IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

30942

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

BRANDI RENEA TILLMAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed December 26, 2024

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STATE OF SOUTH DAKOTA

No. 30942

STATE OF SOUTH DAKOTA,

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BRANDI RENAE TILLMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant Brandi Tillman is called "Tillman." Appellee, the State of South Dakota, is called "State."

JURISDICTIONAL STATEMENT

The Honorable Scott A. Roetzel, Fall River County Circuit Court Judge, filed a Judgment of Conviction on December 9, 2024. Tillman filed a Notice of Appeal on December 23, 2024. This Court has jurisdiction to hear this appeal under SDCL § 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN FINDING THAT AGGRAVATING FACTORS APPLIED IN SENTENCING THE DEFENDANT?

The Circuit Court found aggravating factors and sentenced Tillman to three years in prison. Tillman appeals and submits no aggravating factors exist.

SDCL § 22-6-11

STATEMENT OF THE CASE

The Hot Springs Police Department arrested Tillman on January 15, 2024. On January 17, 2024, the State filed a Complaint charging Tillman with one count of Ingestion of a Controlled Drug or Substance, in violation of SDCL § 22-42-5.1 a Class 5 Felony, one count of Possession of a Controlled Drug or Substance in violation of SDCL § 22-42-5 a Class 5 Felony, and one count of Possession of Drug Paraphernalia in violation of SDCL § 22-42A-3 a Class 2 Misdemeanor. On October 25, 2024, Tillman pled guilty to Unauthorized Ingestion of a Controlled Substance in violation of SDCL § 22-42-5.1. and all other charges were dismissed. On December 6, 2024, Judge Scott A. Roetzel held a sentencing hearing. Ms. Tillman was sentenced to three years' in prison.

STATEMENT OF THE FACTS

Brandi Tillman, pursuant to a plea agreement with the State of South Dakota, entered a guilty plea to one count of Ingestion of a Controlled Substance, in violation of SDCL § 22-42-5.1, a Class 5 Felony (*See* Judgment of Conviction pp. 1-2). The remaining charges were dismissed by the State.

A sentencing hearing was held on the 9th day of December, 2024 before the Honorable Scott A. Roetzel with all parties present. (*See* Transcript of Sentencing (Hereinafter referred to as "Transcript") p.1).

The Court heard information from the State through Fall River State's Attorney Lance Russell, who argued that there were aggravating circumstances that justified a departure from probation.

The Defense, through Gina Ruggieri, argued that there were no aggravating factors in the Defendant's history that posed a significant risk to the public, and that probation was warranted under the statute.

The State argued that this is the Defendant's seventh (7th) felony and that she committed this offense while on parole.

Counsel argued that Ms. Tillman's criminal history, although lengthy, was for nonviolent felonies, specifically, crimes of dishonesty, not crimes of violence.

The Defendant also spoke to the Court and advised that she was enrolled in college, had recently completed treatment and she accepted full responsibility for her mistakes and actions in this case. She admitted that she committed this offense while on parole. She stated that she had changed during the pendency of this litigation and argued that she deserved another chance from this Court.

The Court found that aggravating circumstances did exist and deviated from probation. Tillman was sentenced to the penitentiary for three (3) years. Tillman appeals her sentence.

ARGUMENT

DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN FINDING THAT AGGRAVATING FACTORS APPLIED IN SENTENCING THE DEFENDANT?

"Before sentencing a Defendant, the Court is to "acquire a thorough acquaintance with the character and history of the [person] before it." *State v. Lemley,* 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412 (quoting *State v. Chase in Winter,* 534 N.W.2d 350, 354-55 (S.D. 1995) "In fashioning an appropriate sentence, Courts must also look to the character and history of the Defendant. This requires an examination of the Defendant's 'general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record' as well as rehabilitation prospects." *State v. Bruce,* 2011 S.D. 14, ¶ 29, 796

N.W.2d 397, 406 (quoting *State v. Bonner,* 1998 S.D. 30, ¶ 19, 577 N.W.2d 575, 580). A sentence within the statutory maximum is generally reviewed for an abuse of discretion, and we give great deference to the Court's sentencing decision. *State v. McKinney,* 2005 S.D. 73, ¶ 10, 699 N.W.2d 471, 476." {*State v. Diaz,* 887 N.W.2d 751 (S.D. 2016).

