

APPELLANT'S KORTH BRIEF
IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 30473

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee.

v.

CHAD MERWIN FEIST
Defendant and Appellant,

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

THE HONORABLE JENNIFER MAMMENGGA
Circuit Court Judge

| | |
|--------------------------|--------------------------|
| Mark Kadi | Marty Jackley |
| Public Advocate's Office | Attorney General |
| 415 N Dakota Avenue | 1302 E SD Highway 14, #1 |
| Sioux Falls, SD 57104 | Pierre, SD 57501 |
| Attorney for Appellant | Attorney for Appellee |

Daniel Haggar
Minnehaha Co. State's Attorney
415 N Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellee

Notice of Appeal Filed September 22, 2023.

TABLE OF CONTENTS

| | <u>Page</u> |
|------------------------------------|-------------|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT. | 1 |
| JURISDICTIONAL STATEMENT | 2 |
| PART A | 2 |
| STATEMENT OF THE CASE. | 3 |
| STATEMENT OF FACTS | 4 |
| PART B | 6 |
| CERTIFICATE OF COMPLIANCE. | 13 |
| CERTIFICATE OF SERVICE | 13 |
| APPENDIX | |

TABLE OF AUTHORITIES

| <u>CASES:</u> | <u>PAGE</u> |
|--|-------------|
| <u>State v. Korth</u> , 650 N.W.2d 528 (SD 2002) | 2 |
| <u>Statutes:</u> | |
| SDCL 15-26A-3 | 2 |
| SDCL 23A-32-2 | 2 |
| SDCL 23A-32-9 | 2 |

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

) SS

COUNTY OF MINNEHAHA)

SECOND JUDICIAL CIRCUIT

* * * * *
STATE OF SOUTH DAKOTA *

Plaintiff and Appellee, *

Case No. 30473

v. *

KORTH BRIEF

CHAD MERWIN FEIST, *

Defendant and Appellant. *

* * * * *

Appellant's attorney has filed and served a Notice of Appeal. This Korth Brief is submitted in connection with counsel's Notice of Appeal.

PRELIMINARY STATEMENT

Citations to the settled record will be referred to "SR" followed by the page number. Citations to the appendix will be referred to as "A" followed by the number for the appendix exhibit. The sentencing hearing transcript of August 23, 2023, will be referred to as "S" followed by the page number. The transcript of the change of plea hearing of March 28, 2023, will be referred to as "P" followed by the volume number/date and page number. Appellant will be referred to as "Appellant", "Defendant" or "Feist".

JURISDICTIONAL STATEMENT

This is an appeal of the Appellant's Judgment of Conviction entered on August 23, 2023, regarding Second Judicial Circuit Minnehaha County file Cr.22-6021, wherein the trial court sentenced the Appellant to the penitentiary. SR26. The Appellant filed a timely notice of appeal on September 22, 2023. SR125. This Court possesses jurisdiction of this matter pursuant to, inter alia, SDCL 15-26A-3, SDCL 23A-32-2, and SDCL 23A-32-9.

PART A

The following is submitted in compliance with State v. Korth, 650 N.W.2d 528 (SD 2002). I certify that I have:

- (1) thoroughly reviewed the record of all prior proceedings herein, including the court file, the transcripts, and the defense attorney file;
- (2) discussed this case with the Appellant through written correspondence and conversations by telephone;
- (3) discussed this case with Appellant's original appellate counsel, Christopher Miles, of the Minnehaha County Public Defender's Office, and
- (4) no substantive motions were presented by trial counsel. By signing this Brief, I certify that I have not identified any arguably meritorious issue to justify appeal.

STATEMENT OF THE CASE

On September 22, 2022, the Minnehaha County Grand Jury charged the Defendant with Burglary 3rd, Burglary 3rd, Burglary 3rd, Burglary 3rd, Burglary 3rd, Burglary 3rd, and Grand Theft. The State also filed a Part II Information. The Defendant was arraigned on the charges on October 6, 2022.

The Defendant changed his plea to guilty regarding Counts 3 and 4 to charges of Burglary 3rd. He also admitted to the Part II Information. On August 17, 2023, the trial court sentenced the Defendant to 6 years in the Penitentiary with 2 years suspended, crediting time served, regarding Count 3. Regarding Count 4, the trial court sentenced the Defendant to two years suspended in the Penitentiary which ran consecutive to Count 3.

Feist filed a notice of appeal. He undertook efforts to remove his counsel representing him on appeal. He filed a motion for limited remand before this Court to allow the trial court to hear arguments for counsel's removal. There was no objection to the remand. The remand order was granted with one dissenting opinion, and original appellate counsel was replaced. The Office of the Public Advocate was appointed, and the matter returned to the Court.

The Defendant then sought another motion for limited remand to remove his current appellate counsel. His counsel sought, in the alternative, an extension to permit counsel additional time to file a Korth brief, so the Defendant could present a Part B statement. The State opposed the first request, but did not object to the alternative request. This Court denied the alternative request for remand, but granted the extension to file the Korth Brief.

STATEMENT OF FACTS

At the change of plea hearing, the prosecutor presented the following factual basis:

MR. HENSLEY: Your Honor, Jason Schulte, S-C-H-U-L-T-E, owned property at 734 West 10th street here in Sioux Falls, Minnehaha County, South Dakota. It's a building in which he has several apartments rented out to tenants, Your Honor. Mr. Schulte had constructed a drop box for the tenants to conveniently place their rent deposits in a basement room that he had secured. It has a slot for depositing the slips that wasn't then accessible once the deposit had been placed into that area. There was a box on the other side to which he had access and would retrieve the rent payments on a regular basis.

He reported to law enforcement that the Fall of 2022 he discovered that he was missing several deposits made and left by tenants who reported making cash deposits there beginning July 1st of 2022 and extending through the end of August of 2022. Mr. Schulte investigated on his own. He installed a surveillance camera in the room itself that we know the rent deposits were placed. Reviewing the footage from that camera, he saw the person he knew as the defendant

entering on multiple occasions into this secured room itself. Mr. Feist was to do that by having apparently unscrewed a wall panel and was able to move that panel aside to gain entry and then to replace the wall panel not to be discovered. There were missing rent funds that Mr. Schulte calculated to be some \$2,420 in cash deposits on three different occasions made by tenants there.

The video footage was reviewed by law enforcement as well. The confirmed that it was, in fact, Mr. Feist who was making entry into the room without authorization and retrieving deposits there from the rent box area to include on August 26th and August 27th of 2022, Your Honor. P:13-15.

The trial court inquired whether Feist agreed with the factual basis. He replied, "No." P:15. The lower court then examined specific aspects of the factual basis separately. It confirmed the dates the events occurred. P:15. He entered the room in question. P:15. The room was in an occupied structure. P:15. He entered the room with the intent to commit the crime of theft. P:15.

The trial court then reviewed the Part II Information. Feist admitted to his felony convictions occurring in 2011, 2013 and 2021. P:16-17. The trial court found there was an adequate factual basis for the plea and admissions on the Part II. P:17.

A restitution hearing was held at the time of sentencing. The victim testified that the room in question had a drop box where tenants deposited their rent. Certain

rent payments were missing from tenants who typically paid.
S:6-8. The victim installed a video camera system.

Footage revealed the Defendant taking money from the room on August 8. A tenant had placed \$720.00 in there that day. S:9-10, 30. Further testimony suggested a greater amount was taken overall (\$2415). S:11. The court limited the restitution amount since Feist admitted to that count. P:26-27.

Dated this 25th day of June, 2024.



