Revocation of Supervised Release set for 4/1/2024 at 01:00 PM in Pierre Courtroom 1 before Chief Judge Roberto A. Lange. Signed by Chief Judge Roberto A. Lange on 1/24/2024. (SAC) (Entered: 01/24/2024)
02/14/2024	<u>128</u>	Unopposed MOTION for Furlough <i>to Attend Hearing</i> by Ervin Yellow Robe. (Attachments: # <u>1</u> Attachment Notice of Hearing) (Turner, Randall) (Entered: 02/14/2024)
02/15/2024	<u>129</u>	ORDER granting <u>128</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 2/15/24. (SF) (Entered: 02/15/2024)
02/21/2024	<u>130</u>	Unopposed MOTION to Amend/Correct <u>129</u> Order on Motion for Furlough by Ervin Yellow Robe. (Turner, Randall) (Entered: 02/21/2024)
02/22/2024	<u>131</u>	ORDER granting <u>130</u> Motion to Amend/Correct as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 2/22/2024. (SF) (Entered: 02/22/2024)
03/20/2024	<u>132</u>	MOTION for Furlough by Ervin Yellow Robe. (Turner, Randall) (Entered: 03/20/2024)
03/20/2024	<u>133</u>	ORDER denying <u>132</u> Motion for Furlough as to Ervin Yellow Robe (1). Signed by US Magistrate Judge Mark A. Moreno on 3/20/2024. (SF) (Entered: 03/20/2024)
04/01/2024	<u>134</u>	Minute Entry for proceedings held before Chief Judge Roberto A. Lange: Final Hearing re Revocation of Supervised Release as to Ervin Yellow Robe. The Court grants the <u>119</u> Amended Petition to Revoke. Defendant Sentenced to 3 months custody; 30 months supervised release under the same terms and conditions previously imposed with additional conditions. (Court Reporter: Cheryl Hook) (SKK) (Entered: 04/01/2024)

04/01/2024	<u>135</u>	EXHIBIT LIST as to Ervin Yellow Robe re <u>134</u> Supervised Release - Final Revocation Hrg held on 4/1/24 before Chief Judge Roberto A. Lange. (SKK) (Entered: 04/01/2024)
04/01/2024	<u>136</u>	RESTRICTED EXHIBITS offered by Ervin Yellow Robe as to Ervin Yellow Robe during <u>134</u> Supervised Release - Final Revocation Hrg on 4/1/24 before Chief Judge Roberto A. Lange. RETURNED original exhibits to counsel via Interoffice Mailbox. (SKK) The offering party must review its attached exhibits to determine if redactions are required. If redactions are required, the offering party must electronically file its documentary exhibits offered and/or received into evidence during the trial or evidentiary hearing, including ALL redacted documents and ALL documents that do not require redaction, within 21 days using the Redacted Trial/Hearing Exhibits event. This requirement excludes exhibits that were sealed when offered and/or received. If no redactions are necessary, the attached exhibits will be unrestricted in 21 days on 4/23/2024. (Entered: 04/01/2024)
04/02/2024	<u>137</u>	REDACTED Exhibits by Ervin Yellow Robe as to Ervin Yellow Robe. Redacted version of previously filed document <u>136</u> Restricted Trial/Hearing Exhibits,,, All of the trial/hearing exhibits offered by this party are attached. Those requiring redaction have been redacted by counsel. (Turner, Randall) (Entered: 04/02/2024)
04/03/2024	<u>138</u>	JUDGMENT ON REVOCATION of Supervised Release as to Ervin Yellow Robe Signed by Chief Judge Roberto A. Lange on 4/3/2024. (SAC) (Entered: 04/03/2024)

PACER Service Center			
Transaction Receipt			
05/28/2025 07:28:42			
PACER Login:	peteheidpriem	Client Code:	Yellowrobe
Description:	Docket Report	Search Criteria:	3:20-cr-30129-RAL
Billable Pages:	11	Cost:	1.10
Exempt flag:	Not Exempt	Exempt reason:	Not Exempt

UNITED STATES DISTRICT COURT

District Of South Dakota, Central Division

UNITED STATES OF AMERICA

v.

Ervin Yellow Robe

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:20CR30129-1

USM Number: 28155-509

A. Jason Rumpca

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 of the indictment.

☐ pleaded nolo contendere to count(s)
which was accepted by the Court.

☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 1153 and 113(a)(7)	Assault Resulting in Substantial Bodily Injury to an Intimate Partner	03/01/2020	2

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 1 of the indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States attorney of material changes in economic circumstances.

11/29/2021

Date of Imposition of Judgment



Signature of Judge

Roberto A. Lange, Chief Judge

Name and Title of Judge

November 29, 2021

Date

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

IMPRISONMENT

- ☒ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 32 months.
- ☒ The Court makes the following recommendations to the Bureau of Prisons:
The defendant's history of substance abuse indicates he would be an excellent candidate for the Bureau of Prisons' substance abuse treatment program. It is recommended the defendant be allowed to participate in that program.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state, local, or tribal crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
 - ☐ The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. ☒ You must participate in an approved program for domestic violence. *(Check, if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other state authorizing a sentence of restitution. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this Court as well as with any other conditions on the attached page.

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at reasonable times, at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3B - Conditions of Supervision

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must not enter onto the premises, travel past, or loiter near where the victim, Rita Miller, resides and must have no correspondence, telephone contact, or communication with the victim personally or through a third party.
2. You must participate in the District of South Dakota's community coach/mentoring program as directed by the probation office.
3. You must participate in cognitive behavioral training programs as directed by the probation office, including a domestic violence intervention program. You must enter into and comply with the Behavior Agreement for Relations with Intimate Partner as adopted in the District of South Dakota.
4. You must participate in a program approved by and at the direction of the probation office for the treatment of substance abuse.
5. You must not consume any alcoholic beverages or intoxicants. Furthermore, you must not frequent establishments whose primary business is the sale of alcoholic beverages.
6. You must submit a sample of your blood, breath, or bodily fluids at the discretion or upon the request of the probation office.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments set below.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100	None requested	Waived	Not applicable	Not applicable

☐ The determination of restitution is deferred until ____.
An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ You must make restitution (including community restitution) to the following payees in the amount listed below.

If you make a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

- ☐ Restitution amount ordered pursuant to Plea Agreement: \$ _____
- ☐ You must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The Court determined that you do not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, & Andy Child Pornography Assistance Act of 2018, Pub. L. 115-299.

**Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

***Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SCHEDULE OF PAYMENTS

Having assessed your ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payment of \$100 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____, to commence _____ (e.g., 30 or 60 days) after the date of this Judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____, to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment of the total restitution and other criminal monetary penalties shall be due in regular quarterly installments of 50% of the deposits in your inmate trust account while you are in custody, or 10% of your inmate trust account while serving custody at a Residential Reentry Center. Any portion of the monetary obligation(s) not paid in full prior to your release from custody shall be due in monthly installments of \$ __, such payments to begin __ days following your release.
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, or electronically at Pay.gov.

You shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several			
Case Number			
Defendant and Co-Defendant Names (including defendant number),	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

- ☐ You shall pay the cost of prosecution.
- ☐ You shall pay the following Court cost(s):
- ☐ You shall forfeit your interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

PROB 12C - SD
(SD 04/19)

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH DAKOTA**

Petition to Revoke Supervised Release

U.S.A. vs. Ervin Yellow Robe

Docket No.: **3:20CR30129-1**

Sentencing Judge: **The Honorable Roberto A. Lange**
Original Sentence:
Imprisonment: **32 months**
Supervised Release: **3 years**
Date of Original Sentence: **11/29/2021**
Original Offense: **Assault Resulting in Substantial Bodily Injury to an Intimate Partner**
Criminal History Category: **V**
Statutory Custody Maximum for Revocation: **2 years**
Date Supervision Commenced: **07/31/2023**

Petitioning the Court

The probation officer believes Mr. Ervin Yellow Robe has not complied with the following condition(s) of supervision:

1. On or about 08/02/2023, in the District of South Dakota, Ervin Yellow Robe did unlawfully use a controlled substance, that is, methamphetamine, in violation of Mandatory Condition No. 3 of the Conditions of Supervised Release. This behavior constitutes a Grade C violation.
2. On or about 09/27/2023 and 11/16/2023, in the District of South Dakota, Ervin Yellow Robe did unlawfully use a controlled substance, that is, methamphetamine, in violation of Mandatory Condition No. 3 of the Conditions of Supervised Release. This behavior constitutes a Grade C violation.
3. On or about 12/12/2023, in the District of South Dakota, Ervin Yellow Robe did consume alcoholic beverages, in violation of Special Condition No. 5 of the Conditions of Supervised Release. This behavior constitutes a Grade C violation.
4. On or about 12/12/2023, in the District of South Dakota, Ervin Yellow Robe engaged in conduct which constitutes a violation of tribal law, that is Domestic Violence, in violation of Mandatory Condition No. 1 of the Conditions of Supervised Release. This behavior constitutes a Grade C violation.

The probation officer recommends a warrant be issued for the arrest and return to Court of Mr. Ervin Yellow Robe for a hearing to determine whether his supervised release should be revoked.

Summary of Current Period of Supervision

Mr. Yellow Robe began supervised release on 07/31/2023 residing with his mother, Janice Howe in Big Bend Community on the Crow Creek Sioux Tribe Indian Reservation. During his supervised release orientation on 08/02/2023, he submitted a urine sample which tested positive for methamphetamine. He admitted ingesting methamphetamine the morning of his release from the Winner City Jail. He also admitted ingesting methamphetamine 3 to 4 times per month for 4 months while at the Winner City Jail. The probation office disapproved of his behavior and directed to obtain a substance abuse assessment; however, he failed to obtain an assessment as directed.

PROB 12C - SD
(SD 12/18)

On 08/15/2023 the probation office received notification Mr. Yellow Robe consumed alcohol, was assaulted, and left alongside the road. He was found and brought to the hospital where he received medical attention for his injuries. The probation office addressed the behavior and continued to supervise him in the community.

On 09/06/2023 the probation office received notice indicating Mr. Yellow Robe was intoxicated at his residence. On 09/07/2023 Mr. Yellow Robe met with the probation officer at his residence, as he entered the vehicle, alcohol was detected on his person. When questioned regarding his use of alcohol, he reported he had not consumed alcohol on this date. However, he and others consumed 6 half-gallon bottles of Vodka on 09/06/2023. Due to his use of alcohol, the contact was terminated.

On 09/21/2023 the probation office received confirmation indicating Mr. Yellow Robe consumed alcohol on 09/20/2023 after he had met with the probation office. On 10/05/2023 Mr. Yellow Robe admitted he ingested marijuana on 09/27/2023 and signed a Report of Substance Use. On 10/11/2023 Mr. Yellow Robe submitted a urinalysis test which tested positive for marijuana, which was considered residual use from 09/27/2023. Due to his use of marijuana, Mr. Yellow Robe committed to attend scheduled session with the probation office and follow up on his substance abuse assessment. He attended sessions with the probation office; however, he did not obtain a substance abuse assessment.

On 10/18/2023 Mr. Yellow Robe met with the probation office, during the meeting he admitted he consumed Tequilla 1800 the prior evening, and law enforcement were called to the residence as two family members were arguing at the residence. On 10/21/2023 Mr. Yellow Robe was arrested in Pierre, SD, for Public Intoxication. On 10/23/2023 the probation office spoke with Mr. Yellow Robe's mother who advised he had a substance abuse assessment scheduled with Indian Health Services on 11/14/2023. She advised he wanted to attend substance abuse treatment and indicated she would assist him in doing so.

On 10/31/2023 law enforcement responded to Mr. Yellow Robe's residence as he was reported to be drinking. When law enforcement arrived, Mr. Yellow Robe was observed laying on the ground, but got up and went inside the house. Law enforcement spoke with Mr. Yellow Robe's mother who advised he could remain at her residence.

On 11/16/2023 Mr. Yellow Robe submitted a urine sample which tested positive for marijuana. He admitted he ingested marijuana and signed a Report of Drug Use. The probation office disapproved of his behavior, and he committed to attend Moral Reconation Therapy. On 11/21/2023 Mr. Yellow Robe advised the probation office he was scheduled for a substance abuse assessment on 11/22/2023 at Capital Area Counseling in Pierre. It is not known if Mr. Yellow Robe attended his scheduled assessment.

On 12/12/2023 law enforcement responded to an alleged domestic assault during the early morning hours at the Janice Howe residence in the Big Bend Community. Upon arriving at the residence, Mr. Yellow Robe was intoxicated and is alleged to have assaulted Amber Touche who is also on supervised release. Ms. Touche was also intoxicated, and law enforcement was unable to gather a statement from her due to her level of intoxication. The probation office obtained a photograph of Ms. Touche's injuries. Ms. Touche received medical attention from Emergency Medical Services; however, was not taken to the hospital. Mr. Yellow Robe was not arrested at this time. However, law enforcement was dispatched to the Big Bend Community during the evening hours of 12/12/2023 due to a receiving a report of television sets being stolen. As part of the investigation, it was determined the television sets were not stolen. Law enforcement entered the residence of Erin Yellow Robe, Mr. Yellow Robe's sister. Law enforcement observed Mr. Yellow Robe sitting at a table with alcohol on it. Based on law enforcement's investigation, it was determined there was probable cause to arrest Mr. Yellow Robe for Domestic Assault. At the time of the arrest, Mr. Yellow Robe was intoxicated, and law enforcement observed Mr. Yellow Robe to have bruises and scrapes on his elbow and forearm.

Upon arrival at the Lower Brule Detention Center in Lower Brule, SD, Mr. Yellow Robe submitted a Preliminary Breath Test (PBT), which registered .128%.

The probation office received a photograph of the injuries Ms. Touche received and received a written statement from Ms. Touche outlining her version of the assault which has been provided to law enforcement.

I, Blayne Olson, a Probation and Pretrial Services Officer employed in the U.S. District Court for the District of South Dakota, solemnly affirm and declare, under penalty of perjury, that to the best of my information and belief, the facts set forth in this affidavit are true and correct.

PROB 12C - SD
(SD 12/18)

Respectfully submitted,

Blayne Olson

Blayne Olson
Senior U.S. Probation Officer
U.S. Probation & Pretrial Services Office
225 S. Pierre Street, Ste 318
Pierre, SD 57501
(605)945-4651
blayne_olson@sdp.uscourts.gov

Reviewed by:
Jamie Ayers
Assistant Deputy Chief

Date: 12/15/2023

AO 245D (Rev. 09/19) Judgment in a Criminal Case for Revocations
Sheet 1

UNITED STATES DISTRICT COURT

District Of South Dakota, Central Division

UNITED STATES OF AMERICA

v.