The Defendant submits that for a Class Five (5) Felony, the Court is required to find aggravating factors that pose a significant risk to the public, if the Court decides to depart from probation. SDCL § 22-6-11. It is the Defendant's position that although the sentencing court found factors, the factors that the Court cited do not constitute "aggravating factors", that warrant a departure from probation.

The phrase "aggravating circumstances" is not defined but was analyzed by the Court in *Underwood.* The Court in *Underwood* noted that "only circumstances that 'pose a significant risk to the public *and* require a departure from presumptive probation' can justify imposing a sentence other than probation." *Underwood,* 2017 S.D. 3 ¶ 6 890 N.W.2d 240, 241

Here, the Court stated that aggravating factors existed because Tillman committed the offense while on parole, Tillman had a lengthy criminal history, continued to use drugs while on parole, and in essence,

had "blown through her chances". SH: 8. The Court made no findings on how the Defendant poses a risk to the public but should have.

Defendant's counsel concedes that under *Whitfeld*, the Court need not find the prior offenses committed were crimes of violence. *State v. Whitfeld*, 2015 S.D. 17, ¶ 23, 862 N.W.2d at 140. This Court rejected that Defendant's argument that nonviolent prior offenses are not aggravating factors. In *Whitfield*, the Defendant was sent to prison, and this Court affirmed his sentence. Id. ¶¶ 23-24, 862 N.W.2d at 140.

However, in the *Underwood* case, the Circuit Court was able to articulate many factors as to why the Defendant should serve a penitentiary sentence, citing factors like having a five (5) page rap sheet, having prior failures to appear, having two (2) prior parole violations, and failing to comply with conditional release. *State v. Underwood*, 2017 S.D. 3 ¶ 6 890 N.W.2d at 240, 241.

In the case before us, the lower court did not articulate sufficient aggravating factors that pose a risk to the public, citing only as aggravating factors that Ms. Tillman had "blown through her chances," she had committed the offense of methamphetamine use while she was on parole, and she had a criminal history. SH: 8. The Court also cited poor performance but does not describe "what poor performance" and how poor performance would pose a risk to society. In essence, the

sentencing court found that probation was not appropriate for Ms. Tillman, because she had a criminal history and committed the offense while on parole. *Id.* This is insufficient under the statute.

Counsel for Ms. Tillman argues that SDCL § 22-6-11 does not bar defendants from receiving a probationary sentence, just because they have a criminal history. Further, it seems that Tillman received the penitentiary sentence, as the Court was frustrated that she committed this offense while on parole. Again, just because Tillman committed a Class Five Felony while she was on parole, should not bar her from receiving probation. Under *Orr*, the Circuit Court could have granted her a suspended DOC sentence but chose not to. *State v. Orr*, 871 N.W.2d, ¶ 11, 834 (S.D. 2015). Here, the Defendant argues that the Court erred, and she should have received probation under SDCL § 22-6-11. Moreover, in the recent *Kurtz* case, this Court did acknowledge that "it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant risk to the public." *State v. Kurtz*, 2024 S.D. 13, "¶15 4 N.W. 3d 1, 4.

Finally, the Court did not consider or make any findings on *how* Ms. Tillman presents a risk to society. It has been said that sentencing involves "considering the totality of the circumstances as to the individual Defendant before the Court, and this same governing principle

applies when a Court makes its ultimate determination whether to depart from the otherwise mandated presumptive probation. *State v. Seidel*, 2020 S.D. 73, ¶ 47, 953, N.W.2d 301, 316-317. Further, the Circuit Court's finding under SDCL § 22-6-11 must focus on the relationship of those circumstances to public safety. Here, there is no focus or findings as it relates specifically to public safety. Th record is bare here, and, for this reason, this Court should find that the Court erred when it departed from probation, as it failed to make the appropriate findings at sentencing.

