

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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APPEAL # 30855

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STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

TIMOTHY UPTON,

Defendant and Appellant.

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APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

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THE HONORABLE ROBERT GUSINSKY

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**APPELLANT'S *KORTH* BRIEF**

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NOTICE OF APPEAL WAS FILED SEPTEMBER 30<sup>TH</sup>, 2024

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STATE OF SOUTH DAKOTA,

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**PART A**

**PRELIMINARY STATEMENT**

Throughout this brief, Defendant below and Appellant herein, Timothy Upton, will be referred to as “Defendant” or by name. Plaintiff and Appellee, the State of South Dakota, will be referred to as “State.” All references herein to the Settled Record are referred to as “SR” followed by the page number(s). Transcripts of the court hearings from this matter will be cited by the initials of the hearing’s name (e.g., Sentencing Hearing, “SH”) followed by the page number(s). Any references to documents also contained in the Appendix will be referred to as “APP” followed by the appropriate page number(s).

**JURISDICTIONAL STATEMENT**

Mr. Upton appeals from a final Judgment and sentence entered by the Honorable Robert Gusinsky, Circuit Court Judge of the Seventh Judicial Circuit. The Judgment of Conviction was filed on November 19, 2024, and an Amended Judgment was filed



October 8<sup>th</sup>, 2024. (SR 138; see also APP 1). Notice of Appeal from the Judgment of Conviction was timely filed on September 30<sup>th</sup>, 2024. (SR 140). This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

### **STATEMENT OF THE LEGAL ISSUE**

**Whether the court erred in sentencing Mr. Upton to a term of incarceration rather than probation.**

*Anders v. California*, 386 U.S. 738 (1967).  
SDCL 23A-7-8.

### **STATEMENT OF THE CASE AND FACTS**

On August 16<sup>th</sup>, 2023, a Pennington County Grand Jury issued an Indictment against Mr. Upton alleging Count 1: Aggravated Assault (Domestic Abuse), in violation of SDCL 22-18-1.1(8) and Count 2: Interference with Emergency Communication, in violation of SDCL 49-31-29.2(1). (SR 27).

On July 23, 2024, Mr. Upton appeared before the circuit court for a change of plea hearing. (See generally, COP). At the hearing, the circuit court advised Mr. Upton of his constitutional and statutory rights. Mr. Upton informed the circuit court that he listened to the explanation of rights and did not have any questions regarding his rights. (Id.). Defense informed the circuit court of the terms and conditions of the Plea Agreement, which called for a plea of guilty to Count 1, Aggravated Assault (Domestic Abuse). (Id.; see also, SR 74). In exchange for a plea of guilty on this count, the State agreed to dismiss Count 2 of the Indictment, the Part II Information, and the Indictment in Court File No. 51CRI23-3550 dated August 31, 2023. (Id.). The term of incarceration was open to the circuit court, but the parties had agreed that both sides are free to comment. (Id.).

The circuit court thoroughly canvassed Mr. Upton on his rights and the effect of the plea agreement. (See generally, COP). When the circuit court asked Mr. Upton if he agreed with the terms of the plea agreement described by defense, he indicated that he did, and that he did not believe anything additional should have been included as part of the plea agreement. (Id.). Defense provided the circuit court with a factual basis to support the plea. (Id.).

After hearing the factual basis, the circuit court found Mr. Upton had been advised of his constitutional and statutory rights, which he understood, and that by pleading guilty, he waived those rights. (Id.). The circuit court also found a factual basis existed to support the plea, and determined the plea to be voluntarily, knowingly, and intelligently entered. (Id.).

On November 23, 2022, the trial court sentenced Mr. Upton to serve 15-years' imprisonment with 3-years suspended and 125-days credit plus each day served while in Pennington County Jail. (See generally, SH).

**STATEMENT OF COUNSEL REGARDING SIGNIFICANT MOTIONS FILED  
IN THE CASE**

The undersigned does not believe that any significant motions were filed in this matter. For example, the defense did file discovery motions based on case law and statutory authority. (SR 47). The court granted those motions.