Ervin Yellow Robe

JUDGMENT IN A CRIMINAL CASE (For Revocation of Probation or Supervised Release)

Case Number: 3:20CR30129-1

USM Number: 28155-509

Randall B. Turner
Defendant's Attorney

THE DEFENDANT:

- ☒ admitted guilt to violation(s) # 2 and #3 of the Amended Petition to Revoke Supervised Release.
- ☐ was adjudicated guilty by the Court of violation(s) # of the after a denial of guilt.

The defendant is adjudicated guilty of these violation(s):

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
2	Did unlawfully use a controlled substance, that is, marijuana, in violation of Mandatory Condition No. 3 of the Conditions of Supervised Release.	11/16/2023
3	Did consume alcoholic beverages, in violation of Special Condition No. 5 of the Conditions of Supervised Release.	12/12/2023

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The alleged violation(s) # 1 and #4 of the Amended Petition to Revoke Supervised Release are dismissed.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States attorney of material changes in economic circumstances.

04/01/2024

Date of Imposition of Judgment


Signature of Judge

Roberto A. Lange, Chief Judge
Name and Title of Judge

April 3, 2024
Date

AO 245D (Rev. 09/19) Judgment in a Criminal Case for Revocations
Sheet 2 — Imprisonment

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

IMPRISONMENT

☒ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 3 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

AO 245D (Rev. 09/19) Judgment in a Criminal Case for Revocations
Sheet 3 - Supervised Release

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 30 months.

MANDATORY CONDITIONS

1. You must not commit another federal, state, local, or tribal crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
 - ☐ The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ■ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. ■ You must participate in an approved program for domestic violence. *(Check, if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this Court as well as with any other conditions on the attached page.

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at reasonable times, at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

AO 245D (Rev. 09/19) Judgment in a Criminal Case for Revocations
Sheet 3B - Conditions of Supervision

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must not enter onto the premises, travel past, or loiter near where the victim, Rita Miller, resides and must have no correspondence, telephone contact, or communication with the victim personally or through a third party.
2. You must participate in the District of South Dakota's community coach/mentoring program as directed by the probation office.
3. You must participate in cognitive behavioral training programs as directed by the probation office, including a domestic violence intervention program. You must enter into and comply with the Behavior Agreement for Relations with Intimate Partner as adopted in the District of South Dakota.
4. You must participate in a program approved by and at the direction of the probation office for treatment of substance abuse.
5. You must not consume any alcoholic beverages or intoxicants. Furthermore, you must not frequent establishments whose primary business is the sale of alcoholic beverages.
6. You must submit a sample of your blood, breath, or bodily fluids at the discretion or upon the request of the probation office.
7. You must not enter onto the premises, travel past, or loiter near where the victim, Amber Touche, resides and must have no correspondence, telephone contact, or communication with the victim personally or through a third party.
8. You must reside and comply with the rules of the Oxford House, Brookings, SD, or such other residential reentry center or sober living house to which you are directed, for a term of 4 months immediately upon release from custody.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245D (Rev. 09/19) Judgment in a Criminal Case for Revocations
Sheet 5 - Criminal Monetary Penalties

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments set below.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
ORIGINAL TOTALS	\$100	None requested	Waived	Not applicable	Not applicable
PRINCIPAL BALANCE DUE	\$50	None requested	Waived	Not applicable	Not applicable

- ☐ The determination of restitution is deferred until.
An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

- ☐ You must make restitution (including community restitution) to the following payees in the amount listed below.

If you make a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

- ☐ Restitution amount ordered pursuant to Plea Agreement \$ _____
- ☐ You must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The Court determined that you do not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, & Andy child Pornography Assistance Act of 2018, Pub. L. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Ervin Yellow Robe
CASE NUMBER: 3:20CR30129-1

SCHEDULE OF PAYMENTS

Having assessed your ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payment of \$ 50 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below); or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____, to commence _____ (e.g., 30 or 60 days) after the date of this Judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____, to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment of the total restitution and other criminal monetary penalties shall be due in regular quarterly installments of 50% of the deposits in the defendant's inmate trust account while the defendant is in custody, or 10% of the defendant's inmate trust account while serving custody at a Residential Reentry Center. Any portion of the monetary obligation(s) not paid in full prior to your release from custody shall be due in monthly installments of \$, such payments to begin _____ days following your release.
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, or electronically at Pay.gov.

You shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- | Case Numbers
Defendant and Co-Defendant Names
(including defendant number), | Total Amount | Joint and Several
Amount | Corresponding Payee,
if appropriate |
|---|--------------|-----------------------------|--|
| | | | |
- ☐ You shall pay the cost of prosecution.
- ☐ You shall pay the following Court cost(s):
- ☐ You shall forfeit your interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ERVIN K. YELLOWROBE,

Defendant and Appellant.

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

THE HONORABLE CHRISTINA KLINGER
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Jacob R. Dempsey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
Telephone: (605) 773-3215
Email: atgscrvice@statc.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Pete Heidepriem
Heidepriem, Purtell, Siegel, & Hinrichs
LLP
101 West 69th Street, Suite 105
Sioux Falls, SD 57108
Telephone: (605) 679-4470
Email: pete@hpslawfirm.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed February 19, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ERVIN K. YELLOWROBE

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Ervin K. Yellowrobe, is called “Yellowrobe.” Plaintiff and Appellee, the State of South Dakota, is called “State.” References to documents are as follows:

Hughes County Criminal File Number 24-262 SR
November 5, 2024, Status HearingStatus
November 12, 2024, Change of Plea Hearing.....CPH
January 28, 2025, Sentencing Hearing.....Sentencing
Yellowrobe’s Appellant Brief..... YB

All document designations are followed by the appropriate page numbers.

JURISDICTIONAL STATEMENT

The Honorable Christina Klinger, Hughes County Circuit Court Judge, filed a Judgment of Conviction on January 30, 2025. SR:176-77. Yellowrobe filed a Notice of Appeal on February 19, 2025. SR:179. This Court has jurisdiction to hear the appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT'S CONSECUTIVE PRISON SENTENCE WAS LEGAL?

The circuit sentenced Yellowrobe to a consecutive prison sentence.

SDCL 22-6-6.1

18 USCA 3583

Johnson v. United States, 529 U.S. 694 (2000)

Esteras v. United States, No. 23-7483, 2025 WL 1716137 (U.S. June 20, 2025)

State v. McMillen, 2019 S.D. 40, 931 N.W.2d 725

State v. Red Kettle, 452 N.W.2d 774 (S.D. 1990)

STATEMENT OF THE CASE

A grand jury indicted Yellowrobe in July 2024 for one Count of Attempted Robbery First Degree, violating SDCL 22-30-1, 22-30-6, 22-30-7, and 22-4-1. SR:17. The State filed a Part II Information alleging prior felony convictions for Second Degree Arson, Third Degree Burglary, and Assault. SR:19. Yellowrobe accepted a plea agreement in November 2024 where he pled guilty to Attempted Robbery First Degree in

exchange for the State dismissing the Part II Information and recommending a sentence no longer than seven-and-a-half years. CPH:5. The circuit court sentenced Yellowrobe in January 2025 to seven years imprisonment with two years suspended. SR:176-77.