Mark Kadi c/o
Office of the Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57104
mkadi@minnehahacounty.gov
Attorney for the Appellant
(605) 367-7392

PART B

Part B, as required by Korth, is meant to include the Petitioner's submission, unedited by counsel. I have informed Petitioner by mail and by phone that I could not find or present a non-frivolous issue, and have also asked Petitioner to provide me with information regarding his case.

The Appellant sent in an original statement for the Part B requirement. The Part B original statement in the Appendix contains his letter. I have received the following from the Petitioner:

I, CHAD FEIST, appellant in case 30473 (49CRI22006021) ask this honorable court to consider all legal arguments supported by case law in this matter, being first duly sworn upon oath, depose and state as follows.

#1. Sentencing court used presentence report for sentencing purposes, without appellant ever getting to see all issues in report. Including PSR sentencing recommendation.

A. A presentence report is not evidence and is not legally sufficient basis for making findings on contested issues of material fact.

US v Richey 758 F 3d 999

B. Defendant must have notice and opportunity to respond to information relied on in determining sentencing under sentencing guidelines. USCA Amend 5 (3.5)c(3)

Cr Procedure 326(A1)18USCA

#2. I the appellant in this matter did not have a chance to rebut the selected sentence based of erroneous facts or the court failing to adequately explain the chosen sentence (18 UCSA 3553 3(a) USSG 1B1.1ct.sq.)

#3. Appellant in matter of this case (49CRI22006021) did not have the circuit court produce a supporting departure from presumptive sentence under SDCL 22-6-11. The court is required to state on the record and a "deposition" and a written judgement must state the aggravating factors - circumstances supporting a departure from presumptive probation or suspended penitentiary time. (State vs. Roedder)

A. The aggravating factors in this case are not supported by fact nor does it have aggravating factors to depart from 22-6-11.

1. 5 prior felonies used in aggravating factors for sentencing are not aggravating circumstances. (Two of the five prior felonies are 15 yrs or older.)

2. Court used probation was aggravating factors. I the appellant have never been on probation so using this as aggravating factor is not factual. Even if it would be true probation violation does not pose a threat to society. So this does not support a departure from presumative sentence under 22-6-11 SDCL.
(State of South Dakota vs Kurtz)
(State of South Dakota cs Roedder.)

(Strict compliance of provisions of statute 22-6-11)
Sentence Presumative Probation

3. Court should of given the appellant chance to present any mitigation information of punishment. (After landlord testified a sentencing hearing.)
 4. Victims considered in aggravating factors (The 3rd degree burglary charge is a property crime) Although the victim as court says is a aggravating factor. (The property is returned to landlord.)
 5. A felony that I plead nolo-contendere to can only be used for that specific case not a future case. (Felony 2013) (this case for sentence enhancement) U.S. V. Lair 195 F. 47
- #4. Departure from sentencing guidelines must give parties reasonable notice of departure. Rule 32c (3) (A)
- A. I appellant had no notice of any departure from sentencing guidelines nor (SDCL 22-6-11 SDCL)
 - B. Defendant must have opportunity to respond to information relied on in determining sentencing (under guidelines)
(USCA. Cont. Amend. 5 Fed rule of Cr procedure)
326 (3.5) c (3) (A) 18 U.S.C.A.
 - C. Selecting a sentence based on clearly erroneous facts, or failing to adequately explain chosen sentence.
(18 U.S.C.A 355} (a)
(U.S.S.G. 1B1.1.ct.seq)
5. Third degree burglary is broader than a generic burglary and does not qualify as a predicate conviction under ACCA.

Taylor Id. 94.

therfor it does not qualify for a sentence
enhancement under ACCA.

6. District court cannot base sentence of disputed
unproven allegations in a presentence report.

Taylor vs US 495US575 110 S.C.F.214B

#5. Appellant was working for 10 months out in the
community after his plea of guilty. With no legal or
issues with the law. (Therefor how does circuit court say
there are aggravating circumstances 10 months later at
sentencing) The court would of sentenced appellant in
this matter with-in days not ten months later.)

#6. An indictment is multiplicitous when it charges a
single offense in multiple counts, such an indictment is
improper because can lead to imposition of multiple
punishments for the crime, violating the double jeopardy
clause of the fifth Ammendment.)

(There was 7 counts on third degree burglary in this
matter on the same indictment that did lead to multiple
punishments.)

A. Enhanced sentence and enhanced class of felony.

B. Double-enhanced habitual offender status count 4+5.

South dakota vs. Whitfield 295 SD 17 11 8692 N.W. 2d.
133 137

Underwood 2017 SD 3,5,890 N.W.2d 240 241

#7. Appellants-defendant in the matter case #30473
49CRI22006021 cannot serve as a predicate offense of third
degree burglary for sentence enhancement.

2K2.1 Mathis

136 S.Ct. at 2251

Taylor 495 U.S. at. 602,110 s.ct.2143

#8. 1. Through-out this case (49CRI22006021) - matter I was
not given a summons, indictement, PSI-PSR, throughout my
case.

2. I was the defendant in this case that and unaware of
any - landlords impact statements nor his appearance
unknown to me. Therfor I had know chance to argue his
statements during sentencing hearing.

Indictment clause provides the right of a defendant to
be notified of the charges against him, through
recitation of the elements and description of charges.
To allow defendant to argue future proceedings. USCA
Const Amend 5

9. The state prosecutor asked the landlord at restitution - sentencing hearing pg.25 if there was anything stolen or missing from August 26 August 27th of 2022.

The landlord says no there was not and defered the question in a different direction.

I the defendant cannot be guilty of 3rd degree burglary on August 26 or August 27th of 2022. When landlord states at restitution - sentencing hearing that nothing was missing.

Therfor the court should of let me withdraw my plea or should of never accepted a plea of guilty of 3rd degree burglary on 26th of August 2022 and 27th August 2022.

There was not a factual bases admitted to (accept plea) in open court at sentencing. Supported by testimony by the accuser - landlord. If nothing was missing on 27th and 28th of August 2022 there was insufficient evidence to bring prosecution of 3rd degree burglary against defendant. Supported by accusers testimony at sentencing hearing.

#10. THE National Crime Victimization Survey burglary property crime not a violent crime and of defendants do not show any future criminality.

(2.7%)

Burglaries of this nature 3rd degree burglary do not involve physical violence nor does it show risk to the public.

#11. Judgement of Conviction states:

Aggravating circumstances:

1. 5 prior felonies - but does not state what prior felonies - therfor how is this a aggravating circumstance from departure of SDCL 22-6-11

2. Failure to comply with probation

Again defendant-appellant argues that this is not a aggravating circumstance, because defendant was not on any probation, and even if was it does not pose a significant risk to the public.

3. Impact of Victims - Again the court does not state any impact of victims - again does not show aggravating factors. (State v Kurtz) (State v Roedder)

#11. A part two habitual offender was was filed on July 1 2022 before I the defendant was ever indicted on Sept, 22, 2022

How can a part II be filed before a indictment of offenses charged.

#12. The amendment deletes burglary of dwelling from the list of enumerated offenses in implementing this charge of burglary offense rarely result in physical violence of a dwelling. Is rarely the instant offense of conviction or the "derminative predicate" for triggering a higher penalty under the career offender guideline. Historically career offenders have ever been arrested for a burglary offense after release.

Several studies support this analysis.

#13 Information proceeding to establish prior convictions was never done by the court so going into sentencing I the defendant did not know the courts position for sentence enhancement

- South Dakota habitual offender statutes enhance a defendants sentence, not the underlying offense (Rowley vs SD. Bd. Pardons + Paroles 2013 SD 61 10 826NW.2d 360, 364
- The habitual offender statutes operate to increase the defendants sentence, but do not substantively change the class of principil felony. Although Rowley interpreted SDCL 22-7-8.1, a seperate enhancement statute, the dispositive language in SDCL 22-7-7 is the same.

