

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 31284

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

GAVIN COLE MITCHELL,
Defendant and Appellant.

Appealed from the Circuit Court
Third Judicial Circuit, Beadle County, South Dakota
The Honorable Kent A. Shelton, presiding

APPELLANT'S BRIEF

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Notice of Appeal filed November 6, 2025

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PRELIMINARY STATEMENT

The Defendant and Appellant, GAVIN COLE MITCHELL, will be referred to as “Defendant”. The Plaintiff and Appellee, State of South Dakota, will be referred to as “State”. References to documents will be as follows:

Preliminary Hearing	PH
Change of Plea Hearing	CPH
Pre-Sentence Report.....	PSR
Settled Record.....	SR
Sentencing Hearing.....	SH

All documents will be followed by their appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appealed from a Judgment of Conviction entered on November 4, 2025, by the Honorable Kent A. Shelton, Circuit Court Judge, for the Third Judicial Circuit, in Beadle County, South Dakota. (SR 90). The Judgment of Conviction is a final order and is appealable as a matter of right pursuant to SDCL 23A-32-2. The Notice of Appeal was filed on November 6, 2025.

LEGAL ISSUES

1. The Court’s sentence constitutes cruel and unusual punishment.

Relevant Authority:

State v. Blair, 2006 S.D. 75

State v. Bonner, 1998 S.D. 30

STATEMENT OF THE CASE

The Defendant pled guilty to Count II of an Indictment charging Unauthorized Possession of Controlled Substance, a Class 5 Felony on October 21, 2025, and was sentenced by the Honorable Kent A. Shelton on November 4, 2025. The Defendant was sentenced to five years in the South Dakota State Penitentiary.

STATEMENT OF FACTS

On August 7, 2025, the Defendant was the driver of a vehicle that was stopped for an inoperable headlight. During the traffic stop, law enforcement learned that there was an active arrest warrant from Minnehaha County and the Defendant was arrested on the warrant. During a search of the vehicle 12.9 grams of cocaine were located along with drug paraphernalia.

ARGUMENT

I. The Court's sentence constitutes cruel and unusual punishment.

The Eighth Amendment to the United States Constitution and Article VI, § 23 of the South Dakota Constitution prohibit cruel and unusual punishments. Although sentences within the statutory maximum are reviewed under the abuse of discretion standard, an Eighth Amendment challenge subjects review of the sentence to the Bonner standards of proportionality. State v. Bonner, 1998 SD 30. This Court has held that a sentence must be proportionate to the offense committed and the offender, and that the harshest sentences are reserved for the “most serious combinations of the offense and the background of the offender.” State v. Blair, 2006 SD 75 ¶ 26 (internal citations omitted). In order to properly assess the proportionality of sentence, the sentencing court must

“acquire a thorough acquaintance with the character and history of the person before it.

Id. (citing Bonner).

The factors a sentencing court must consider are: 1) the Defendant’s moral character; 2) mentality; 3) habits; 4) social environment; 5) tendencies; 6) age; 7) aversion or inclination to commit crimes; 8) life; 9) family; 10) occupation and 11) previous criminal record. *Id.* at ¶27. In addition, the Defendant’s rehabilitation prospects and the impact of the crime(s) on any victims must be considered. *Id.* The sentencing court failed to consider the majority of these factors when imposing sentence.

While noting that this is a presumptive probation case pursuant to SDCL 22-6-11, the Court found the following aggravating factors: 1) an active arrest warrant in Minnehaha County at the time of his arrest in Beadle County; 2) an Indictment in June, 2025 in Minnehaha County on drug distribution charges; 3) low likelihood of complying with terms of probation; 4) the amount of controlled substance in his possession at the time of his arrest and 5) a substantial threat to the community. SH 5, SH 6, lines 1-3. The court then imposed the maximum sentence. SH 6, lines 4-15.

Because the Defendant did not object to the Court’s departure from the presumptive probation provisions of SDCL 22-6-11, the standard of review is plain error.