At the time the circuit court entered its Judgment of Conviction, Yellowrobe had a federal Judgment in a Criminal Case from November 2021, and the sentence for that offense was unfinished. SR:277-79, 287-89. The sentence in that federal matter could be modified following a state criminal conviction. Sentencing:4. The circuit court therefore specified in the Judgment of Conviction that Yellowrobe's state sentence was to run consecutively to his "current Federal sentence." SR:176-77.

STATEMENT OF THE FACTS

Yellowrobe entered Happy Jack's Casino in Pierre in June 2024. SR:2; CPH:10. He approached the casino teller, T.E., at the bar area where the tills were located. SR:2; CPH:10. Yellowrobe demanded she put all the casino money in a bag. SR:2; CPH:10. T.E. refused, so Yellowrobe put his hand inside his sweatshirt. SR:2; CPH:10. Yellowrobe pointed something at T.E. from underneath his sweatshirt. SR:2; CPH:10. T.E. feared it might have been a firearm. SR:2; CPH:10. Yellowrobe again commanded T.E. to put the money in a bag, but T.E. refused and activated an alarm. SR:2; CPH:10. Yellowrobe ran out of the building. SR:2; CPH:10.

Law enforcement arrived at Happy Jack's a short time after Yellowrobe left. SR:2; CPH:9. T.E. described the attempted robbery and Yellowrobe—a tall Native American male with a large build wearing a white baseball hat, black hooded sweatshirt, blue jeans, and white tennis shoes with red trim. SR:2; CPH:10. Law enforcement canvassed the area but did not find Yellowrobe. SR:2.

Two days later, police obtained security camera footage from a bar located next to Happy Jack's, which depicted a white Buick Lucerne driving through a nearby alleyway shortly before the robbery attempt. SR:2. The next day, police obtained security footage from Happy Jack's that showed the Buick drive by the premises and park on a nearby street. SR:2. Yellowrobe is portrayed exiting the vehicle and walking into the casino. SR:2. The security footage then depicted Yellowrobe's robbery attempt. SR:2. After the robbery failed, the footage showed Yellowrobe exit the building and drive off in the Buick. SR:2.

Law enforcement was familiar with Yellowrobe's Buick from an interaction with him the week prior. SR:2. Body camera footage from that interaction depicted Yellowrobe and showed he had a similar height and build to the suspect in the casino footage, and he wore the same shoes. SR:2. T.E. identified a picture of Yellowrobe as the perpetrator in a photograph lineup. SR:2; CPH:10. Law enforcement located and arrested Yellowrobe and charged him with Aggravated Assault and Robbery in the First Degree. SR:2.

At the time of Yellowrobe's robbery attempt in June 2024, he had a November 2021 federal conviction for assault. SR:277-79. For that federal conviction, Yellowrobe had been sentenced to a thirty-two-month term of federal imprisonment to be followed by supervised release for three years. SR:277-79. In April 2024—two months prior to his robbery attempt—Yellowrobe had a Judgment for Revocation of Supervised Release entered against him for methamphetamine and alcohol use that occurred in November and December 2023. SR:284-89. This Judgment for Revocation modified his federal sentence by giving him three more months in federal prison and supervised release for thirty months upon release. SR:287-89.

In this state matter, the parties informed the circuit court at a November 2024 status hearing that they reached a plea agreement. Status:2. The State also notified the circuit court Yellowrobe was on federal supervision. Status:3. Yellowrobe relayed that the federal probation officials could not tell him what kind of federal sentence modification would occur after a state Attempted Robbery conviction. Status:3. The circuit court replied that more information on the federal matters "would be much appreciated," and "that will determine if we sentence that day or not." Status:3. At the change of plea hearing a week later, Yellowrobe did not provide any additional information or documentation on his federal situation. CPH:5.

At sentencing, Yellowrobe again did not provide more information, but acknowledged that he “is also on federal probation[.]” Sentencing:4. Yellowrobe asked the circuit court for a suspended sentence so he could “be returned to the federal system where he has a federal hold.” Sentencing:4. Thus, Yellowrobe attempted to use the lack of information he provided on his federal situation to convince the circuit court to give him a suspended sentence. Sentencing:4. The circuit court did not grant his request for a suspended sentence, instead sentencing him to a term in prison consecutive to his “current Federal sentence.” Sentencing:11; SR:176-77.

ARGUMENTS

THE CIRCUIT COURT’S CONSECUTIVE PRISON SENTENCE WAS LEGAL.

A. Standard of Review.

Because Yellowrobe never objected to his sentence being consecutive, he forfeits this issue on appeal. *State v. Carter*, 2023 S.D. 67, ¶¶ 49-50, 1 N.W.3d 674, 691-92. All the same, this Court has evaluated unpreserved issues before. *E.g. State v. Robertson*, 2023 S.D. 19, ¶ 18, 990 N.W.2d 96, 101. “When an issue is not preserved for appeal, this Court is limited to review for plain error.” *Id.* This Court invokes its discretion under the plain error rule “cautiously and only in ‘exceptional circumstances.’” *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729-30 (quoting *State*

v. Bariteau, 2016 S.D. 57, ¶ 23, 884 N.W.2d 169, 173); *see also State v. Christians*, 381 N.W.2d 214, 217 (S.D. 1986) (declining to apply plain error doctrine to a lower court's sentencing because the failure to object before appeal deprived the lower court the opportunity to correct the sentence).

If this Court applies plain error analysis, "appellant must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30 (quoting *State v. Bausch*, 2017 S.D. 1, ¶ 27, 889 N.W.2d 404, 412). "[W]ith plain error analysis, the defendant bears the burden of showing the error was prejudicial." *Id.* ¶ 13, 931 N.W.2d at 730.

B. No Error Occurred.

The circuit court's authority to sentence Yellowrobe consecutively arose from SDCL 22-6-6.1. "[T]he starting point when interpreting a statute must always be the language itself." *State v. Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d 212, 217 (quoting *State v. Bryant*, 2020 S.D. 49, ¶ 20, 948 N.W.2d 333, 338). "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." *Id.* (quoting *State v. Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d 9, 13). "In conducting statutory interpretation, we give

words their plain meaning and effect, and read statutes as a whole.” *Id.* (quoting *State v. Thoman*, 2021 S.D. 10, ¶ 17, 955 N.W.2d 759, 767).

SDCL 22-6-6.1 provides: “if a defendant is *convicted of two or more offenses*, regardless of when the offenses were committed or when the judgment or sentence is entered, *the judgment or sentence may be that the imprisonment* on any of the offenses or convictions *may run concurrently or consecutively* at the discretion of the court.” (emphasis added). Thus, the legality of the circuit court’s sentence depends on whether: 1) Yellowrobe had two convictions; and 2) the circuit court’s sentence was consecutive to the federal sentence. *Id.*

i. Yellowrobe Had Two Convictions.

SDCL 22-6-6.1 requires a defendant to be “convicted of two or more offenses” for a circuit court to issue a consecutive sentence. The plain language of SDCL 22-6-6.1 does not prohibit a circuit court from issuing a state sentence consecutively to a preexisting federal sentence. *See Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217. In fact, this Court has held that state sentences may be consecutive to federal sentences provided they are for different offenses. *State v. Red Kettle*, 452 N.W.2d 774, 775 (S.D. 1990); *see also State v. Red Kettle*, 2018 S.D. 66, ¶ 3, 918 N.W.2d 393, 394.