SDCL 22-7-7, like SDCL 22-7-8.1 only provides that the sentence for the principal felony shall be enhanced. And interpreting the statute to enhance the classification of the underlying felony would require us to ignore the words "the sentence for" which we will not do." Rowley 2013 SD.6¶8 826N.W.2d at 364

Regardless of the nomenclature we chose...the habitual offender status operates to not substantively change the class of the principle felony. Id 10 826 N.W.2d at 364 See also State v Guthmiller 2003 SD 83 131 667 NW.2d 295, 305

- Appellant in this matter was convicted of a class 5 felony. The sentence of the first third degree burglary charge went beyond the maximum of 5 year sentence. The court agreed with prosecutor to a plea bargain of 6 yrs. and some suspended time.

therfor the court went beyond 5 years maximum on a class 5 felony.

- The court in this matter did state aggravating circumstances on judgment of conviction but not on a dispositional form. The factors the court used to form aggravating factors are anything but factors that pose a significant risk to the public.
- Defendants-Appellants criminal records are from 10-20 years old, a nolo-contendre plea and a presentence report not factual in its content.
- Probation violation does not support aggravating circumstances to depart from SDCL 22-6-11.

I ask this honorable court to look into all issues presented. I also ask the court to realize that I the appellant in this case does not have aggravating circumstances that pose a risk to the public.

Appellant Chad M. Feist was working for 10 months between sentencing and plea of guilty. I the appellant along with the sentencing court knew I was not a threat to the public, because sentencing would have been with-in 2 days.

I pray that this honorable court takes into consideration Appellants my stand about the circumstances in this matter. All the testimony I present are factual and I the appellant am not a risk to society.

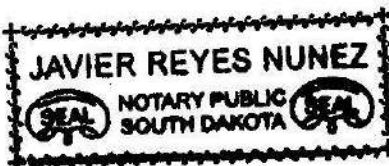
(Appellant) I believe that court erred under SDCL 22-6-11 and that it is supported by there not being and aggravating factors the a departure from presumative sentence guidelines.

Appellant Chad M. Feist presents these arguments that support issues in case 49cri22006021. Pages 1-12. to this honorable court. I pray, before this court to do what is just in this case, which is supported by facts in 49CRI22006021 "Korth brief."

Dated this 2 day of July, 2024.

Chad Feist

Chad Feist
Mike Durfee State Prison
1412 Wood St.
Springfield, SD 57062
Appellant



2-12-30

CERTIFICATE OF COMPLIANCE

The Appellant certifies that this brief complies with applicable page and word count (3483) requirements.

Dated this 25th day of June, 2024.



Mark Kadi c/o
Minnehaha Co Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57104
605-367-7392
mkadi@minnehahacounty.gov
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the Korth brief in support thereof, upon all other parties hereto, by email, on the 8th day of July, 2024, addressed to: Daniel Haggar, Minnehaha County State's Attorney; John Strohman, Assistant Attorney General.

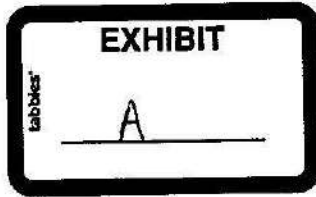


Mark Kadi
Attorney for Appellant

APPENDIX #30473

Exhibit

| | |
|---------------------------------|---|
| Appellant Statement | A |
| Judgment and Sentence | B |



JUN 06 2024

1/13

IN THE STATE OF
 South Dakota
 Appellee,
 v.
 CHAD MERWIN FEIST
 Appellant

Case # 30473
 Korth Brief
 part B
 Second Judicial Circuit
 49 CR 122006021

I, CHAD FEIST, appellant in case ^(49CR122006021) 30473 ask this honorable court to consider all legal arguements supported by case law in this matter, being first duly sworn upon oath, depose and state as follows.

#1. Sentencing court used presentence report for sentencing purposes, without appellant ever getting to see all issues in report. Including PSR sentencing recommendation.

A. A presentence report is not evidence and is not legally sufficient basis for making findings on contested issues of material fact.

USV Richey 758 F3d 999

B. Defendant must have notice and opportunity to respond to information relied on in determining sentencing under sentencing guidelines. USCA Amend 5 (3-g) c(3) Cr procedure 32b (11/18 USCA)

② If the appellant in this matter did not have a chance to rebut the selected sentence based of erroneous facts or the court failing to adequately explain the chosen sentence (18 USC 3553 3(a) USSG 1B1.1 ct. sq.)

*③ Appellant in matter of this ^(49CR12206091) case did not have the circuit court produce a supporting departure from presumative sentence under SDCL 22-6-11. The ~~state~~ court is required to state on the record and a "deposition" and a written judgement must state the aggravating factors. Trial Court must state the aggravating factors - circumstances supporting a departure from presumative probation or suspended penitentiary time. (State vs. Roedder)

A. The aggravating factors in this case are not supported by fact nor does it have aggravating factors to depart from 22-6-11.

① 5 prior felonies used in aggravating factors for sentencing are not aggravating circumstances. (Two of the five prior felonies are 15 yrs old or older.)

② Court used probation was used in aggravating factors. I the appellant have never been on probation so using this as aggravating factor is not factual. Even if it would be true probation violation does not pose a threat to society. So this does not support a departure from presumative sentence under 22-6-11 SDCL. (State South Dakota vs Kurtz
State South Dakota vs Roedder.)

(Strict compliance of provisions of statute 22-6-11) ^{sentence presumative}
③ Court should of given the appellant chance to present any mitigation information of punishment. (After landlord testified a Sentencing hearing.)

④ Victims considered in aggravating factors (The 3rd degree burglary charge is a property crime) Although the victim as court says is a aggravating factor. (The property is returned to landlord.)

⑤ A felony that I plead nolo-contendere to can only be used for that ^{felony} specific case not a future case (2013)
(for sentence enhancement) U.S. V. Lair 195 F 47

#4 Departure from sentencing guidelines must give parties reasonable notice of departure. Rule 32c (3) (A).

A. I appellant had no notice of any departure from sentencing guidelines nor (SDCL 22-6-11 SDCL)

B. Defendant must have opportunity to respond to information relied on in determining sentencing (under guidelines)
(USCA Cont. Amend. 5 Fed rules of Cr procedure)
326 (3, 5) c (3) (A) 18 U.S.C.A

C. Selecting a sentence based on clearly erroneous facts, or failing to adequately explain chosen sentence. (18 U.S.C.A. 3553(a))
(U.S.S.G. 1B1.1.c.8g)

#5 Third degree burglary is broader than a generic burglary and does not qualify as a predicate conviction under ACCA.

Taylor Id. 94.

therefor it does not qualify for a sentence enhancement under ACCA.

#6 District Court cannot base sentence of disputed unproven allegations in a presentence report. TAYLOR vs US 495us 575

#5 Appellant was working for 10 months out in the community after his plea of guilty. With no legal or issues with the law. (Therefore how does circuit court say there are aggravating circumstances 10 months later at sentencing)

The court would of sentenced appellant in this matter with-in days not ten months later.)

#6 An indictment is multipictous when it charges a single offense in multiple counts, such an indictment is improper because can lead to imposition of multiple punishments for the crime, violating the double jeopardy clause of the fifth Ammendment.)

(There was 7 counts of third degree burglary in this matter on the same indictment that did lead to multiple punishments.)

A. Enhanced sentence and enhanced class of felony.

B. Double-enhanced habitual offender status count ~~to 47~~ 4+5.

South Dakota vs. Whitfield 2015 SD 17 11 862 N.W.
2d. 133 137

Underwood 2017 SD 3, 5, 890 N.W.2d 240 241

① Appellants - defendant in this matter
case # ^{49CR122006021} 30473 Cannot serve as a predicate
offense of third degree burglary
for sentence enhancement.