To demonstrate plain error [the appellant] must establish that there was: ““(1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.”

State v. Janes, 2026 SD 9, ¶ 14 (citations omitted).

Plain error is permissive and “applied cautiously in on the most exceptional circumstances.” *Id.* at ¶ 15.

The Court's error in departing from the presumptive probation provisions of the statute is plain. The Court's only reference to the facts of the instant offense was to the amount of cocaine found during the traffic stop. SH 5, lines 17-23. The majority of the Court's finding of aggravating circumstances related to the pending Minnehaha County charges. SH 5, lines 3-16.

This plain error affects the substantial rights of the Defendant in that rather than being placed on probation he was imprisoned for five years-the maximum sentence allowable. Negatively affecting a Defendant's rights in this manner affects the fairness of the judicial proceedings.

The Court failed to analyze and apply the Bonner factors at sentencing. The factors a sentencing court must consider are: 1) the Defendant's moral character; 2) mentality; 3) habits; 4) social environment; 5) tendencies; 6) age; 7) aversion or inclination to commit crimes; 8) life; 9) family; 10) occupation and 11) previous criminal record. *State v. Bonner*, 1998 SD 30, ¶ 19. The sentencing hearing transcript is completely devoid of the mention of any of the above factors but for previous criminal history. In fact, the reasons for the Court's sentence occupy only twenty-eight lines of the sentencing hearing transcript. SH 5, 6 lines 1-3.

These twenty-eight lines demonstrate that the Court failed to address ten of the eleven Bonner factors. The Court focused solely on the Minnehaha County case, which was unresolved at the time of sentencing, and the amount of cocaine involved in both cases. SH 5 lines 6-19. In so doing, the Court failed to acquire a thorough acquaintance with the Defendant. *State v. Blair*, 2006 SD 75, ¶ 26. The Court made note of the fact that the Defendant possessed a scale at the time of his arrest but failed to take note of the

Defendant's age, employment, family and other aspects of the Defendant's background in order to fashion a sentence that was proportionate to the Defendant and the crime he was sentenced for. In addition, the Court failed to consider the Defendant's rehabilitation prospects and the impact (if any) of the crime(s) on any victims. *Id.* at ¶ 27. The Court in *Blair* conducted a careful and seemingly complete analysis of all the necessary factors, something the sentencing Court here failed to do. *Id.*

If the harshest sentences are reserved for the "most serious combinations of the offense and the background of the offender" *State v. Blair*, 2006 SD 75 ¶ 26 (internal citations omitted), then this record does not reflect that the maximum allowable sentence was appropriate, let alone proportionate. The Defendant was a young man with one pending felony case in another county, had no prior crimes of violence, and only prior minor traffic offenses for which he had paid the fines. It was plain error for the Court to conclude otherwise and impose the maximum sentence.

A Court must also relate aggravating factors to public safety. *State v. Kurtz*, 2024 SD 13, ¶ 15. The Court failed to do so. It appears that the Court considered it a foregone conclusion that the pending Minnehaha County case and the amount of cocaine involved in each case rendered the Defendant a significant risk to the public. *Id.* The sentencing transcript reveals that the Court's conclusion that the Defendant posed a significant risk to the public was unsupported and the relationship between the Defendant's conduct and character and his risk to the public was unarticulated.

As stated above and the record reflects, the Court only considered the Defendant's pending charges in Minnehaha and Beadle County and the amount of cocaine involved and failed to consider the remaining *Bonner* factors. The record reflects that the court

failed to consider the information contained in the pre-sentence report prepared pursuant to SDCL 23A-27-5 and 6. The information included in the pre-sentence report included information related to the Bonner factors the court did not consider.

The record indicates that the sentence was grossly disproportionate given the Bonner factors. Although the court enumerated its aggravating factors in imposing the sentences, the court failed to articulate a thorough understanding of the Defendant in light of the Bonner factors. The court in Blair considered remorse, rehabilitation prospects, danger to the community and effects of the crime on the victims as appropriate factors for the sentencing court to take into consideration. State v. Blair, 2006 SD 75 ¶ 46-64. Although the court affirmed the sentence, it conducted a careful and seemingly complete analysis of all the necessary factors, something the sentencing court here failed to do.