The United States District Court for the District of South Dakota entered a Judgment in a Criminal Case against Yellowrobe in November 2021. SR:277-79. That Judgment specified that Yellowrobe pled guilty

to Assault Resulting in Substantial Bodily Injury to an Intimate Partner, violating criminal statutes 18 USCA 1153 and 113(a)(7). SR:277-79. The federal judgment therefore convicted Yellowrobe of a crime. SR:277-79. The circuit court's January 2025 Judgment of Conviction specified that Yellowrobe "is guilty of Attempted Robbery First Degree[.]" SR:176-77. That state judgment is Yellowrobe's second conviction. SR:176-77. The requirement that Yellowrobe be "convicted of two or more offenses" was met. SDCL 22-6-6,1.

Yellowrobe contends his November 2021 federal Judgment cannot be considered an applicable conviction because he had finished his prison term and was serving a sentence of supervised release when the circuit court entered the state Judgment in January 2025. YB:11-12. But this argument ignores that his supervised release was part of the sentence arising from the original criminal conviction. YB:11-12. The same federal Judgment that convicted Yellowrobe of a crime sentenced him to a thirty-two-month prison term and specified it would be followed by three years of supervised release. SR:277-79. The federal statute permitting the District Court to place Yellowrobe on supervised release, 18 USCA 3583, provides "the court, in imposing a sentence to a term of imprisonment *for a felony or misdemeanor* . . . shall include *as a part of the sentence* a requirement that the defendant be placed on a term of supervised release[.]" (emphasis added). Therefore, the fact that Yellowrobe was on supervised release does not somehow vacate his

underlying criminal conviction—it proves he had a criminal conviction to begin with. *Id.*; see *Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217.

Yellowrobe also argues that because his federal sentence may be modified due to his state conviction, the circuit court's sentence is consecutive to a hypothetical future criminal conviction and sentence. YB:12-14. But the circuit court specified that its sentence was consecutive to Yellowrobe's "current Federal sentence," not something future or hypothetical. SR:176-77. Further, Yellowrobe's argument conflates a sentencing tool—the revocation of supervised release—with the original criminal conviction giving rise to the sentence. YB:12-14. The statute allowing revocation for violations of supervised release, 18 USCA 3583(c)(3), permits a district court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute *for the offense that resulted in such term of supervised release*["] (emphasis added). The statute plainly states that any additional prison term arising from a supervised release revocation is for the original conviction that gave rise to supervised release to begin with. *Id.*; see *Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217.

The United States Supreme Court agreed with the plain reading of 18 USCA 3583(e)(3) in *Johnson v. United States*, where it held revocation of supervised release is considered part of the penalty for the original

conviction, not a separate punishment for violating the terms of supervised release. 529 U.S. 694, 700-01 (2000). The United States Supreme Court also pointed out in *Johnson* that “although such violations [of supervised release] often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard.” 529 U.S. at 700-01. Yellowrobe’s argument that any revocation of supervised release is a new criminal conviction and sentence directly contradicts federal statutory and case law. *Id.*; 18 USCA 3583(e)(3).

The District Court demonstrated the distinction between a criminal conviction and supervised release revocation when it modified Yellowrobe’s sentence in April 2024. SR:287-89. It was Yellowrobe’s original conviction, not a new criminal conviction, that permitted the District Court to revoke his supervised release and sentence him to 3 more months in prison for the 2023 violations. SR:287-89; 18 USCA 3583(e)(3); *Johnson*, 529 U.S. at 700-01. Thus, any further modification of Yellowrobe’s federal sentence because of his state conviction for Attempted Robbery would not be a new conviction and sentence—it would flow from the original Assault conviction and be part of the same sentence. 18 USCA 3583(e)(3); *Johnson*, 529 U.S. at 700-01. The circuit court therefore sentenced Yellowrobe consecutively to his November 2021 conviction and sentence, not a hypothetical future conviction and sentence. 18 USCA 3583(e)(3); *Johnson*, 529 U.S. at 700-01.

Yellowrobe criticizes the circuit court for issuing its sentence without, according to him, sufficient documents in the record. YB:9. He cites no law showing that this rendered the sentence impermissible. YB:9. Further, the circuit court requested that Yellowrobe provide more information, but he did not do so. Status: 2; CPH: 5. The circuit court is not at fault for Yellowrobe's failure to provide requested information. The parties agreed that Yellowrobe had a federal conviction and was on a federal hold at sentencing. Sentencing:4, 7. And nothing in the plain language of SDCL 22-6-6.1 prohibits a consecutive sentence because a circuit court is not provided information it requested. *See Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217. Rather, the statute requires more than one conviction for a consecutive sentence to be imposed, and that condition was present for Yellowrobe. *Id.* The circuit court committed no error, and this is not a scenario that behooves this Court to invoke plain error doctrine. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30; *see also Christians*, 381 N.W.2d at 217.

ii. Yellowrobe's Sentence Was Consecutive.

SDCL 22-6-6.1 provides "the judgment or sentence may be that the imprisonment on any of the offenses or convictions may run concurrently or consecutively[.]" By its plain terms, consecutive sentencing requires multiple sentences so that one may commence consecutively to another. *Id.*; *see Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d at 217. Yellowrobe therefore needed to be serving a sentence on

his federal conviction for the circuit court to sentence him consecutively to his “current Federal sentence.” SR:176-77; *Red Kettle*, 452 N.W.2d at 775.

The District Court sentenced Yellowrobe in November 2021 to a thirty-two-month prison term followed by three years of supervised release. SR:277-79. In April 2024, the District Court modified that sentence by adding an additional 3 months of imprisonment and thirty months of supervised release. SR:287-89. The United States Supreme Court recently noted in *Esteras v. United States* “as [18 USCA 3553(a)(3)] articulates, there are three ‘kinds of sentences available’ for an individual ‘found guilty of an offense’: ‘a term of probation,’ ‘a fine,’ and ‘a term of imprisonment.’ In fact, a term of supervised release is not itself a ‘sentence’ at all; *it is a component of a defendant’s prison sentence.*” No. 23-7483, 5 n.4, 2025 WL 1716137 (U.S. June 20, 2025) (citing 18 USCA 3583(a)) (emphasis added). Thus, every second spent on supervised release was part of Yellowrobe’s federal prison sentence for his November 2021 criminal conviction. *Id.*; *see also Johnson*, 529 U.S. at 700-01. Yellowrobe therefore had an unfinished federal prison sentence for his November 2021 conviction when the circuit court sentenced him consecutively to his “current Federal sentence.” *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137; 18 USCA 3583(e)(3); SR:176-77. This satisfied the requirements of SDCL 22-6-6.1.

Yellowrobe relies on *State v. Kramer* to argue that he had to be incarcerated in a federal prison instead of on supervised release for the circuit court to sentence him to a consecutive state prison term. 2008 S.D. 73, 754 N.W.2d 655; YB:13-14. *Kramer* involved this Court reversing a Rule 35 motion to correct a sentence of three consecutive hunting license suspensions issued at the same time. *Id.* ¶ 13, 754 N.W.2d at 659; YB:13. Yellowrobe's argument misapplies *Kramer* in several ways. *See generally* 2008 S.D. 73, 754 N.W.2d at 655; YB:13-14.