2K2.1 Mathis

136 S.Ct. at 2251

Taylor 495 U.S. at 602, 110 S.Ct.

2143

⑧ ① Through-out this case-matter I ^(49CR122006021)

was not given a summons, indictment,
PSI-PSR, throughout my case.

② I was the defendant in this case
that and unaware of any ~~landlord's~~ -landlord's
impact statements nor his appearance
unknown to me, therefor I had know
chance to argue his statements
during sentencing hearing,

Indictment clause provides the right of
a defendant to be notified of the charges
against him, through recitation of the elements
and description of charges. To allow defendant
to argue future proceedings. USA Const Amend 5

7/18

⑨ The state prosecutor asked the landlord at restitution-sentencing hearing pg. 25 if there was anything stolen or missing from August 26 August 27th of 2022.

The landlord says no there was not and defered the question in a different direction.

I the defendant cannot be guilty of 3rd degree burglary on August 26 or August 27th of 2022. When landlord states at restitution-sentencing hearing that nothing was missing.

Therefore the court should of let me withdraw my plea ~~or~~ should of never accepted a plea of guilty of 3rd degree burglary on 26th of August 2022 and 27th August 2022.

There was not a factual bases admitted to (accept plea) in open court at sentencing. Supported by testimony by the accuser-landlord. If nothing was missing on 27th and 28th of August 2022 there was insufficient evidence to bring prosecution of 3rd degree burglary against defendant. Supported by accusers testimony at sentencing hearing.

⑩ THE National Crime Victimization Survey burglary property crime not a violent crime and ~~91%~~ of defendants do not show any future criminality. (2.7%)

Burglaries of this nature 3rd degree burglary do not involve physical violence nor does it show risk to the public.

⑪ Judgement of Conviction States:

Aggravating circumstances:

① 5 prior felonies - but does not state what prior felonies - therefore how is this a aggravating circumstance from departure of ~~§~~ 22-6-11

② failure to comply with probation
Again defendant - appellant argues that this is not a aggravating circumstance, because defendant was not on any probation, and even if was it does not pose a significant risk to the public.

③ Impact of Victims - Again the court does not state any impact of victims - again does not show aggravating factors. (Stater Kurtz) (State v Roedder)

#11. A part two habitual offender was filed on July 1 2022 before I the defendant was ever indicted on Sept, 22, 2022.

How can a part II be filed before a indictment of offenses charged.

#12. The amendment deletes burglary of dwelling from the list of enumerated offenses in implementing this change of burglary offense rarely result in physical violence of a dwelling, It's rarely the instant offense of conviction or the "determinative predicate" for triggering a higher penalty under the career offender guideline. Historically career offenders have ever been arrested for a burglary offense after release. Several studies support this analysis.

#13. Information proceeding to establish prior convictions was never done by the court so going into Sentencing I the defendant did not know the courts position for sentence enhancement.

10/13

- South Dakota habitual offender statutes enhance a defendant's sentence, not the underlying offense (Rowley vs. SD Bd. ^{Parole} & Paroles 2013 SD 610 826 N.W.2d 360, 364)

- The habitual offender statutes operate to increase the defendant's sentence, but do not substantively change the class of principal felony. Although Rowley interpreted SDCL 22-7-8.1, a separate enhancement statute, the dispositive language in SDCL 22-7-7 is the same.

SDCL 22-7-7, like SDCL 22-7-8.1 only provides that the sentence for the principal felony shall be enhanced. And interpreting the statute to enhance the classification of the underlying felony would require us to ignore the words "the sentence for" which we will not do." Rowley 2013 SD 618

826 N.W.2d at 364

★
Regardless of the nomenclature we chose ... the habitual offender status operates to increase defendant's sentence ~~but~~ do not substantively change the class of the principal felony. Id 10 826 N.W.2d at 364
See also State v. Guthmiller 2003 SD 83 131 667 N.W.2d 295, 305

- Appellant in this matter was convicted of a class 5 felony. The sentence of the first third degree burglary charge went beyond the maximum of 5 year sentence. The court agreed with prosecutor to a plea bargain of 6 yrs. and some suspended time. therefor the court went beyond 5 years maximum on a class 5 felony.

- The court in this matter did state aggravating circumstances on judgement of conviction but not on a dispositional form. The factors the court used to form aggravating factors are anything but factors that pose a significant risk to the public.

- Defendants-Appellants criminal records are from 10-20 years old, a nolo-contendere plea and a presentence report not factual in its content.

- Probation does not support aggravating violation
Circumstances to depart from 22-6-11.
SOC L

I ask this honorable court to look into all issues presented. I also ask the court to realize that I the appellant in this case does not have aggravating circumstances that pose a risk to the public.

Appellant Chad M. Feist was working for 10 months between sentencing and plea of guilty. I the appellant along with the sentencing court knew I was not a threat to the public, because sentencing would of been with-in 2 days.

I pray that this honorable court takes into consideration my ^{Appellants} stand about the circumstances in this matter.

All the testimony I present are factual and I the appellant am not a risk to society.

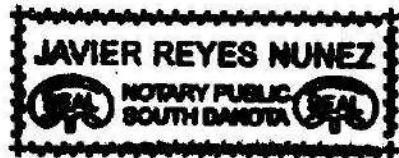
(Appellant) I believe that court erred under sdc 22-6-11 and that it is supported by there not being any aggravating factors the a departure from presumative sentence guidelines.

Appellant Chad M Feist presents these arguments that support issues in case 49CR 122 006021, Pages 1-12, to this honorable court. I pray before this court to do what is just in this case, which is supported by facts in 49CR 122 006021 "Karth brief."

Notary: 3 June 2024
JMM JMM JMM

Dated: 3 June 2024

Print: Chad M. Feist
Signature: Chad M. Feist



2-12-30

Certificate of Service

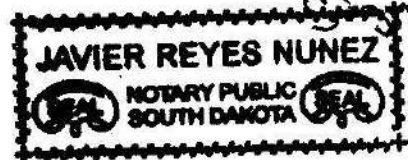
The undersigned hereby certifies that a true and correct copy of case # 304173 Karth Brief part B was sent to MARK Kad, Minnehaha Co. Public Advocate office 415 N Dakota Ave Sioux Falls, SD 57104

By U.S. postal service mail.

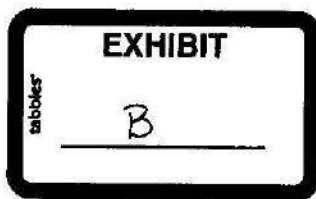
Notary: 3 June 2024
JMM JMM JMM

Dated: 3 June 2024

Print: CHAD M. FEIST
Signature: Chad M. Feist



2-12-30



STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

PD 22-018865

STATE OF SOUTH DAKOTA,
Plaintiff,

+

49CRI22006021

vs.

+

JUDGMENT & SENTENCE

CHAD MERWIN FEIST,
Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on September 22, 2022, charging the defendant with the crimes of Count 1 Burglary 3rd Degree on or about July 1, 2022; Count 2 Burglary 3rd Degree on or about August 12, 2022; Count 3 Burglary 3rd Degree on or about August 26, 2022; Count 4 Burglary 3rd Degree on or about August 27, 2022; Count 5 Burglary 3rd Degree on or about August 28, 2022; Count 6 Burglary 3rd Degree on or about August 29, 2022; Count 7 Grand Theft (>\$1,000 to \$2,500) on or about July 1, 2022 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on October 6, 2022, Lisa Capellupo appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

Defendant with counsel, Beau Blouin, returned to Court on March 28, 2023, the State appeared by Thomas R. Hensley, Chief Criminal Deputy State's Attorney. The defendant thereafter changed his plea to guilty to Count 3 Burglary 3rd Degree (SDCL 22-32-8) and guilty to Count 4 Burglary 3rd Degree (SDCL 22-32-8) and admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-8.1), with sentencing continued after the completion of a presentence report.