CONCLUSION

The Court failed to consider all of the required factors in order to balance the criminal conduct of the Defendant with his character. This renders the sentence imposed plain error and grossly disproportionate. Therefore, the case should be remanded to the Court to reconsider sentencing.

Dated this 23rd day of February, 2026.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENTS

Defendant, by and through counsel, requests the opportunity to present oral arguments to the Court in support of this appeal.

/s/ Jeffrey M. Banks

Jeffrey M. Banks

APPENDIX

1. Judgment of Conviction and Sentencing entered on November 4, 2025.

STATE OF SOUTH DAKOTA)
) SS
 COUNTY OF BEADLE)

IN CIRCUIT COURT
 THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff	Cr. 02CRI25-000288
vs.	JUDGMENT OF CONVICTION AND SENTENCE
GAVIN COLE MITCHELL, Defendant.	

An Indictment was filed with this Court on the 29th day of August, 2025, charging the Defendant, GAVIN COLE MITCHELL, with the crimes of COUNT I – POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE (SDCL 22-42-2(A)) and COUNT II – POSSESSION OF A CONTROLLED SUBSTANCE (SDCL 22-42-5) committed on or about the 7th day of August 2025, in Beadle County, South Dakota.

The Defendant, GAVIN COLE MITCHELL, his court-appointed attorney, Jeffrey Banks, and the prosecuting attorney appeared before the Honorable Kent Shelton, Circuit Court Judge, on the 21st day of October 2025 for arraignment.

The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge filed against the Defendant. The Defendant, GAVIN COLE MITCHELL, pled GUILTY to the charge of COUNT II – POSSESSION OF A CONTROLLED SUBSTANCE (SDCL 22-42-5).

The State has agreed to dismiss the charge of COUNT I – POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE (SDCL 22-42-2(A)).

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

It is, therefore, the JUDGMENT of this Court that the Defendant GAVIN COLE MITCHELL, is GUILTY of COUNT II – POSSESSION OF A CONTROLLED SUBSTANCE in violation of SDCL 22-42-5.

SENTENCE

On the 4th day of November 2024, the Defendant, GAVIN COLE MITCHELL, and his court-appointed attorney, Jeffrey Banks, together with Alyssa Horn, Beadle County State's Attorney, appeared before the Honorable Kent Shelton Circuit Court Judge, for sentencing. The Court asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS THE FINDING OF THIS COURT that aggravating circumstances exist to depart from the presumptive probation of SDCL 22-6-11. The following aggravating circumstances are:

- Defendant had an active warrant out of Minnehaha County, South Dakota when the Defendant was picked up in Beadle County, South Dakota for similar charges
- Defendant had large amounts of drugs and paraphernalia consistent with distribution, putting the community at risk
- Additional probation likely would not deter the defendant from continuing a course of criminal activity
- Failure to cooperate with a Court Services Officer poses a significant risk to the public because it deprives the court of its ability to assess the risk to the public in granting the Defendant probation

The Defendant's actions show a significant risk to the community and therefore it is the sentence of the court as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, GAVIN COLE MITCHELL, shall serve five (5) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota.

IT IS FURTHER ORDERED that the Defendant, GAVIN COLE MITCHELL, shall receive five (5) days credit for time served.

IT IS FURTHER ORDERED that the Defendant, GAVIN COLE MITCHELL, shall pay court costs in the amount of \$116.50.

IT IS FURTHER ORDERED that the Defendant, GAVIN COLE MITCHELL, shall reimburse Beadle County for his court appointed attorney fees.

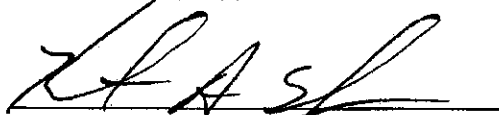
IT IS FURTHER ORDERED that the Defendant, GAVIN COLE MITCHELL, shall pay blood testing fees in the amount of \$200.50.