CONCLUSION

The Circuit Court's findings that aggravating factors exist that pose a risk to society should be reversed, and the Defendant should be granted a suspended DOC sentence.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's brief contains 1,968 words.

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

Dated this 19th day of February, 2025.

/s/ Gina Ruggieri
Gina Ruggieri
Attorney for the Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 19, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Brandi Renae Tillman* was served through Odyssey File and served upon Sarah L. Thorne at:

Sarah L. Thorne
Assistant Attorney General
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Pierre, SD 57501-8501

/s/ Gina Ruggieri

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF FALL RIVER/OGLALA LAKOTA	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	
v.	)	**23CRI 24-18**
	)	
BRANDI RENEA TILLMAN,	)	
D.O.B. 06.08.1978	)	
	)	
Defendant.	)	

JUDGMENT OF CONVICTION

An Information was filed in this Court on the March 20, 2024, charging the Defendant with the crimes of

COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5.1, (Cl. 5 felony).

COUNT 2: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5, (Cl. 5 felony).

COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3, (Cl. 2 misd.).

The Defendant was arraigned on said Information by the Court and received a copy thereof in open Court on 10th day of May 2024. The Defendant, the Defendant's attorney, Gina Ruggieri, and the Fall River County State's Attorney, Lance S. Russell, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against them, including but not limited to, the right against self-incrimination, the right of confrontation, the right to be represented by counsel, and the right to a jury trial. On the 25th day of October 2024, in open Court at Hot Springs, Fall River County, South Dakota, the Defendant, accompanied by her attorney, plead guilty to the charge of ***COUNT 1:*** INGESTION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5.1, (Cl. 5 felony); and the State agreed to dismiss the remaining charges.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing and intelligent; and that a factual basis existed for the plea; that the Defendant was represented by competent counsel.
It is, therefore, the Judgment of this Court that the Defendant is guilty of INGESTION OF CONTROLLED DRUG OR SUBSTANCE, in violation of SDCL 22-42-5.1, (Cl. 5 felony).

SENTENCE

The Court specifically, having found aggravating factors pursuant to SDCL 22-6-11 that warrant deviation from a presumptive probation. Those factors were stated on the record by the Honorable Scott A. Roetzel and include that this is the Defendant's seventh (7th) felony conviction and the Defendant has a lengthy criminal history and was on parole at the time of her arrest in this matter, the Defendant has had multiple chances while on bond in this file, and the Defendant is a severe risk to the public.

On the 6th day of December 2024, with the Honorable Scott A. Roetzel presiding, in open Court at Hot Springs, Fall River County, South Dakota, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. As no cause was offered, the Court thereupon pronounced the following sentence:

IT IS ORDERED, that the Defendant, Brandi Renea Tillman, be sentenced three (3) years in the South Dakota State Women's Penitentiary with credit for time served of _____ days and shall receive credit for time served while awaiting transport; and it is further

ORDERED, that the Defendant pay court costs of one hundred sixteen dollars and fifty cents ($116.50), laboratory costs in the amount of two hundred sixty-five dollars ($265.00) and court appointed attorney fees in an amount to be submitted by order and which may be liened; and it is further

ORDERED, that the Defendant shall pay restitution in the amount of seven hundred twenty-nine dollars and forty-five cents ($729.45) to the Fall River County Treasurer; and

YOU ARE FURTHER ADVISED that you have only thirty (30) days from the date of this Judgment and Sentence to file an appeal with the Supreme Court.

DATED this 9 day of December 2024.

BY THE COURT:

The Honorable ***SCOTT A. ROETZEL***

ATTEST:

Fall River County Clerk of Courts
(SEAL)

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
DEC 09 2024

By:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30942

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Notice of Appeal filed December 26, 2024

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Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Brandi Renea Tillman, will be referred to as "Defendant" or "Tillman." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to documents will be as follows:

Settled Record ..... SR

Defendant's Brief..... DB

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

JURISDICTIONAL STATEMENT

On December 9, 2024, the Honorable Scott Roetzel, Circuit Court Judge for the Seventh Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Brandi Renea Tillman.* SR:174-76. Defendant filed her Notice of Appeal on December 26, 2024. SR:182-83. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT ERRED IN SENTENCING DEFENDANT?