Thereafter, on August 17, 2023, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

S E N T E N C E

AS TO COUNT 3 BURGLARY 3RD DEGREE / HABITUAL OFFENDER : CHAD MERWIN FEIST shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for six (6) years with credit for three (3) days served and with two (2) years of the sentence suspended on conditions that the defendant sign and comply with all terms Parole Agreement and that the defendant pay \$116.50 court costs and restitution of \$720.00 (from bond posted) through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 4 BURGLARY 3RD DEGREE / HABITUAL OFFENDER : CHAD MERWIN FEIST shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of

Minnehaha, State of South Dakota for two (2) years with the sentence suspended (consecutive to Count 3) on the conditions that the defendant sign and comply with all terms Parole Agreement and that the defendant pay \$116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

The Court finds aggravating circumstances exist that pose a significant risk to the public and requires a departure from presumptive probation pursuant to SDCL 22-6-11, as follows:

- Defendant's criminal history / 5 prior felonies
- Defendant's previous failure to comply with probation
- Impact on the victim(s)


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

It is ordered that Counts 1, 2, 5, 6 and 7 charging _____ with four (4) counts of Burglary 3rd Degree and one (1) count of Grand Theft (>\$1,000 to \$2,500) be and hereby are dismissed.

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

8/23/2023 2:15:42 PM

BY THE COURT:



JUDGE JENNIFER D. MAMMENGA
Circuit Court Judge

Attest:
Schuelke, Austin
Clerk/Deputy



IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30473

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHAD MERWIN FEIST,

Defendant and Appellant.

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

THE HONORABLE JENNIFER D. MAMMENGA
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

John M. Strohman
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

Mark Kadi
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Telephone: (605) 367-7392
Email: mkadi@minnehahacounty.org

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed September 22, 2023

TABLE OF CONTENTS

| | PAGE |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT..... | 1 |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF LEGAL ISSUES AND AUTHORITIES..... | 2 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| ARGUMENTS | |
| PART A | |
| PURSUANT TO <i>STATE V. KORTH</i> , 2002 S.D. 101, 650 N.W.2D 528, APPELLATE COUNSEL DID NOT RAISE ANY ISSUES | 7 |
| PART B | |
| DEFENDANT STATES VARIOUS COMPLAINTS REGARDING EVIDENCE, HIS COUNSEL AND THE JUDGE IN HIS CASE ARE WITHOUT MERIT | 8 |
| CONCLUSION..... | 20 |
| CERTIFICATE OF COMPLIANCE..... | 21 |
| CERTIFICATE OF SERVICE | 21 |

TABLE OF AUTHORITIES

| CASES CITED: | PAGE |
|--|---------------|
| <i>Brakeall v. Weber</i> , 2003 S.D. 90, 668 N.W.2d 79..... | 14 |
| <i>Hansen v. Kjellsen</i> , 2002 S.D. 1, 638 N.W.2d 548 | 10 |
| <i>Kern v. Progressive Ins. Co.</i> , 2016 S.D. 52, 883 N.W.2d 511 | 10 |
| <i>Miller v. Hernandez</i> , 520 N.W.2d 266 (S.D. 1994) | 9 |
| <i>State v. Arabie</i> , 2003 S.D. 57, 663 N.W.2d 250 | 2, 7, 8, 10 |
| <i>State v. Birdshead</i> , 2015 S.D. 77, 871 N.W.2d 62 | 2, 9 |
| <i>State v. Bryant</i> , 2020 S.D. 49, 948 N.W.2d 333..... | 9 |
| <i>State v. Ceplecha</i> , 2020 S.D. 11, 940 N.W.2d 682 | 2, 8 |
| <i>State v. Feucht</i> , 2024 S.D. 16, 5 N.W.3d 561 | 11, 18 |
| <i>State v. Fool Bull</i> , 2009 S.D. 36, 766 N.W.2d 159 | 10 |
| <i>State v. Gard</i> , 2007 S.D. 117, 742 N.W.2d 257..... | 9 |
| <i>State v. Hannemann</i> , 2012 S.D. 79, 823 N.W.2d 357..... | 16 |
| <i>State v. Hoeft</i> , 1999 S.D. 24, 594 N.W.2d 323 | 8 |
| <i>State v. Janssen</i> , 371 N.W.2d 353 (S.D. 1985)..... | 20 |
| <i>State v. Korth</i> , 2002 S.D. 101, 650 N.W.2d 528 | 2, 7 |
| <i>State v. Pellegrino</i> , 1998 S.D. 39, 577 N.W.2d 590..... | 10, 20 |
| <i>State v. Podzimek</i> , 2019 S.D. 43, 932 N.W.2d 141..... | 9 |
| <i>State v. Thomas</i> , 2011 S.D. 15, 796 N.W.2d 706 | 12, 18 |
| <i>State v. Whitfield</i> , 2015 S.D. 17, 862 N.W.2d. 133..... | 2, 13, 14, 19 |
| <i>United States v. Sineneng-Smith</i> , 140 S. Ct. 1575 (2020)..... | 9 |

STATUTES CITED:

SDCL 15-26A-60(4)..... 9

SDCL 15-26A-60(6)..... 9, 20

SDCL 22-6-11 Passim

SDCL 22-32-8 1, 2

SDCL 22-30A-1 3

SDCL 22-30-17(1)..... 3

SDCL 23A-8-3 9

SDCL 23A-27-5 10

SDCL 23A-27-7 10, 13

SDCL 23A-28-1 6, 7

SDCL 23A-32-2 1

SDCL 23A-32-14 9

FEDERAL CASES CITED:

Federal Rule 32(c)(3)(a) 13

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30473

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHAD MERWIN FEIST,

Defendant and Appellant.

PRELIMINARY STATEMENT

Appellant, Chad Merwin Feist, will be called “Defendant” or “Feist.” Appellee, State of South Dakota, will be called “State.” Defendant was convicted in Minnehaha County Criminal File No. 49CRI22-006021, for two counts of Burglary - third degree (SDCL 22-32-8). He also admitted to the State’s Part II Habitual Criminal Offender Information. Citations to Appellant’s brief will be referred to as “DB.” Citations to the settled record will be referred to as “SR.” All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On August 23, 2023, the Honorable Jennifer D. Mammenga filed a Judgment and Sentence in *State of South Dakota v. Chad Merwin Feist*, Minnehaha County Criminal File No. 49CRI22-006021. SR:27-28. Defendant filed his Notice of Appeal on September 22, 2023. SR:127-28. This Court has subject matter jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

PART A

PURSUANT TO *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2D 528, APPELLATE COUNSEL DID NOT RAISE ANY ISSUES.

The State concurs with Defendant’s counsel that there are no arguably meritorious issues for appeal based on the settled record.

State v. Arabie, 2003 S.D. 57, 663 N.W.2d 250

State v. Korth, 2002 S.D. 101, 650 N.W.2d 528

PART B

DEFENDANT STATES VARIOUS COMPLAINTS REGARDING HIS SENTENCE.

The court did not rule on this issue.