For starters, this Court has upheld state prison sentences that ran consecutively to a term of parole. *State v. Martin*, 2025 S.D. 15, ¶¶ 23, 36, 19 N.W.3d 9, 14-17. In *Martin*, the issue was whether the sentencing court could consider uncharged conduct without making explicit findings, but the sentences at issue were consecutive to an existing term of parole from a prior conviction, and this Court did not take issue with that. *Id.* Thus, Yellowrobe's contention that *Kramer* requires current incarceration for a consecutive term of imprisonment to be issued is misplaced. 2008 S.D. 73, 754 N.W.2d at 655; *See Martin*, 2025 S.D. 15, ¶¶ 23, 36, 19 N.W.3d at, 14-17.

Yellowrobe's argument also inverts this Court's reasoning in *Kramer* because it emphasizes that the first sentence was a hunting license suspension instead of a term of imprisonment. 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658; YB:13-14. In other words, Yellowrobe argues the fact that the first sentence was not for a term of imprisonment was the

reason consecutive sentences could not be hunting license suspensions, YB:13-14. But this Court held *consecutive* sentences had to be for terms of imprisonment and could not be hunting license suspensions. 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658. The error arose from the lower court sentencing Kramer to consecutive hunting license suspensions instead of consecutive terms of imprisonment, so it was the second and third license suspensions that ran afoul SDCL 22-6-6.1. *Id.* ¶ 12, 754 N.W.2d at 658-59. Here, the circuit court sentenced Yellowrobe to a consecutive sentence of imprisonment, so it abided by the holding in *Kramer*. *Id.*; SR:176-77.

Finally, Yellowrobe's argument ignores that supervised release is considered part of his prison sentence. *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137; 18 USCA 3583(c)(3). Thus, even though it was not required, the circuit court did sentence Yellowrobe to a state term of imprisonment consecutive to a current federal prison sentence. *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137; 18 USCA 3583(c)(3). In sum, Yellowrobe has failed to show the circuit court committed any error, let alone issued what he calls an "illegal sentence," so plain error does not apply. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30; YB:8.

C. Any Alleged Error Was Not Plain.

Assuming for the sake of argument error did occur, it is not "plain" on this record. "An error is 'plain' when it is clear or obvious." *State v. Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d 131, 136 (quoting *McMillen*,

2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). This “means that [circuit] court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the Rule’s scope.” *Id.* (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732). An error is plain when the Supreme Court of the United States or this Court has resolved the issue beyond debate. *Id.* (citations omitted).

The United States Supreme Court has resolved that revocations of supervised release are for the underlying conviction and are part of the sentence for that conviction. *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137; *Johnson*, 529 U.S. at 700-01. Yellowrobe cited no authority showing otherwise. *See generally* YB. As much as the Supreme Court has engaged the issues, it has resolved them beyond debate against Yellowrobe. *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137; *Johnson*, 529 U.S. at 700-01. If this Court holds the circuit court could not sentence Yellowrobe consecutively, the error was not clear and obvious. *Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d. at 136. Plain error doctrine therefore cannot apply, and Yellowrobe has failed to carry his burden. *Id.*; *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729.

D. Yellowrobe Failed to Show How His Substantial Rights Were Affected.

Yellowrobe must show any alleged error by the circuit court affected his substantial rights. *See McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729. This requires Yellowrobe to establish prejudice. *State v.*

Guziak, 2021 S.D. 68, ¶ 21, 968 N.W.2d 196, 202-03. “Prejudice’ in the context of plain error requires a showing of a ‘reasonable probability’ that, but for the error, the result of the proceeding would have been different.” *Id.* (internal quotation omitted).

Yellowrobe has failed to establish prejudice. *See id.* He argues prejudice exists because “the duration of [his] sentence is undetermined[.]” YB:17. But he also admits that “it is not certain, but possible that, while at the state penitentiary serving his sentence, the federal court revokes his supervised release[.]” YB:16. Plain error doctrine requires a showing that rights were affected, not that they potentially could be. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729. Yellowrobe’s hypothetical concern is not a showing that the outcome of the sentencing proceeding would have been different. *Guziak*, 2021 S.D. 68, ¶ 21, 968 N.W.2d at 202-03. The prejudice Yellowrobe complains of—that the implication of the circuit court’s sentence is unknown—is precisely the reason this prong cannot be met. *See id.* The sentence, as imposed, certainly has not enlarged Yellowrobe’s sentence as he argues in his brief. SR:176-77; YB:16-17. Yellowrobe’s argument for this prong is too imprecise and conjectural to meet his plain error burden. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30.

E. Yellowrobe Failed to Show how the Fairness, Integrity, or Public Reputation of Judicial Proceedings were Seriously Affected.

Yellowrobe also has not satisfied his burden on how this prong is met. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30. He offers a vague statement that “it is critical for all criminal sentencing proceedings to operate within the authority provided by statute.” YB:17. But it is legal for circuit courts to issue consecutive sentences. SDCL 22-6-6.1. And, as discussed above, the circuit court issued its sentence consecutively to an ongoing federal sentence originating from a November 2021 criminal conviction. SR:277-79; *Johnson*, 529 U.S. at 700-01; *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137. The circuit court had the authority to issue a sentence consecutively to a federal conviction and prison sentence, so Yellowrobe’s argument on this prong is meritless. SDCL 22-6-6.1; *Red Kettle*, 452 N.W.2d at 775; *Johnson*, 529 U.S. at 700-01; *Esteras*, No. 23-7483, 5 n.4, 2025 WL 1716137. Further, Yellowrobe’s argument is that the circuit court’s sentence could become problematic if a supervised release revocation were to happen. YB:16-17. But again, such hypotheticals fail to make the needed showing because they are not actual events that have occurred. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30. Yellowrobe has once more failed to carry his burden. *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30.

CONCLUSION

Based on the arguments and authorities, the State requests that Yellowrobe's conviction and sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

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 3,913 words.

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

Dated this 23rd day of July 2025.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2025, a true and correct copy of Appellee's Brief in the matters of *State of South Dakota v. Ervin K. Yellowrobe*, Appeal No. 31002, was served via electronically through Odyssey File and Serve on Pete Heidepriem at pete@hpslawfirm.com.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 31002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ERVIN K. YELLOWROBE,

Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Christina Klinger
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Pete Heidepriem
Heidepriem, Purtell, Siegel & Hinrichs,
LLP
101 W. 69th Street,
Suite 105
Sioux Falls, SD 57108

Attorney for Appellant

Casey Jo Deibert
Hughes County State's Attorney
104 E. Capitol Ave.
Pierre, SD 57501

Marty J. Jackley
Sarah L. Thome
Jacob R. Dempsey
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501

Attorneys for Appellee

Notice of Appeal filed on February 19, 2025.

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement is the same as in Appellant's Brief.

STATEMENT OF ISSUES

The Statement of Issues is the same as in Appellant's Brief.

STATEMENT OF THE CASE

The Statement of the Case is the same as in Appellant's Brief.

STATEMENT OF FACTS

The Statement of Facts is the same as in Appellant's Brief.

STANDARD OF REVIEW

The Standard of Review is the same as in Appellant's Brief.

ARGUMENT

I. The Court can and should conduct de novo review

Appellant's Brief established that this Court can and should conduct de novo review of Mr. Yellowrobe's sentence. See State v. Litschewski, 2011 S.D. 88, ¶ 7, 807 N.W.2d 230, 232 ("Litschewski argues his sentence was illegal under the version of SDCL 22-6-6.1 that was in effect at the time he was sentenced. . . . Whether Litschewski's sentence was illegal is a question of statutory interpretation we review de novo.").