The circuit court did not rule on this issue as it was not raised.

SDCL 22-6-11

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

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

STATEMENT OF THE CASE AND FACTS

This case originated when Brandi Renea Tillman was contacted to complete a parole compliance check. The "check" was a random search and seizure by a law enforcement officer of Tillman while she was on parole.

On January 15, 2024, law enforcement arrived at 1738 Washington Avenue, in Hot Springs, South Dakota, where they conducted a search of that residence. SR:1. During the search, they made contact with Tillman, who admitted she was staying in the "front bedroom" of that residence. *Id.* Tillman informed the officers that she had a "bong located by the bedroom window." *Id.* She also admitted to recently using Methamphetamine. *Id.* While searching her bedroom, law enforcement found a crystal-like substance, consistent with Methamphetamine, on both the stem area of a red glass bong, a white spoon and a clear glass pipe. *Id.*

On January 17, 2024, the Fall River County State's Attorney filed a Complaint against Defendant which was followed by an Information charging her with:

> COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCE, in that she did knowingly ingest a controlled drug or substance or have a controlled drug or substance in an altered state in the body, to-wit: Brandi Renea Tillman did knowingly ingest Methamphetamine or have Methamphetamine, a schedule II controlled drug or substance, in an altered state her body, in violation of SDCL 22-42-5.1, (Class 5 felony);
>
> COUNT 2: POSSESSION OF CONTROLLED DRUG OR SUBSTANCE, in that she did knowingly possess a controlled drug or substance, namely Methamphetamine, a schedule II controlled drug or substance, in violation of SDCL 22-42-5, (Class 5 felony);
>
> COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, in that she did, knowing the drug related nature of the object, use or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body any controlled substance or marijuana, in violation of SDCL 22-42A-3, (Class 2 misdemeanor.)

SR:8-9, 42-43.

Later, the State filed a motion to revoke Tillman's bond. SR:61-62. The claimed violation of her bond was the result of a warrant request being submitted for the crimes of forgery and theft by deception. SR:61-62. The Fall River County Sheriff's Office report alleged that Defendant used a check from another person's account to pay the county treasurer for her vehicle registration and license plates. SR:66-67. The owner of the checking account was aware that Defendant used one of her checks and

stopped payment on it. SR:66. After the matter came before Judge Roetzel for hearing, he ordered that Defendant's bond be revoked and she be remanded to custody. SR:79.

On October 25, 2024, Defendant entered into a plea agreement with the State regarding the three drug charges from the Information. SR:86. The agreement required Defendant to plead guilty to Count I, Ingestion of a Controlled Drug or Substance. *Id.* In return for the guilty plea, the State agreed to dismiss the remaining two counts and not file the forgery or theft by deception charges in relation to the cancelled check. *Id.* The agreement also stated that the "length and conditions of any sentence were solely the discretion of the sentencing judge." SR:86. On October 25, 2024, Defendant entered her guilty plea. SR:174-75. The court then ordered a presentence investigation report be prepared. SR:87.

On December 6, 2024, Defendant was sentenced. The court asked Defendant about her age, which was 46 years old. SR:192. The court also inquired about her counsel. *Id.* She answered that she had adequate time with her attorney and was satisfied with the representation that she received. *Id.* She also stated that she understood and acknowledged her guilty plea. SR:193.

Both the State and defense counsel stated that they had reviewed the presentence report and did not have any "changes or corrections" for it. *Id.* The State began its sentencing argument by explaining that Defendant had numerous problems in complying with the 24/7 program.

SR:193. The current conviction represented Defendant's seventh felony conviction, and it occurred while she was on parole. *Id.* The State pointed to additional aggravating factors on why Defendant should receive a penitentiary sentence. SR:194. These factors included the recent reported crime of "forgery" and that she still owes the county treasurer approximately $700 on the cancelled check matter. *Id.*

Defense counsel claimed that Defendant intends to pay the treasurer back "quickly" but did not give a date as to when that would happen. SR:195. Counsel further argued that "there is absolutely nothing aggravating in this case." SR:194-95. He concluded by saying that since there are no aggravating factors about Defendant's criminal history, she should receive presumptive probation. *Id.* While making this statement Counsel acknowledged that "if you look at the criminal history, it's a lot of crimes of dishonesty: grand theft, identity theft, insufficient funds." SR:195.