IT IS FURTHER ORDERED that the Defendant be remanded to the custody of the Beadle County Sheriff for transport to the Minnehaha County Jail for Court and to South Dakota State Penitentiary after.

Attest:
Liebing, Lauren
Clerk/Deputy



BY THE COURT:


Kent A. Shelton
Judge of the Circuit Court

NOTICE OF RIGHT TO APPEAL

You, GAVIN COLE MITCHELL, 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 Beadle 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 of Conviction was signed, attested and filed.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	)	
Plaintiff/Appellee,	)	
v.	)	CERTIFICATE OF COMPLIANCE
	)	
GAVIN COLE MITCHELL ,	)	# 31284
Defendant/Appellant	)	

The undersigned hereby certifies that the foregoing brief complies with the type volume limitations found in SDCL 15-26A-66(b). It contains 1808 words and 11,425 characters.

Dated this 23rd day of February, 2026.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	)	
Plaintiff/Appellee,	)	
v.	)	CERTIFICATE OF SERVICE
	)	
GAVIN COLE MITCHELL,	)	# 31284
Defendant/Appellant	)	

The undersigned hereby certifies that, on the 23rd day of February, 2026, a true and correct copy of Appellant's Brief was served through the eFileSD System upon the following, to-wit:

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Sarah L. Thorne
Deputy Attorney General

Alyssa Horn
Beadle County States Attorney

Dated this 23rd day of February, 2026.

/s/ Jeffrey M. Banks

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31284

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

GAVIN COLE MITCHELL,

Defendant and Appellant.

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

THE HONORABLE KENT A. SHELTON
Circuit Court Judge

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Notice of Appeal filed November 6, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31284

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

GAVIN COLE MITCHELL,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Gavin Cole Mitchell, is referred to as “Defendant” or “Mitchell.” Plaintiff and Appellee, the State of South Dakota, is referred to as “State.” All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Beadle Co. File 02CRI25-288)..... SR

Sentencing Hearing (November 4, 2025)SENT

Appellant’s Brief.....AB

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

JURISDICTIONAL STATEMENT

Mitchell appeals the Judgment of Conviction entered by the Honorable Kent A. Shelton, Circuit Court Judge, Beadle County, Third

Judicial Circuit. SR 68-70. The Judgment of Conviction was filed on November 4, 2025. SR 69. Defendant filed a Notice of Appeal on November 6, 2025. SR 73. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE SENTENCE IMPOSED BY THE CIRCUIT COURT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OR PLAIN ERROR?

The circuit court did not rule on this issue. The circuit court found aggravating circumstances exist that pose a significant risk to the public to depart from presumptive probation and sentenced Mitchell to five years in the state penitentiary.

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475.

State v. Rice, 2016 S.D. 18, 877 N.W.2d 75.

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

SDCL 22-6-11

STATEMENT OF THE CASE AND FACTS¹

On August 7, 2025, Officer David Syverson of the Huron Police Department observed a vehicle with an inoperable front headlight traveling northbound on Lincoln Avenue in Huron, South Dakota. SR 1, 29 (sealed document). Officer Syverson initiated a traffic stop on the vehicle and observed that the vehicle also had a broken taillight. SR 1, 29 (sealed document).

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

Officer Syverson contacted the driver of the vehicle, identified as Mitchell. SR 1, 30 (sealed document). Mitchell had an active arrest warrant for drug-related charges out of Minnehaha County. SR 1, 30 (sealed document). Dispatch confirmed the warrant and Officer Syverson placed Mitchell under arrest. SR 1, 30 (sealed document). Mitchell told Officer Syverson that he had a baggie in his wallet. SR 1, 30 (sealed document). When Officer Syverson searched Mitchell's person, he located two baggies with a white powdery substance and a "snort tube" in Mitchell's wallet. SR 1, 30 (sealed document). The substance tested presumptively positive for cocaine. SR 1, 30-31 (sealed document).