There was no trial held in this matter as Defendant pleaded guilty to Aggravated Assault. This plea was taken pursuant to the Plea Agreement wherein the State agreed to dismiss the Part II Information filed in this matter. (SR 74). The State further agreed that it would dismiss an additional matter (51CRI23-3550) which alleged alternative counts of

Rape in the Third Degree. (Id.). After a Pre-Sentence Investigation was completed, Mr. Upton was sentenced.

### **RELEVANT BACKGROUND FACTS TO KORTH ISSUE PRESENTED**

On or about August 3, 2023, Mr. Upton is alleged to have spent an evening out at a bar with his wife (Cassandra) and a couple of friends. After returning home, Mr. Upton and Cassandra began to argue. At some point Mr. Upton pinned Cassandra against a trailer in their driveway. The dispute temporarily deescalated. A little while later, the argument reignited in the couple's bedroom. As Mr. Upton entered the bedroom, he punched a television, threw a lamp, and began to strangle Cassandra. Cassandra fled to the living room. Mr. Upton pursued her and began strangling Cassandra again.

Cassandra contacted law enforcement after she was able to get to her cellular phone. When law enforcement arrived to speak with Cassandra, Mr. Upton had already left the home. Cassandra provided law enforcement with home security footage of Mr. Upton hitting and choking her. (GJ at pp. 3-9). Mr. Upton entered a plea of guilty to Aggravated Assault on July 23, 2024, and was subsequently sentenced to 15-years' incarceration with 3-years suspended and 125-days credit plus each day while in Pennington County Jail on September 17<sup>th</sup>, 2024.

### **COUNSEL'S STATEMENT**

This brief is submitted in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Korth*, 2002 S.D. 101, 650 N.W.2d 528. No significant motions were filed during the pendency of the case. Counsel for Mr. Upton has thoroughly reviewed the record and has discussed this case with Mr. Upton.

Upon carefully examining the facts and matters contained in the record of this appeal, researching the law and relevant authority in connection therewith, and discussing this case with Mr. Upton, appellant counsel has concluded that he does not believe any meritorious or non-frivolous issues exist to support an appeal. In reaching this conclusion, counsel reviewed this matter Mr. Upton and thoroughly read and examined the record for any arguable violations of the Constitution of the United States, the Constitution of the State of South Dakota, the statutes of the State of South Dakota, the Rules of Evidence, and the Rules of Criminal Procedure.

Counsel on appeal was also trial counsel. *See, State v. Arabie*, 2003 S.D. 57, 663 N.W.2d 250 (this Court discussing duties of appellate counsel in presenting a *Korth* brief, and trial counsel also serving as appellate counsel where appellant claimed ineffective assistance of counsel). Should this Court find that any additional issues should be briefed, counsel is available.

### **CONCLUSION**

For the reasons submitted in Section B of this *Korth* Brief, Mr. Upton requests that his conviction be vacated that that this matter be remanded for a new trial.

Dated this 24<sup>th</sup> day of January 2025.


GREY &  
EISENBRAUN LAW

/s/ Paul Eisenbraun  
Paul Eisenbraun  
909 St. Joseph Street, 10<sup>th</sup> Fl.  
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## **PART B**

As required by *Korth*, Part B is meant to include the Appellant's submission, unedited by counsel. Counsel has informed Mr. Upton that counsel could not find or present any non-frivolous issues. Counsel requested that Mr. Upton provide counsel with a written statement or argument regarding all of the issues he wishes to submit to the Court as Part B of this brief, including the grounds on which he contends he was denied his basic constitutional rights.

Counsel received a 1 page (double sided) written argument from Mr. Upton. Due to the format of Mr. Upton's written argument, counsel has attached a copy of Mr. Upton's original argument. Counsel also advises that he had Mr. Upton review the completed *Korth* brief and all attachments, including a photocopy of his written argument, and requested Mr. Upton sign Part B after reviewing the completed brief and all attachments, including the attached photocopy of his written argument.

  
Timothy Upton  
Defendant/Appellant

IN THE SUPREME COURT  
OF THE  
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APPEAL # 30855

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

CERTIFICATE OF COMPLIANCE

vs.

TIMOTHY UPTON,

Defendant and Appellant.