The court agreed that Defendant did have a lengthy criminal history of seven lifetime felony convictions. The court then summarized its opinion, stating:

> *finds for the aggravating factors that you do pose a significant risk to the community.* We are going to deviate from the presumptive probation. We feel given your poor performance, your behavior, your criminal history, your behavior as -- and you were on parole when this happened, the Court is going to order three years in the South Dakota State Penitentiary . . .

SR:197 (emphasis added). The court also gave Defendant credit for time served. *Id.* After the court ruled and stated its findings regarding aggravating factors, Defendant neither raised any objections nor contested any of the factors the court found.

The court then filed a Judgment of Conviction, which stated that the court "found aggravating factors pursuant to SDCL 22-6-11 that warrant deviation from a presumptive probation." SR:176. The Judgment set forth that the "factors were stated on the record by the Honorable Scott A. Roetzel and include that this is the Defendant's seventh (7th) felony conviction and the Defendant has a lengthy criminal history and was on parole at the time of her arrest in this matter, the Defendant has had multiple chances while on bond in this file, and the Defendant *is a severe risk to the public.*" *Id.* (emphasis added). It is important to note that Defendant did not raise any objection or contest the factors found in the filed Judgment of Conviction.

On December 12, 2024, Defendant filed a pro-se motion for appeal. The motion stated Defendant wanted some "change[s]" for her case, such as granting her a change in venue and a "different" prosecutor and Judge. SR:179. The filing also asked for a "new" presentence investigation to be prepared by someone other than her previous parole officer. *Id.* A formal Notice of Appeal was filed on December 26, 2024. SR:182-83.

ARGUMENTS

I.

DEFENDANT RECEIVED AN APPROPRIATE SENTENCE.

A. *Background.*

Defendant acknowledges that her current felony was committed while on parole but would have rather had the sentencing court focus on her having a job and taking an online course. SR:195. Defendant's brief argues "that although the sentencing court found factors, the factors that the [c]ourt cited do not constitute 'aggravating factors', that warrant a departure from probation." DB:5.

Contrary to Defendant's claim, the court stated on the record that Defendant's criminal conduct while on parole, her criminal history and behavior were aggravating factors "that pose a significant risk to the community." SR:197. This was reiterated in the filed Judgment of Conviction. SR:174-76.

B. *Standard of Review.*

Generally, when assessing non-constitutional challenges to a sentence, this Court reviews a circuit court's sentencing decisions under an abuse of discretion standard. *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486; *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83. Abuse of discretion is described as "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*,

2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109; *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83.

However, if a defendant fails to properly preserve an issue for appellate review, this Court is limited to plain error review if a defendant invokes plain error review on appeal. *See State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818. For an appellant issue to be preserved on alleged procedural errors involving SDCL 22-6-11, the issue must "first [be] brought to the attention of the sentencing court." *State v. Feucht*, 2024 S.D. 16, ¶ 25, 5 N.W.3d 561, 569. This aligns with the Court's rule that parties must raise issues first to the circuit court to give "the circuit court . . . an opportunity to correct any error." *Feucht*, 2024 S.D. 16, ¶ 22, 5 N.W.3d at 568 (quoting *State v. McCrary*, 2004 S.D. 18, ¶ 15, 676 N.W.2d 116, 121). It is not an "efficient nor a prudent use of judicial resources to allow a party to remain silent when fully aware that the circuit court has failed to comply with SDCL 22-6-11." *Id.* ¶ 23, 5 N.W.3d at 568-69.

Defendant did not raise at sentencing the error she now alleges on appeal. Defendant now claims that the circuit court's reasons to depart from probation were not actual "aggravating factors" and the findings were insufficient. DB:5, 7. This Court has ruled that procedural errors involving SDCL 22-6-11, that were not first brought to the attention of the sentencing court, will now be reviewed for plain error only. *Feucht*, 2024 S.D. 16, ¶ 25, 5 N.W.3d at 569.