Officer Syverson and Captain Phillip Van Diepen searched Mitchell's vehicle. SR 1, 30-31 (sealed document). Captain Van Diepen found approximately 12.9 grams of a substance later identified as cocaine in the glove compartment. SR 1, 30-31 (sealed document). Officer Syverson located a cooler in the backseat with a large quantity of baggies containing a white powdery substance and an assortment of "snort tubes," some of which had a white powdery substance around the inside edges. SR 1-2, 30 (sealed document). The officers also found two scales in the vehicle. SR 2 , 30 (sealed document).

On August 12, 2025, a Complaint was filed against Mitchell for Count I: Possession of Controlled Substance with Intent to Distribute (Cocaine) in violation of SDCL 22-42-2, a Class 4 Felony; and Count II:

Possession of a Controlled Substance (Cocaine) in violation of SDCL 22-42-5, a Class 5 Felony. SR 8-9. A Beadle County Grand Jury issued an Indictment against Mitchell for these charges on August 29, 2025. SR 12.²

Mitchell reached an agreement with the State to plead guilty to Count II of the Indictment, with the State agreeing to dismiss Count I and recommend a five-year penitentiary sentence. SR 23 (sealed document). On October 21, 2025, Mitchell entered a guilty plea to Count II: Possession of a Controlled Substance. SR 68, 80; SENT 2. A pre-sentence investigation report (“PSI”) was prepared by Court Services. *See generally* SR 23-67 (sealed document).

A sentencing hearing was held on November 4, 2025. SR 79; SENT 1. The circuit court found several aggravating circumstances existed to depart from the presumptive probation provision of SDCL 22-6-11. At the sentencing hearing, the circuit court stated the following on the record:

I’ve looked at this and it is presumptive probation, but there are aggravating circumstances. I find the following aggravating circumstances: When you were arrested on this, you had an active warrant for drug distribution out of Minnehaha County.

And the timeline I have is on December 13, 2024 you had the incident in Sioux Falls.

² The Indictment does not appear in the Settled Record as it has been sealed, but the Judgment of Conviction and Sentence notes the charges contained in the Indictment. SR 68.

You were indicted June 25, '25 for manufacturing, distribution of possession of schedule one or two drugs, class four felony. Also, in a drug free zone, and possession of controlled substance.

On August 7, 2025 you were arrested in Beadle County on a warrant and new charges. And I think you indicated you were using drugs, and threatened to commit suicide, and you were caught with 72.8 grams of cocaine. You also had baggies, scales.

And then the same thing happened here in Beadle County eight months later. Same thing only you had 12.9 grams of cocaine. Numerous baggies, scaled.

I don't think there's any question what you were doing there. And it wasn't for personal use because why you would need to weigh it if it's for personal use. And have baggies like that.

I've considered the likelihood of you not complying with conditions of probation. And probation likely would not deter you from continuing a course of criminal activities.

In my opinion, your actions show a significant risk to the community.

SR 83-84; SENT 5-6.

The written Judgment of Conviction and Sentence also set out the following aggravating circumstances:

- Defendant had an active warrant out of Minnehaha County, South Dakota when the Defendant was picked up in Beadle County, South Dakota for similar charges;
- Defendant had large amounts of drugs and paraphernalia consistent with distribution, putting the community at risk;
- Additional probation likely would not deter the defendant from continuing a course of criminal activity; and
- Failure to cooperate with a Court Services Officer poses a significant risk to the public because it deprives the court of its ability to assess the risk to the public in granting the Defendant probation.

SR 69. The circuit court specifically found, both orally at sentencing and in the written Judgment of Conviction and Sentence that Mitchell's actions "show a significant risk to the community." SR 69, 84; SENT 6. The circuit court then ordered a five-year penitentiary sentence. SR 69.

ARGUMENT

THE SENTENCE IMPOSED BY THE CIRCUIT COURT DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT OR PLAIN ERROR.