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

State v. Birdsheed, 2015 S.D. 77, 871 N.W.2d 62

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

STATEMENT OF THE CASE AND FACTS¹

On September 07, 2022, the State filed a Complaint charging Defendant with six counts of Burglary in the Second Degree and one count of Grand Theft. SR:1-3. On September 22, 2022, a subsequent indictment was filed charging six counts of Burglary in the Third Degree, in violation of SDCL 22-32-8 and one count of Grand Theft in violation of

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

SDCL 22-30A-1 and 22-30-17(1). SR:8-10. A Part II Habitual Criminal Offender Information was also filed alleging that Defendant had felony convictions in:

- 2011 for Witness Tampering (Mead County, South Dakota);
- 2013 for Attempted Sexual Contact with a Victim Incapable of Consent (Butte County, South Dakota); and
- 2021 for Failure to Register (Minnehaha County, South Dakota).

SR:11-12

Defendant was arraigned on October 6, 2022. SR:172. The court informed him of his constitutional and statutory rights. SR:172-80. The court also entered Defendant's not guilty plea to the charges, along with his denial to the Part II Information. SR:180.

A change of plea hearing took place on March 28, 2023. SR:145. The court again informed Defendant of his constitutional and statutory rights. SR:146-55. Defendant then entered a plea of guilty to Counts 3 and 4 of the Indictment. SR:156.

The court asked the State to provide the factual basis. SR:157. The victim of Defendant's crime, Jason Schulte, owned an apartment building in Sioux Falls. The basement of the apartment building contained a secured room which had a drop box attached to it that was used for tenants to pay their rent. Once a deposit was made in the drop box, the money or check was not retrievable by the renter. SR:157-58.

In July 2022, Mr. Schulte noticed that the box was missing several cash deposits tenants had made. SR:158. He decided to install a

surveillance camera in the room. SR:158. Obtained camera footage showed Defendant entering the secured room several times. SR:158. Defendant gained entrance into the room by unscrewing and removing a wall panel. SR:158. After completing the theft, Defendant would replace the wall panel to prevent detection. SR:158. During three different incidents, Defendant stole a total of \$2,420 in rent money. SR:158.

When asked if Defendant agreed with the State's factual basis, he said, "No." SR:159. The court then asked Defendant, "[d]o you agree that on or about August 26th and 27th of 2022, here in Minnehaha County, South Dakota, that you did enter a secure room at 734 West 10th Street here in Sioux Falls?" SR:159. Defendant answered, "[y]es." SR:159. The court then inquired if he entered the room without permission and that if the room was within an occupied or unoccupied structure, and not a motor vehicle. Defendant again answered, "yes." SR:159. The court's next question was whether he entered the room with the intent to commit theft. SR:159. Defendant answered, "[y]es, Your Honor." SR:159.

The court then asked Defendant questions about his prior convictions listed in the Part II Information. Defendant admitted to the prior felonies. SR:160-61. The court summarized the hearing by stating:

I find that this defendant has been advised and understands the nature of the charges, the penalties that could be imposed, and that he has been advised of his constitutional and statutory rights by the Court and Counsel and he understands those rights.

He's been advised of and understands that by pleading guilty he waives his rights; including the right to a trial, the right to

confront and cross-examine witnesses against him, and the right against self-incrimination. This defendant's pleas are knowing, voluntary and intelligent and are not the result of force, threats or promises and are made without duress. This defendant has been represented by competent Counsel and is competent to enter pleas in this court.

I also find that there is an adequate factual basis for the pleas and the admission on the Part II. I therefore accept his pleas and admission and I do find the defendant guilty of Counts 3 and 4 charging him with Burglary in the Third Degree. I do also find that the defendant does have three prior felony convictions as indicated by the Part II.

SR:161-62.

The court ordered a presentence investigation report ("PSI") be prepared. SR:162. The sentencing and restitution hearing took place on August 17, 2023. SR:195. Both the State and Defendant's counsel informed the court that they did not have any additions or changes to the PSI. SR:197.

The victim, Jason Schulte, testified at sentencing. SR:198. He explained the location of the secured room and lockbox in his apartment building. SR:200. He also explained how his video recording camera would save portions that were motion activated. SR:201. After eight days, Mr. Schulte captured Defendant on video entering the room, eleven times. SR:201. He would see Defendant "entered the room, opened the drop box, and rifled through its contents each time." SR:210.

Mr. Schulte contacted law enforcement. He also explained to the court the amounts of money that was taken each month which totaled \$2,415.

SR:204-05. The State recommended Defendant spend four years in the

penitentiary, along with additional time suspended. SR:214. The State argued that the penitentiary time is justified based on Defendant's record. *Id.*

Defense counsel claimed that Defendant committed the crimes at a low time in his life where he was unemployed, and his girlfriend had lost her job. SR:217. Counsel concluded by arguing that Defendant should receive only a probationary sentence with three days credit. SR:218. Defendant did not wish to address the court personally. SR:218.

The court then addressed the restitution issue, referencing SDCL 23A-28-1. SR:218-20. The court concluded that it could not order restitution above the \$720 that was stolen in Count 3. SR:220-21. The court then commented on the fact that Defendant stole rent money from Mr. Schulte who was providing low-income housing in a community that had a great need for it. SR:221-23.

The court then addressed the punishment for the crime by pointing out that Defendant was almost sixty years old, and this was his "sixth felony conviction." SR:223. The court also recognized his military service and that he has been employed. *Id.* For Count 3, the court sentenced Defendant to six years in the South Dakota State Penitentiary with two years suspended based on successful completion of the terms and conditions. SR:224. As to Count 4, Defendant was sentenced to two years in the South Dakota State Penitentiary, to be suspended upon

successful completion of various terms and conditions. SR:225. The court ordered the two sentences to run consecutive to each other. *Id.*

The court filed its Judgment and Sentence on August 23, 2023. SR:27-28. Defendant filed his Notice of Appeal on September 22, 2023. SR:127-28. On February 7, 2024, appellate counsel, Christopher Miles, moved to withdraw as counsel due to “destruction of communication causing a breakdown in the attorney-client relationship.” SR:237. The court granted the motion. *Id.* This Court then granted Defendant an Order of Limited Remand and stayed the Appellant’s brief due date. SR:234. Later the court appointed Mark Kadi from the Public Advocate’s Office to represent Defendant.

PART A

PURSUANT TO *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2D 528, APPELLATE COUNSEL DID NOT RAISE ANY ISSUES.

Defendant’s counsel has filed a brief under *State v. Korth*, 2002 S.D. 101, 650 N.W.2d 528. Defense counsel has made the statements required in that case, as well as in *State v. Arabie*, 2003 S.D. 57, 663 N.W.2d 250. Among other things, counsel stated that he has “not identified any arguably meritorious issue to justify appeal.” DB:2.

The State has also examined the settled record. After this examination, the State has likewise found no meritorious issues. The State believes that the governing standards for the filing of a “*Korth* brief” are set out in *Arabie*, 2003 S.D. 57, ¶¶ 8-18, 663 N.W.2d at 254-56. In

examining Part A of the brief, it appears to comply with *Arabie*, in that it contains a thorough statement of the case and facts and makes the required statements of counsel without raising any arguably meritorious issues. The State, therefore, requests that this Court affirm the Judgment of Conviction and Sentence.

PART B

DEFENDANT STATES VARIOUS COMPLAINTS REGARDING EVIDENCE, HIS COUNSEL AND THE JUDGE IN HIS CASE ARE WITHOUT MERIT.

Under *Arabie*, 2003 S.D. 57, ¶ 19, 663 N.W.2d at 256, this Court must examine the record, considering all the briefs, and Defendant's Part B. Defendant's Part B either raises issues that are waived or not ripe for review or fails to develop a comprehensible factual and legal argument capable of meaningful review.