C. *Analysis.*

If this Court finds that appellant failed to preserve some SDCL 22-6-11 procedural error by failing to raise it to circuit court, then plain error is the standard of review. *State v. Feucht*, 2024 S.D. 16, ¶ 25, 5 N.W.3d at 569. This Court has held that it will invoke the plain error doctrine only in ". . . 'exceptional circumstances, such as, where a miscarriage of justice has occurred because the defendant is innocent or because the error may seriously affect the fairness, integrity, or public reputation of the judicial proceedings.'" *State v. Talarico,* 2003 S.D. 41, ¶ 30, 661 N.W.2d 11, 22 (citing *State v. Dufault*, 2001 S.D. 66, at ¶ 8, 628 N.W.2d 755, 757). A finding of plain error requires "(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 affects the fairness, integrity or public reputation of judicial proceedings.'" *State v. Bauer,* 2014 S.D. 48, ¶ 17, 851 N.W.2d 711, 717, see also *State v. Janis*, 2016 S.D. 43, ¶ 21, 880 N.W.2d 76, 82. Plain error also requires that the Defendant has a burden of showing prejudice in the application of plain error. *Id. See also Talarico, supra* at ¶ 33 (citing *Dufault*, 2001 S.D. 66, at ¶ 8, 628 N.W.2d at 757). If this Court finds there is no plain error by the circuit court, then Defendant's conviction and sentence should be affirmed.

If this Court finds that plain error analysis does not apply in this case, then the Court reviews the circuit court's sentencing decisions under an abuse of discretion standard. *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874

N.W.2d 475, 486. This Court has held that circuit courts exercise broad discretion when deciding the extent and kind of punishment to impose, and a sentence within the maximum statutory generally will not be disturbed on appeal. *State v. Yeager*, 2019 S.D. 12, ¶ 11, 925 N.W.2d 105, 110; *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83; *State v. Talla*, 2017 S.D. 34, ¶ 10, 897 N.W.2d 351, 354; *State v. Milk*, 2000 S.D. 28, ¶ 10, 607 N.W.2d 14, 17. This Court has held that it will not substitute its judgment for that of the circuit court when determining the appropriateness of a particular sentence. *State v. Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d 354, 358.

When sentencing a Class 5 felony, a circuit court may impose a sentence other than probation, or a fully suspended penitentiary sentence. SDCL 22-6-11.* When deviating from a presumptive probation, the

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* SDCL 22-6-11 provides:

> The sentencing court shall sentence an offender convicted of a Class 5 or Class 6 felony, except those convicted under §§ 22-11A-2.1, 22-14-15, 22-18-1, 22-18-1.05, 22-18-26, 22-18-29, 22-19A-1, 22-19A-2, 22-19A-3, 22-19A-7, 22-19A-16, 22-22A-2, 22-22A-4, 22-24A-3, 22-22-24.3, subdivision 22-23-2(2), 22-24-1.2, 22-24B-2, 22-24B-12, 22-24B-12.1, 22-24B-23, 22-30A-46, 22-42-7, subdivision 24-2-14(1), 32-34-5, and any person ineligible for probation under § 23A-27-12, to a term of probation. If the offender is under the supervision of the Department of Corrections, the court shall order a fully suspended penitentiary sentence pursuant to § 23A-27-18.4. *The sentencing court may impose a sentence other than probation or a fully suspended penitentiary sentence if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section. If a departure is made, the judge shall state on the record at the time of sentencing the aggravating circumstances and the same shall be stated in the*

(continued . . .)

circuit court must find that aggravating circumstances exist that pose a significant risk to the public and require a departure from probation. *Id.* The circuit court must specify these circumstances both on record and in the dispositional order. *Id.*

Defendant now, for the first time on appeal, alleges that the factors that Judge Roetzel cited do not constitute 'aggravating factors' that warrant departure from probation. DB:5. Yet no error occurred. The sentencing court stated these circumstances on the record and correctly recorded them in the Judgment of Conviction. SR:237-40, 310. At sentencing, the court said it "*finds for the aggravating factors that you do pose a significant risk to the community* . . ." SR:197 (emphasis added). The final Judgment of Conviction stated, "the Defendant *is a severe risk to the public.*" SR:176 (emphasis added). Defendant's complaint is without merit. There was no error, much less plain error.