Mitchell argues that his five-year penitentiary sentence constitutes cruel and unusual punishment, but focuses on the circuit court's departure from presumptive probation and failure to apply the standards set out in *State v. Bonner*, 1998 S.D. 30, 577 N.W.2d 575 to support his argument. AB 2-6. In doing so, Mitchell conflates two separate sentencing arguments: (1) whether the sentence imposed constitutes cruel and unusual punishment, and (2) whether the circuit court erred in departing from presumptive probation. The State will thus address each of these arguments separately.

A. *The five-year penitentiary sentence is not so disproportionate to the offense as to offend the Eighth Amendment's prohibition on cruel and unusual punishment.*

This Court has abrogated the application of the *Bonner* standards in cases involving the Eighth Amendment. "Taking this opportunity to revisit our decision in *Bonner*, we conclude that its Eighth Amendment analysis will no longer be followed by this Court." *State v. Rice*, 2016 S.D. 18, ¶ 16, 877 N.W.2d 75, 81. Rather, "when the question

presented is whether a challenged sentence is cruel and unusual in violation of the Eighth Amendment, [this Court] conduct[s] a de novo review.” *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486.

“The Eighth Amendment to the U.S. Constitution, which was extended to the states through the Fourteenth Amendment, prohibits the infliction of ‘cruel and unusual punishments[.]’” *Id.*, ¶ 32, 874 N.W.2d at 486 (citing U.S. Const. amend. VIII). “[T]he Eighth Amendment does not require strict proportionality between the crime and sentence. Rather, it forbids only extreme sentences that are *grossly disproportionate* to the crime.” *State v. McCahren*, 2016 S.D. 34, ¶ 34, 878 N.W.2d 586, 601 (quoting *Chipps*, 2016 S.D. 8, ¶ 33, 874 N.W.2d at 487) (emphasis added).

Review of an Eighth Amendment claim is a two-step process. First, this Court “compare[s] the gravity of the offense—i.e., ‘the offense’s relative position on the spectrum of all criminality’—to the harshness of the penalty—i.e., ‘the penalty’s relative position on the spectrum of all permitted punishments.’” *Rice*, 2016 S.D. 18, ¶ 13, 877 N.W.2d at 80 (citing *Chipps*, 2016 S.D. 8, ¶¶ 35-38, 874 N.W.2d at 488-89). “Rarely does this lead ‘to an inference of gross disproportionality and typically marks the end of [this Court’s] review.’” *State v. Deleon*, 2022 S.D. 21, ¶ 26, 973 N.W.2d 241, 248 (quoting *State v. Klinetobe*, 2021 S.D. 24, ¶ 42, 958 N.W.2d 734, 744).

We move to the second step of the analysis - “[i]f the penalty

imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those ‘imposed on other criminals in the same jurisdiction’ as well as those ‘imposed for commission of the same crime in other jurisdictions.’” *Chipps*, 2016 S.D. 8, ¶ 38, 874 N.W.2d at 489 (citing *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 3011 (1983)). These comparisons “‘are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.’” *Chipps*, 2016 S.D. 8, ¶ 34, 874 N.W.2d at 487 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S.Ct. 2680, 2707 (1991)).

In this case, there is no need to go beyond the first step in the Eighth Amendment analysis because the gravity of Mitchell’s crime is not grossly disproportionate to the harshness of the penalty imposed. Mitchell pled guilty to Possession of a Controlled Substance (Cocaine) pursuant to SDCL 22-42-5, a Class 5 felony. While this is not the most serious felony offense, the “[c]ommission of any felony is a serious matter.” *State v. Hauge*, 2019 S.D. 45, ¶ 35, 932 N.W.2d 165, 175.

Further, “[i]n judging the gravity of an offense, a court may also consider certain past conduct of the defendant.” *Chipps*, 2016 S.D. 8, ¶ 36, 874 N.W.2d at 488. Although Mitchell’s criminal history does not include any prior felonies, he had pending charges in Minnehaha County for possession and distribution of cocaine (alleged to have

occurred in a drug free zone) at the time he was arrested in the present case. SR 24-25 (sealed document). In fact, the active warrant in the Minnehaha County case led to Mitchell's arrest, the search of his person and vehicle, and the charges in this case. SR 1, 30 (sealed document).