Without providing any counterargument to applying the de novo standard, the State assumes this Court will review for plain error only. That assumption is wrong.

Mr. Yellowrobe's appeal contends that the Circuit Court imposed an illegal sentence, and "[w]hen a defendant asserts that their sentence was illegally imposed, this Court is presented with a question of law which we review de novo." See State v. Simonsen, 2024 S.D. 21, ¶ 11, 5 N.W.3d 843, 846 (affirming consecutive sentences under de novo standard of review); see also State v. Sieler, 1996 S.D. 114, ¶ 16, 554 N.W.2d 477, 481 (conducting de novo review of a circuit court's authority under SDCL § 22-6-6.1); State v. Arguello, 1996 S.D. 57, ¶ 10, 548 N.W.2d 463, 464 (same, noting "[m]atters of statutory construction present questions of law that are subject to de novo review by this Court.").

Even if the Court applies plain error review, that standard also reveals the Circuit Court imposed an illegal sentence, see Appellant's Brief at 16–17, so the outcome of the analysis should be the same—vacating the sentence below and ordering resentencing consistent with this Court's interpretation of SDCL § 22-6-6.1.

II. SDCL § 22-6-6.1 authorizes consecutive terms of imprisonment only

As established in Appellant's Brief, SDCL § 22-6-6.1 authorizes a circuit court to impose consecutive sentences in limited circumstances. When a circuit court has (1) a defendant convicted of two or more offenses, it may (2) order that the imprisonment on any of the offenses or convictions run consecutively. The State incorrectly interprets SDCL § 22-6-6.1 requiring "1) Yellowrobe had two convictions; and 2) the circuit court's sentence was consecutive to the federal sentence." Appellee's Br. at 8. That formulation of the statute omits essential words. The statute applies only when "the imprisonment on any of the offenses or convictions [is to] run concurrently or consecutively[.]" See SDCL § 22-6-6.1. The statute authorizes a circuit court to make two terms of imprisonment consecutive. It does not grant the court power to make any non-imprisonment sentences consecutive.

The operative term in the statute is "imprisonment." Strictly speaking, Mr. Yellowrobe's history does involve multiple convictions, but the key question for this appeal is whether there were two terms of imprisonment eligible to be run consecutively under SDCL § 22-6-6.1. Short answer: there are not.

a. The State misinterprets Kramer

This Court rejected the State's interpretation of SDCL § 22-6-6.1 in the Kramer decision. Kramer also confirms that the statute authorizes only consecutive terms of imprisonment. "By its plain terms, SDCL 22-6-6.1 only authorizes consecutive sentences for terms of 'imprisonment[.]'" State v. Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d 655, 658. The Kramer Court held that "a revocation of hunting privileges does not constitute 'imprisonment' under its plain and ordinary meaning." Id. The Court

declared it “will not enlarge a statute beyond its face where the statutory terms are clear and unambiguous in meaning.” Id. (internal quotation marks omitted). Echoing Kramer, the Court in Krause held that the statute “restrains a court’s power to consecutively impose sentences other than imprisonment (e.g., a sentence of probation).” State v. Krause, 2017 S.D. 16, 894 N.W.2d 382, 388 n.8.

No one disputes that the Circuit Court imposed a term of imprisonment as part of Mr. Yellowrobe’s sentence. But under the plain language of SDCL § 22-6-6.1, that term of imprisonment can be consecutive to only another term of imprisonment. There is no other applicable term of imprisonment.

The State claims the Circuit Court “sentenced Yellowrobe consecutively to his November 2021 conviction and sentence, not a hypothetical future conviction and sentence.” Appellee Br. at 11. Before the sentencing in this matter, Mr. Yellowrobe completed all imprisonment ordered by the federal court for his November 2021 conviction and April 2024 supervised release revocation. Indeed, he was out of custody and in the process of re-entering the community when he committed the attempted robbery underlying this appeal. And since his arrest for the attempted robbery, Mr. Yellowrobe has not received another federal sentence of imprisonment.

b. The State fails to find a second term of imprisonment

Because Mr. Yellowrobe was not then serving—and had not been sentenced to—any other term of imprisonment, there was no second term of imprisonment to which the attempted robbery sentence could be made consecutive. The State appears to say it is consecutive to his supervised release term as ordered by the federal court when it revoked his supervised release in April 2024. According to the State, “every second spent on

supervised release was part of Yellowrobe's federal prison sentence for his November 2021 criminal conviction." Appellee's Br. at 13. The State bases its position on dicta in a United States Supreme Court decision describing supervised release as "a component of a defendant's prison sentence." Esteras v. United States, 145 S. Ct. 2031, 2025 WL 1716137, n.4 2039 (2025).

Esteras does not support the State's position when it comes to interpreting SDCL § 22-6-6.1. For the Circuit Court's consecutive sentence to comply with SDCL § 22-6-6.1, it needs to put one term of imprisonment consecutive to another term of imprisonment. The State cannot rescue the Circuit Court's sentence by arguing that it put one term of imprisonment consecutive to "a component of a defendant's prison sentence." Because in the end, SDCL § 22-6-6.1 requires two discrete terms of imprisonment—and supervised release is not imprisonment.

"The term of supervised release commences on the day the person is released from imprisonment . . . [and] does not run during any period in which the person is imprisoned[.]" 18 U.S.C. § 3624(e). "Though the term of supervised release is part of the sentence, it is not part of the 'term of imprisonment.'" United States v. Island, 336 F. App'x 759, 761 (9th Cir. 2009). "The distinction between supervised release and imprisonment arises from their different statutory purposes." United States v. Guess, 541 F. Supp. 2d 399, 402 (D. Me. 2008) (tracing the statutory background of supervised release as distinct from imprisonment).

Numerous courts have determined that supervised release is separate and distinct from a term of imprisonment. See, e.g., United States v. Perry, 397 F. App'x 521, 523 (11th Cir. 2010) ("[T]he district court correctly concluded that supervised release is not a

form of custody[.]”); United States v. Cundiff, No. 418CR00008TWPVTW1, 2024 WL 665220, at *3 (S.D. Ind. Feb. 16, 2024) (citing Island); United States v. Razz, 387 F. Supp. 3d 1397, 1405 (S.D. Fla. 2019) (citing Island), *aff’d*, 837 F. App’x 712 (11th Cir. 2020); Booker v. United States, No. 3:09CV635, 2011 WL 1337086, at *2 (E.D. Va. Apr. 7, 2011) (citing Island and Guess).

Nowhere does the State identify a term of imprisonment the State Penitentiary term is meant to follow. While the State’s brief goes to great lengths to justify the Circuit Court’s sentence under SDCL § 22-6-6.1, it leaves the reader guessing how the analysis would translate into a practical reality.