If this Court chooses to dig deeper, when considering whether the aggravating circumstances identified by the circuit court are sufficient to justify departure from presumptive probation or a fully suspended penitentiary sentence, this Court applies the abuse of discretion standard. *State v. Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d 57, 59 (citing *State v.*

(. . . continued)
dispositional order. Neither this section nor its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest.

(Emphasis added).

Whitfield, 2015 S.D. 17, ¶ 23, 862 N.W.2d 133, 140); *see also State v. Underwood*, 2017 S.D. 3, ¶ 13, 890 N.W.2d 240, 243 (Kern, J., concurring specially). To determine whether a circuit court abused its discretion in finding aggravating circumstances, this Court applies a totality of the circumstances analysis. *Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d at 60-61. There is no specific or exhaustive list of what may or may not be an aggravating circumstance. "These circumstances are not limited to demonstrations of a risk of violence or a career of criminality." *State v. Roedder*, 2019 S.D. 9, ¶ 33, 923 N.W.2d 537, 547.

The court should have a thorough 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.'" *Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d at 140 (quoting *State v. Chase in Winter*, 534 N.W.2d 350, 354-55 (S.D. 1995)). The circuit court must consider the "fullest information possible concerning the defendant's life and characteristics," acquiring a thorough acquaintance with the character and history of the defendant. *State v. Thorsby*, 2008 S.D. 100, ¶ 7, 757 N.W.2d 300, 302; *State v. McKinney*, 2005 S.D. 74, ¶ 17, 699 N.W.2d 460, 465-66.

Likewise, there is no statutory definition of what is "a significant risk to the public" is. *State v. Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d 1 at 5 (quoting SDCL 22-6-11). This Court has not stated a definition of this phrase, "perhaps because it is not one that can be precisely defined." *Id.*

This Court does not require that "SDCL 22-6-11 contemplates only circumstances demonstrating a risk of violence or career criminality." *Id.* (quoting *Underwood*, 2017 S.D. 3, ¶ 8, 890 N.W.2d at 242). This Court has found that "prior criminal history and probation or parole violations may constitute aggravating circumstances posing a significant risk to the public." *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d 1, 5.

The court considered the totality of the circumstances did that when examining Defendant's presentence investigation report. The court stated Defendant's "poor performance, your behavior, your criminal history, your behavior as -- and you were on parole when this happened . . . " all pointed to "aggravating factors that you do pose a significant risk to the community." SR:197; *see State v. Beckwith*, 2015 S.D. 76, ¶ 11, 871 N.W.2d at 60 ("[t]he likelihood of not complying with the conditions of probation is an appropriate aggravating circumstance to consider as it may signal a significant risk to the public"). Defendant's counsel acknowledges that she has "a lot of crimes of dishonesty: grand theft, identity theft, insufficient funds." SR:195. These are likewise a significant risk to the public that cause serious financial loss, including to the county.

This Court has recognized circumstances like Defendant's—a mindset focused on criminal activity, behavior that negatively affects others, failure to accept responsibility, and continued criminal activity after a previous penitentiary sentence—support a departure from a

presumptive probation sentence. *See Underwood*, 2017 S.D. 3, ¶ 9, 890 N.W.2d at 242-43; *Beckwith*, 2015 S.D. 76, ¶¶ 12-15, 871 N.W.2d at 60-61 (holding that failure "to acknowledge culpability and remorse for his acts" and prior felony convictions are aggravating circumstances).

Based on the totality of the information the circuit court had before it, the circuit court properly found aggravating circumstances that pose a significant risk to the community and stated them on the record. *See Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d at 60-61; SR:197.

CONCLUSION

The sentencing court did not err, much less commit plain error. The circuit court did not err in finding aggravating circumstances justifying departure from presumptive probation. The court also did not abuse its discretion in departing from presumptive probation and denying Defendant a fully suspended penitentiary sentence. The State requests that this Court affirm Defendant's Judgment of Conviction.