Mitchell also had a substantial amount of cocaine in his possession (12.9 grams located in the glove compartment plus the additional baggies located in his wallet and the cooler in the backseat of his vehicle), along with "snort tubes" and scales. SR 1, 30-31 (sealed document). Although Mitchell did not plead guilty to the distribution charge in this case, there was indicia of distribution and the circuit court noted that the amount of cocaine possessed by Mitchell was "more than just for personal use." SR 82; SENT 4.

All these factors contributed to the gravity of Mitchell's offense. While possession of a controlled substance is classified as nonviolent in nature, it is still a serious felony, especially considering the distribution-level amounts of cocaine and paraphernalia he possessed.

Selling drugs is a harsh and unsavory business. Many drug dealers make handsome profits from their endeavors. Drug abuse has devastated countless American youth to include young South Dakotans. Drugs are a peril to our society. Our legislature, recognizing this, made [Mitchell's] abhorrent conduct a felony-a harsh crime.

State v. Pettis, 333 N.W.2d 717, 720 (S.D. 1983). *See also State v.*

Uhing, 2016 S.D. 93, ¶ 17, 888 N.W.2d 550, 555 (finding the

defendant's "offenses are serious crimes on the spectrum of criminality"

as “there was substantial evidence that the defendant was distributing marijuana and involved in the manufacture and distribution of controlled substances, and, to make matters worse, all within a few hundred feet of an elementary school”).

Turning to the harshness of the penalty, “[f]or sentences of imprisonment, the question is one of degree.” *Chipps*, 2016 S.D. 8, ¶ 37, 874 N.W.2d at 488. In considering the spectrum of all permitted punishments (which include up to life in prison or the death penalty), Mitchell’s sentence of five years in the state penitentiary is far from the most severe penalty on the spectrum of all criminal punishment. “The possibility of parole is also considered in judging the harshness of the penalty.” *Id.*, ¶ 37, 874 N.W.2d at 489 (citing *Helm* at 294 n.19, 103 S.Ct. at 3012 n.19). For this first nonviolent felony conviction, Mitchell should be eligible for parole after serving twenty-five percent of his sentence, or approximately fifteen months. SDCL 24-15A-32.

The initial comparison of the gravity of Mitchell’s offense to the harshness of the penalty does not reveal the appearance of gross disproportionality. Therefore, Mitchell’s sentence does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment.

B. There is no plain error in the circuit court’s departure from the presumptive probation provision of SDCL 22-6-11.

SDCL 22-6-11 provides that offenders convicted of certain Class 5 and Class 6 felonies be sentenced to probation. A sentencing court can depart from the presumptive probation requirement “if the court finds

aggravating circumstances exist that pose a significant risk to the public.” *Id.* If such departure is made, “the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” *Id.*

The circuit court found aggravating circumstances exist that pose a significant risk to the public and imposed a penitentiary sentence. SR 69, 83-84; SENT 5-6. Mitchell now takes issue with the circuit court’s departure from the presumptive probation requirements of SDCL 22-6-11 and specifically asserts that the circuit court failed to relate the aggravating circumstances to public safety. AB 5.

“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. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 443 (citing SDCL 23A-44-13). “Issues not advanced at trial cannot ordinarily be raised for the first time on appeal.” *Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d at 443 (citing *State v. Henjum*, 1996 S.D. 7, ¶ 13, 542 N.W.2d 760, 763).

“[W]hen ‘an issue has not been preserved by objection at trial,’ this Court *may* conduct a limited review to consider ‘whether the circuit court committed plain error.’” *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338 (quoting *State v. Buchhold*, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821) (emphasis added). And specifically in cases involving the application of SDCL 22-6-11, this Court 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.