This Court considers an appellant's *pro se* Part B arguments much like it considers and decides issues raised in any other direct criminal appeal. *Arabie*, 2003 S.D. 57, ¶ 19, 663 N.W.2d at 256. This means that waiver, ripeness, and other defenses generally applicable to every appeal apply equally to *Korth* appeals.

A. Any Nonjurisdictional Claims Are Forfeited.

Defendant entered a guilty plea which "waives a defendant's right to appeal all nonjurisdictional defects in the prior proceedings." *State v. Ceplecha*, 2020 S.D. 11, ¶ 29, 940 N.W.2d 682, 692; *see also State v. Hoeft*, 1999 S.D. 24, ¶ 12, 594 N.W.2d 323, 326. Issues not preserved at

the trial court level are forfeited for appellate review. *State v. Podzimek*, 2019 S.D. 43, ¶ 27, 932 N.W.2d 141, 149. A trial “court must be given an opportunity to correct any claimed error before [this Court] will review it on appeal.” *State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261. In order to “preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons.” *State v. Bryant*, 2020 S.D. 49, ¶ 18, 948 N.W.2d 333, 338; SDCL 23A-8-3 (listing issues that must be raised before trial). “A defendant must obtain a definitive ruling on the record admitting or excluding the evidence.” *State v. Birdsheed*, 2015 S.D. 77, ¶ 53, 871 N.W.2d 62, 79.

A defendant can also waive issues at the appellate level by failing to comply with appellate procedure. SDCL 15-26A-60(4)² requires a concise statement of the legal issues and “a concise statement of how the trial court decided it.” *Miller v. Hernandez*, 520 N.W.2d 266, 272 (S.D. 1994) (plaintiff waived an issue by failing to assign it as a legal issue in the brief); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (“In both civil and criminal cases . . . we rely on the parties to frame the issues for decision[.]”). SDCL 15-26A-60(6) states that the argument section for each issue must contain “citations to the authorities relied on.” Failure to adequately present arguments and authority in a brief constitutes waiver

² Under SDCL 23A-32-14, the statutes regarding civil appeals apply to criminal appeals as well.

on appeal. *Kern v. Progressive Ins. Co.*, 2016 S.D. 52, ¶ 35, 883 N.W.2d 511, 518; *State v. Fool Bull*, 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169 (quoting *State v. Pellegrino*, 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599).³

The State of South Dakota has read Defendant's Part B and attempts to address what it can. Because Defendant failed to adequately present arguments and authority, his complaints / issues should be waived for appellate review and his conviction affirmed.

B. Defendant's General Complaints Involve his Sentence, the Judge and his Attorney.

In Defendant's first Part B comment / issue, he claims that the "[s]entencing court used presentence report for sentencing purposes, without [Feist] ever getting to see all issues in report." DB:7. He also claims that the PSI should not be used as it is not "evidence." DB:7. Defendant's allegation was not raised with the trial court at sentencing. SDCL 23A-27-5 gives the court the discretion to order a presentence investigation and PSI. See *Hansen v. Kjellsen*, 2002 S.D. 1, ¶ 11 638 N.W.2d 548, 550-51. A Defendant "has a right to comment on the presentence report and may introduce evidence." *Id.* ¶ 11, 638 N.W.2d at 551; see also SDCL 23A-27-7 ("The court shall afford the defendant, the defendant's counsel, or the prosecuting attorney an opportunity to

³ Defendant's counsel is not required in the Part B to "conduct extensive research, identify authorities and draft a detailed brief supporting the client's arguments no matter how absurd or frivolous they might be." *State v. Arabia*, 2003 S.D. 57, ¶ 18, 663 N.W.2d at 256.

comment thereon and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.”)

In Feist’s case, the court ordered a PSI to be prepared. SR:162. The sentencing hearing took place on August 17, 2023. At that hearing, both the State and Defendant’s counsel informed the court that they did not have any additions or changes to the PSI. SR:195-97.

In Feist’s second Part B comment / issue, he claims that his sentence was “based on erroneous facts or the court failing to adequately explain the sentence.” DB:7. The sentencing was not based on erroneous facts. If Feist really believed that, he would have told the court as much at sentencing, rather than waive the issue. The sentencing record shows that after all the arguments and witness testimony was entered, the court said to Defendant, “Mr. Feist, is there anything that you wanted to tell me today?” Feist responded, “I really don’t have nothing to say, your Honor.” SR:218.

In Defendant’s third Part B comment / issue, he claims that “the circuit court [did not] produce a supporting departure from presumptive sentence under 22-6-11.” DB:7. This Court has held that “when a circuit court fails to comply with the procedural requirements of SDCL 22-6-11, parties must first raise the issue to the circuit court to preserve the error for appeal and avoid plain error review.” *State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d 561,

569; (quoting *State v. Thomas*, 2011 S.D. 15, ¶ 20, 796 N.W.2d 706, 713) “Where an issue has not been preserved by objection at trial, our review is limited to whether the trial court committed plain error.”

At Defendant’s sentencing, the court pointed out to him that this “is your sixth felony conviction...[y]ou’ve been to prison before.” SR:223. The court then stated why it departed from presumptive probation:

You’re in your 50s. You’re almost 60 years old, and I don’t know what to tell you besides you can’t take advantage of other people to get ahead in the world. It’s not how it works.

You’ve got a variety of criminal offenses in your criminal history. I see that you do have a prior theft conviction, so it’s not the first time that you’ve done this either. I do think the recommendation for prison time here is appropriate. I recognize that you’ve been gainfully employed. I think that your services in the armed forces is certainly commendable....

So today, pursuant to South Dakota Codified Law 22-6-11, I do find that aggravating factors exist that do pose a significant risk to the public and require a departure from presumptive probation. Those factors include the defendant’s criminal history. He does have five prior felony criminal convictions. He does have a failure to comply with probation previously as indicated by the presentence investigation report. And the nature of the crime in that it involved theft, both from his landlord and his neighbors. I do find that a prison sentence would be appropriate to further the deterrence of future criminal activity for this defendant.

SR:223-24.

The court also set out the aggravating factors in the Judgment as to why it was departing from presumptive probation. These factors

included Defendant's criminal history, failure to comply with probation and the impact on the victims. SR:27-28.

This Court has set forth the abuse of discretion standard to review a sentencing court's decision to depart from presumptive probation and impose a prison sentence. *See State v. Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d. 133, 140. The court complied with the dictates of SDCL 22-6-11 prior to imposing a prison sentence. First, as required by the statute, the court properly considered the aggravating circumstances on the record at the sentencing hearing. *See* SDCL 22-6-11. The court also complied with SDCL 22-6-11 by specifying the aggravating circumstances in the dispositional order. SR:38; *see Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d. at 140 (holding that the sentencing court must state the aggravating circumstances in the Judgment of Conviction).

In Defendant's fourth Part B comment / issue he makes citations to federal sentencing guidelines. His main claim is that "[d]eparture from sentencing guidelines must give parties reasonable notice of departure. Rule 32c (3) (A) (sic)." DB:8.

The trial court did not depart from the sentencing guidelines. This Court, while making general comments about the Federal Rule 32(c)(3)(a), stated that "our rule does not require that the sentencing court *verify* that counsel and defendant have discussed and reviewed the report. Instead, SDCL 23A-27-7 requires *disclosure* of the report to the

defendant *and* his counsel.” *Brakeall v. Weber*, 2003 S.D. 90, ¶ 25, 668 N.W.2d 79, 87. The disclosure of the report took place:

THE COURT: And I have received from court services a copy of the presentence investigation report which I have reviewed in advance of today’s hearing. Have both parties received the report and had a chance to review it?

MR. BLOUIN: Yes.

MR. HENSLEY: Yes, your Honor.

THE COURT: Were there any additions or changes to the report?