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 3,122 words.

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

Dated this 3rd day of April, 2025.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of April, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Brandi Renea Tillman,* was served electronically through Odyssey File and Serve on Gina Ruggieri at ginaruggieri@yahoo.com.

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

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

30942

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

BRANDI RENEA TILLMAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Circuit Court Judge

APPELLANT'S RESPONSE BRIEF

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Notice of Appeal filed December 26, 2024

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STATE OF SOUTH DAKOTA

No. 30942

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

BRANDI RENAE TILLMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant Brandi Tillman is called "Tillman". Appellee, the State of South Dakota, is called "State". The Sentencing Hearing transcript will be referred to as "SH".

JURISDICTIONAL STATEMENT

The Honorable Scott A. Roetzel, Fall River County Circuit Court Judge, filed a Judgment of Conviction on December 9, 2024. Tillman filed a Notice of Appeal on December 23, 2024. This Court has jurisdiction to hear this Appeal under SDCL § 23A-32-2.

STATEMENTS OF FACTS AT SENTENCING

The transcript reflects that Counsel made a substantive argument to the Court that under SDCL § 22-6-11 that presumptive probation

applied. SH: 5 – 6. Tillman spoke to the Court and advised that she was enrolled in college, had recently completed treatment, and that she accepted full responsibility for her mistakes and actions in this case. SH: 7. She admitted that she committed this offense while on parole. *Id.* Tillman stated she had changed during the pendency of this litigation and argued she deserved another chance from this Court. SH: 6 – 7.

The Court found that aggravating circumstances did exist and deviated from probation. SH: 7 – 8. Tillman was sentenced to the penitentiary for three (3) years. SH: 8.

Tillman appeals her sentence.

ARGUMENT

The proper standard for review is an abuse of discretion standard. Procedural errors that involve SDCL § 22-6-11 must be brought to the attention of the sentencing court to preserve the issuer for appeal, *State v. Feucht*, 2024 SD 16 ¶ 25, 5 N.W. 3d 561, 569. In *Nelson*, the Court stated that an objection is necessary when a court materially deviates from the statutory procedures it is bound to uniformly and fairly administrate. *State v Nelson*, 1998 SD 124, ¶ 13, 587 N.W. 2d at 444.

Here, the Court did not commit any procedural errors at sentencing, therefore, there was no reason for counsel to object on

procedural grounds. Counsel made a substantive argument that probation applied under the statute, and the Court fairly considered the argument of defendant's counsel. Thereafter, the Court stated the reasons for departure on the record, and those reasons are incorporated in the defendant's judgment of conviction. The Circuit Court complied with the procedures of the statute. Thus, there are no procedural errors and the State's argument does not apply here. In sum, the proper standard for review is an abuse of discretion standard.

AGGRAVATING FACTORS

The Court has recognized that behavior negatively affects others, and a Defendant's failure to take responsibility are factors that support departing from probation. *State v Underwood*, 201 SD 3, 9 ¶ 890, N.W. 2d. at 242, 243.

Here, Tillman did tell the Court that she had made progress on parole, had gotten into school, and successfully completed treatment about ten days before the hearing. SH: 7. Tillman advised that she had changed and accepted responsibility for her actions and apologized to the Court. *Id*. For these reasons and all arguments in the Defendant's opening brief, Defendant submits that the sentencing court erred when it sentenced her to a term in the penitentiary. Tillman asks for a suspended Department of Corrections sentence.

CONCLUSION

Tillman respectfully requests that the Circuit Court's findings that aggravating factors exist that pose a risk to society be reversed.

Dated this 7th day of May, 2025.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that the Appellant's Response Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's brief contains 932 words.

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

Dated this 7th day of May, 2025.

/s/ Gina Ruggieri
Gina Ruggieri
Attorney for the Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 6, 2025, a true and correct copy of the Response Brief in the matter of *State of South Dakota v. Brandi Renae Tillman* was served through Odyssey File and Serve and was also served upon Sarah L. Thorne at:

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/s/ Gina Ruggieri