It appears the State’s position is that Mr. Yellowrobe’s term of imprisonment from the Circuit Court is to run consecutively to his current term of supervised release. See Appellee’s Br. at 13 (“Yellowrobe therefore had an unfinished federal prison sentence for his November 2021 conviction when the circuit court sentenced him consecutively to his ‘current Federal sentence.’ ”). Mr. Yellowrobe does not know the precise date when his supervised release term will end. The term is 30 months, and it commenced at some point during April–June 2024, which would have it end during October–December 2026. The State appears to argue that Mr. Yellowrobe’s five-year prison sentence should be considered consecutive to that, so it would not begin running until late 2026. That is not how the South Dakota Department of Corrections (DOC) calculates Mr. Yellowrobe’s State Penitentiary sentence. On the DOC website, Mr. Yellowrobe’s suspended sentence release date is June 15, 2029.¹ If the State was right

¹ See <https://docadultlookup.sd.gov/adult/lookup/details/?id=qUEGI/39TrY=>.

that the penitentiary term did not begin until supervised release ended in October–December 2026, then Mr. Yellowrobe’s release date should be in March–May 2031.

c. The State misunderstands parole versus supervised release

The State argues that the Circuit Court’s sentence is lawful based on State v. Martin, 2025 S.D. 15, ¶ 23, 19 N.W.3d 9, 14. The only part of Martin that the State relies on is the Court’s statement in passing that the lower “court ordered the sentences to run concurrently to each other, but consecutively to a prior sentence for which Martin was on parole at the time.” Id. From the State’s perspective, this means “Yellowrobe’s contention that Kramer requires current incarceration for a consecutive term of imprisonment to be issued is misplaced.” Appellee’s Br. at 14.

First, the brightline holding of Kramer speaks for itself: “By its plain terms, SDCL 22–6–6.1 only authorizes consecutive sentences for terms of ‘imprisonment[.]’ ” 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658. Second, the Court’s comment does not constitute a holding, especially since the issue on appeal had nothing to do with SDCL § 22-6-6.1. And third, it could be permissible for a court to order a prison term consecutive to a parole term because parole is part of a term of imprisonment under South Dakota law. SDCL § 24-15A-15 provides that “[p]arole is the conditional release of an inmate from actual state correctional facility custody before the expiration of the inmate’s term of imprisonment.” The individual “remains an inmate under the legal custody of the department until the expiration of the inmate’s term of imprisonment.” Id. “It is clear from the statute that a prisoner is paroled when he is actually released from penitentiary custody before the expiration of his term of imprisonment.” Winters v. Solem, 444 N.W.2d 722, 724 (S.D. 1989).

A person's time on parole is still considered part of their prison term. See SDCL 24-15A-15. A person's time on supervised release (while still part of their sentence) is separate from their prison term because "the term of supervised release commences on the day the person is released from imprisonment . . . [and] does not run during any period in which the person is imprisoned[.]" 18 U.S.C. § 3624(e). Even if Martin held what the State says, it does not support the State's interpretation of SDCL § 22-6-6.1.

Because the Circuit Court's judgment runs this prison term "consecutively to" something other than another term of imprisonment, it exceeds the authority of SDCL § 22-6-6.1 and is unlawful.

III. If the Court applies plain error review, that standard is met

In the event the Court decides it must employ plain error review, Mr. Yellowrobe has shown he satisfies that test. Whether the error below was plain depends upon the threshold determination of whether the Circuit Court's sentence violated SDCL § 22-6-6.1.

As set out in this brief and Appellant's Brief, the Circuit Court handed down an illegal sentence because it ordered a consecutive sentence beyond the authority granted in SDCL § 22-6-6.1. The consecutive sentence contradicted this Court's interpretation of that statute. See Krause, 2017 S.D. 16, 894 N.W.2d at 388 n.8 (holding SDCL § 22-6-6.1 "restrains a court's power to consecutively impose sentences other than imprisonment (e.g., a sentence of probation)"); Kramer, 2008 S.D. 73, ¶ 11, 754 N.W.2d at 658 ("SDCL 22-6-6.1 only authorizes consecutive sentences for terms of 'imprisonment[.]' "). An error is plain when it involves a violation of this Court's precedent. See State v. Jones, 2012 S.D. 7, ¶ 15, 810 N.W.2d 202, 206.

The plain error also affects Mr. Yellowrobe's substantial rights. Confusingly, the State claims this prong is not met because of an argument Mr. Yellowrobe made about the potentially indeterminate nature of the Circuit Court's sentence. Mr. Yellowrobe's argument was that—because the Circuit Court was unclear about what his sentence is consecutive to—the ultimate length of this sentence could be unknown. The State now attempts to adopt that argument to show lack of prejudice while simultaneously arguing that there is nothing unclear or problematic with the Circuit Court's sentence.

The State cannot have it both ways. Either the sentence is indeterminate, which means there was error below because no one would know how long Mr. Yellowrobe is to serve time in prison. See SDCL § 23A-27-4 (requiring judgment of conviction to set forth a definite term of imprisonment); State v. Holsing, 2007 S.D. 72, ¶ 12, 736 N.W.2d 883, 885 (circuit courts cannot hand down ambiguous sentences). Or the sentence is clear, which means it either violated SDCL § 22-6-6.1 or it did not. It is inconsistent for the State to argue the sentence is indeterminate (so no error prejudicially affected Mr. Yellowrobe's rights) and that the sentence otherwise complied with South Dakota law, including the law on consecutive sentences. Unless this Court determines the Circuit Court abided by SDCL § 22-6-6.1 and Mr. Yellowrobe's sentence includes a discernible set of consecutive prison terms, the plain error below affected Mr. Yellowrobe's substantial rights.

The final prong asks whether the plain error seriously affects the fairness, integrity, and public reputation of judicial proceedings. Like the beginning of the plain error inquiry, the Court's resolution of this question also depends on whether or not the Circuit Court violated SDCL § 22-6-6.1. A sentence contrary to South Dakota law would

satisfy this requirement because courts must follow the law set forth in statutes. See State v. Dillon, 2001 S.D. 97, ¶ 22, 632 N.W.2d 37, 46 (finding plain error based on illegal sentence, remanding for resentencing). Because the analysis above demonstrates that the Circuit Court imposed an illegal sentence, Mr. Yellowrobe meets this last prong of the plain error standard.

CONCLUSION

Based on the discussion above, Mr. Yellowrobe respectfully requests that the Court hold that the Circuit Court's sentence violates SDCL § 22-6-6.1 and the case must be remanded for resentencing.

Dated this 21st day of August, 2025.

**HEIDPRIEM, PURTELL
SIEGEL & HINRICHS, LLP**

/s/ Pete Heidepriem
Pete Heidepriem (pete@hpslawfirm.com)
101 W. 69th Street, Suite 105
Sioux Falls, SD 57108
Ph: (605) 679-4470
Fax: (605)-679-4379

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. I prepared this brief using Microsoft Word 2016, and it contains 2,434 words from the Statement of the Case through the Conclusion. I relied on the word count of Microsoft Word 2016 in order to prepare this certificate.

Dated this 21st day of August, 2025.

BY /s/ Pete Heidepriem
Pete Heidepriem

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed with the Clerk of the Supreme Court via eFileSD and on counsel:

Casey Jo Deibert
Hughes County State's Attorney
104 E. Capitol Ave.
Pierre, SD 57501
Casey.Deibert@co.hughes.sd.us

Jacob R. Dempsey
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501
atgservice@state.sd.us

Attorneys for Appellee

The undersigned further certifies that the original copy of Appellant's Reply Brief was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, State Capitol, 500 East Capitol, Pierre, SD, 57501, by U.S. mail, first class postage prepaid.

Dated this 21st day of August, 2025.

BY /s/ Pete Heidepriem
Pete Heidepriem