MR. HENSLEY: Not from the State, your Honor.

MR. BLOUIN: No.

SR:197.

In Defendant’s fifth Part B comment / issue, he claims that the court needs to notice that he did not get in trouble or was charged with a crime, during the ten-month period between his guilty plea and his sentencing. He believes that this crime-free time should erase his “aggravating circumstances.” SR:9.

The court correctly reviewed Defendant’s history and criminal background. As mentioned above, the State maintains that the court did not abuse its discretion in sentencing Defendant. *See Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d. at 140. The mere fact he did not get arrested for a crime for ten months does not nullify his criminal history of six felonies.

In Defendant's sixth comment / issue he complains about his Indictment. He claims the State "charges a single offense in multiple counts, such an indictment is improper." A simple review of the indictment shows that each of the seven counts, cite a different date for the crimes charged. As mentioned above, Defendant plead guilty on Counts 3 and 4 of the Indictment. The judgement notes that "counts 1, 2, 5, 6, and 7 counts of Burglary 3rd Degree and one (1) count of Grand Theft ... hereby are dismissed." SR:28. There is no issue here.

In Defendant's seventh comment / issue he claims that his current conviction "cannot serve as a predicate offense of third-degree burglary for sentence enhancement." Defendant fails to recognize that he has prior felony convictions, and he pleaded guilty to the Part II Information. The court did not abuse its discretion in sentencing him.

In Defendant's eighth comment / issue he claims he was not provided documents during his case. He states "[i]ndictment clauses provides the right of a defendant to be notified of the charges against him" DB:9.

The record shows that Defendant was Arraigned on October 6, 2022, and the court informed him of the charges along with his constitutional and statutory rights. SR:172-80. Later there was a change of plea hearing March 28, 2023, where again the court informed Defendant of his constitutional and statutory rights and he plead guilty to Counts 3 and 4. SR:146-56. At sentencing, he heard all the

information from the PSI and the victim's testimony. The court then gave Feist a chance to speak. Defendant did not wish to address the court. SR:218. If Defendant is making claims of ineffective assistance of counsel, those are better resolved through habeas corpus proceedings rather than direct appeals. *See State v. Hannemann*, 2012 S.D. 79, ¶ 17, 823 N.W.2d 357, 362.

In Defendant's ninth comment / issue, he claims that the elements of the crime that he plead guilty to where not met. First, he claims that the "landlord states . . . that nothing was missing." DB:10. Defendant's statement is not completely accurate. The court stated during the restitution hearing, "I think it's indisputable here, and certainly Mr. Feist and through his attorney acknowledge that the \$720 taken on August 26th, 2022, that would have been connected to count 3 which the defendant entered a guilty plea to" SR:219. The court then discussed the August 27, 2022, burglary where he entered the locked room to get to the lock box. *Id.*

Defendant wrongfully believes that he must be successful in obtaining the items he entered the building to steal to be guilty of burglary. When the court took his plea, it obtained the necessary factual basis for his convictions. Defendant was asked by the court, "[d]o you agree that on or about August 26th and 27th of 2022, here in Minnehaha County, South Dakota, that you did enter a secure room at 734 West 10th Street here in Sioux Falls?" *Id.* Defendant answered, "[y]es." *Id.*

The court then asked if he entered the room without permission and that if the room was within an occupied or unoccupied structure, and not a motor vehicle. Defendant again answered “yes.” SR:159. The court also asked whether he entered the room with the intent to commit theft. Defendant answered, “[y]es, Your Honor.” *Id.* There is no dispute: Defendant committed the crime. There is no claim that justifies his withdrawal of his guilty plea.

Defendant’s tenth comment / issue is simply a statement he makes. Defendant says that burglary is not a crime of violence “nor does it show risk to the public.” He also claims a statistic to support his opinion. There is no issue raised to be addressed.

In Defendant’s eleventh comment / issue, he talks about his Judgement of Conviction setting forth the aggravating circumstances. SR:10. The judgment states:

The Court finds aggravating circumstances exist that pose a significant risk to the public and requires a departure from presumptive probation pursuant to SDCL 22-6-11, as follows:

- Defendant’s criminal history / 5 prior felonies
- Defendant’s previous failure to comply with probation
- Impact on the victim(s)

SR:10.

Defendant claims that since the five prior felonies are not listed in the judgement, the court should not be allowed to depart from a presumptive probation sentence under 22-6-11. He also believes that

any failure of probation should not be considered an aggravating circumstance.

The State addresses Defendant's comments by referring to its response to Defendant's issue three above. The record showed that Defense counsel was asked at sentencing if they had any additions or changes to the PSI. The defense stated that they did not. SR:197. This Court has said that when a circuit court fails to comply with the procedural requirements of SDCL 22-6-11, parties must first raise the issue to the circuit court to preserve the error for appeal and avoid plain error review. *State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569, See *State v. Thomas*, 2011 S.D. 15, ¶ 20, 796 N.W.2d at 713. Victim here, explained.

In this section, Defendant also claims that his crimes did not impact the victims. The record shows the opposite. Mr. Schulte, a victim in this case, told the court that the amount of money taken one month was around \$2,415. SR:204-05.

Defendant has two comments / issues labeled as number eleven. In the second one, Defendant claims that his Part II Information was filed before his Indictment. DB:10-11. The settled record shows otherwise. A Complaint was filed on September 7, 2022. SR:1-3. The Indictment is listed before the Part II Information. SR:8-11. Both the Indictment and Part II Information were filed on September 22, 2022. SR:8-11.

In Defendant's twelfth comment / issue he states:

#12. The amendment deletes burglary of dwelling from the list of enumerated offenses in implementing this charge of burglary offense rarely result in physical violence of a dwelling. Is rarely the instant offense of conviction or the "derminative (sic) predicate" for triggering a higher penalty under the career offender guideline. Historically career offenders have ever been arrested for a burglary offense after release.

The State is somewhat confused with this comment / issue. The State understands that Defendant believes that his charge "rarely result in physical violence of a dwelling" DB:11. He further states a belief burglars should not get "a higher penalty under the career offender guideline." DB:11. He then concludes with a confusing statement that "career offenders have ever (sic) been arrested for a burglary offense after release." Defendant can have his opinion, but the State cannot identify an issue ripe for response and review.

In Defendant's thirteenth comment / issue he states: "the factors the court used to form aggravating factors are anything but factors that pose a significant risk to the public [p]robation violation does not support aggravating circumstances to depart from SDCL 22-6-11." DB:12. Defendant is recycling back to his general complaint that he should not be viewed as a habitual criminal. His claim is based on his opinion that he is not "a significant risk to the public." DB:11-12. The State maintains that the court did not abuse its discretion in sentencing Defendant. *See Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d. at 140.

CONCLUSION

This Court has held “[t]he failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived.” *State v. Pellegrino*, 1998 S.D. 39, ¶ 22, 577 N.W.2d at 599. This Court has also held that a knowledgeable and voluntary plea of guilty waives all non-jurisdictional defects in the prior proceedings. *See State v. Janssen*, 371 N.W.2d 353, 356 (S.D. 1985). For these reasons, and those set out above, Defendant’s Part B should be found without merit.

The State requests that this Court affirm Defendant’s Judgment of Conviction.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ John M. Strohman

John M. Strohman
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 4,468 words.

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

Dated this 20th day of August 2024.

/s/ John M. Strohman
John M. Strohman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 20, 2024, a true and correct copy of Appellee’s Brief in the matter of *State of South Dakota v. Chad Merwin Feist*, was served electronically through Odyssey File and Serve upon Mark Kadi at mkadi@minnehahacounty.org.

/s/ John M. Strohman
John M. Strohman
Assistant Attorney General