As Mitchell did not object to the circuit court’s departure from the presumptive probation provisions of SDCL 22-6-11 at sentencing or following the issuance of the Judgment of Conviction and Sentence, he concedes that the standard of review is plain error. AB 3. However, this Court invokes its discretion to review for plain error “cautiously and only in ‘exceptional circumstances.’” *Nelson*, 1998 S.D. 124, ¶ 8, 587 N.W.2d at 443 (citing *Henjum*, 1996 S.D. 7, ¶ 14, 542 N.W.2d at 763; *State v. Davi*, 504 N.W.2d 844, 855 (S.D. 1993)).

To establish plain error, Mitchell must show that there was “(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 affect[s] the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206 (quoting *State v. Beck*, 2010 S.D. 52, ¶ 11, 785 N.W.2d 288, 293). In addition, Mitchell must show prejudice under the third prong. “Without prejudice, the error does not ‘affect substantial rights’ under the third prong of plain error review and ‘[an appellate court] ha[s] no authority to correct it.’” *Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d at 206 (quoting *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770,

1781 (1993)). “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.” *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763 (quoting *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283).

In determining an appropriate sentence, the circuit court should “acquire a thorough acquaintance with the character and history of the man before it” which includes an examination of a defendant’s “general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record.” *State v. Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d 133, 140 (citing *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412). “[S]entencing involves considering the totality of the circumstances as to the *individual* defendant before the court, and this same governing principle applies when a court makes its ultimate determination whether to depart from the otherwise mandated presumptive probation.” *State v. Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d 1, 5 (emphasis in original).

Before issuing its sentence in this case, the circuit court familiarized itself with Mitchell by reviewing the PSI and hearing argument from both parties. The PSI contained information about Mitchell’s criminal history, family, education, employment, alcohol/drug history, treatment, health, attitude/orientation, future

plans, law enforcement reports, and Level of Service Inventory-Revised with areas of risk and need. *See generally* SR 23-67 (sealed document).

When asked by the circuit court, neither party had comments or corrections regarding the information in the PSI. SR 80; SENT 2.

At the sentencing hearing, the circuit court found aggravating circumstances existed that pose a significant risk to the public, including:

- Active warrant for drug possession and distribution in a drug free zone out of Minnehaha County at the time Mitchell was arrested in this case;
- Possession of substantial amounts of cocaine with baggies and scales in both the Minnehaha County case and the present case (72.8 grams of cocaine in Minnehaha County and over 12.9 grams of cocaine in the present case); and
- Likelihood of Mitchell not complying with conditions of probation and continuing with a course of criminal activities.

SR 83-84; SENT 5-6.

Mitchell asserts that the circuit court failed to relate the aggravating circumstances to public safety. AB 5. However, the connection between the stated aggravating circumstances and Mitchell's risk to public safety is clear from the record. After orally listing the aggravating circumstances on the record, the circuit court specifically stated to Mitchell that "your actions show a significant risk to the community." SR 84; SENT 6; AB 5. And the aggravating circumstances were memorialized in the Judgment of Conviction and Sentence, followed by the circuit court's finding that "Defendant's actions show a

significant risk to the community.” SR 69.

Mitchell has failed to show any error, much less plain error, in the circuit court’s departure from presumptive probation. The circuit court fulfilled its sentencing duty by thoroughly reviewing all information related to Mitchell, including the PSI and the facts of both the present case and the pending Minnehaha County case. And in considering the totality of the information before it, the circuit court properly found aggravating circumstances existed that pose a significant risk to the public, stating them on the record and in the Judgment of Conviction and Sentence. As there was no plain error by the circuit court in its sentence and departure from the presumptive probation requirements, Mitchell cannot show prejudice or any reasonable probability that the result of the proceeding would have been different.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Defendant’s sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,292 words.

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

Dated this 1st day of April, 2026.

/s/ Angela R. Shute

Angela R. Shute

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Gavin Cole Mitchell* was served via electronic mail upon Jeffrey M. Banks at jeff@bluehaederbanks.com.

/s/ Angela R. Shute

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