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Pursuant to SDCL 15-26A-66, Paul Eisenbraun, counsel for  
Defendant/Appellant, does submit the following:

The Appellant's *Korth* Brief is 6 pages in length. It is typed in proportionally  
spaced typeface Baskerville 12 point. The word processor used to prepare this brief  
indicates there are a total of 1320 words in the body of the brief.

Dated this 24<sup>th</sup> day of January 2025.

GREY &  
EISENBRAUN LAW

/s/ Paul Eisenbraun  
Paul Eisenbraun  
909 St. Joseph Street, 10<sup>th</sup> Floor  
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IN THE SUPREME COURT  
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APPEAL # 30855

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

CERTIFICATE OF SERVICE

vs.

TIMOTHY UPTON,

Defendant and Appellant.

---

The undersigned certifies that he served a true and correct copy of the above and foregoing document upon the persons herein next designated, on the date shown, by e-service through the State of South Dakota's e-filing system, Odyssey, to-wit:

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I further certify that upon acceptance of the electronically filed Appellant's *Korth* Brief, a paper copy of the brief will be mailed by the United States Mail to the Clerk of the Supreme Court of South Dakota, in an envelope addressed to said addressee to wit.:

Supreme Court of South Dakota  
Office of the Clerk  
500 East Capitol Avenue  
Pierre, SD 57501

Which are the last known addresses of the addressees known to the subscriber.

Dated this 24<sup>th</sup> day of January 2025.

GREY &  
EISENBRAUN LAW

/s/ Paul Eisenbraun

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## **APPENDIX**

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STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF PENNINGTON )  
  
STATE OF SOUTH DAKOTA, )  
Plaintiff, )  
 )  
vs. )  
 )  
TIMOTHY DAVID UPTON )  
DOB: 03/31/1990 )  
Defendant )

IN GUSINSKY  
  
SEVENTH JUDICIAL CIRCUIT

File No. CRI23-3109

**AMENDED JUDGMENT**

Appearance at sentencing:

Prosecutor: Roxie Hammond and Natalie Gronlund

Defense attorney: Paul Eisenbraun

Date of sentence: September 17, 2024  
Date of offense: August 3, 2023  
Charge: Aggravated Assault (Domestic Abuse)--felony.  
Class: 3 Felony SDCL: SDP22-18-1.1 (8)  
Plea of Guilty entered on July 23, 2024

☒ The Defendant having pled guilty and the Court finding the plea was made knowingly and voluntarily, and with a sufficient factual basis for the entry of the plea and having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT the Defendant is sentenced to serve:

15 years in the South Dakota State Penitentiary with 3 years suspended and 125 days credit plus each day served in the Pennington County jail.

**TERMS AND CONDITIONS as Ordered:**

- ☒ That Defendant pay court costs of \$116.50.
- ☒ That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.
- ☒ That Defendant pay prosecution costs: Transcript \$117.60.
- ☒ That Defendant pay the statutory fee of \$25.00 DV.
- ☒ That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of \$1592.89 to the victim, Cassandra Joyce Upton.

Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any

Attest: Part II information, if applicable.

Morris, Lisa  
Clerk/Deputy 10/8/2024 11:57:43 AM



BY THE COURT:

  
\_\_\_\_\_  
HON. ROBERT GUSINSKY CIRCUIT JUDGE

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this Judgment is filed.

**APP.1**

aeronautical engineering

### Acceptance of responsibility

- was there - breach of Plea, was given no remedy
- what do they use to score the PSI; got the mental eval done, did counseling at school, had a support group and ~~fixing it~~ was doing better mentally and taking steps to continue.
- Things discussed were taken ambiguously; dad's death went from emotional traumatic event to an excuse according to the judge. Said I blacked out during the event, he didn't see me "pass out" anywhere. The wife tried getting the charges dropped and was given no response during the process than made her statement at sentencing to be told she was trauma bonded.
- There was a lot of harmful errors in this case that got turned into what it could for a conviction instead of trying to find a remedy for our family.
- They brought up what I'd done in past to tell me I wouldn't change, but I worked myself from inmate to Crew Chief at the landfill was part of the union was out of prison for 8 years with no problems until this than was on the ankle monitor for however long with no infractions. So how am I a threat.
- when I went to Hermosa I called to make sure I was still in my 25 mile radius.

Facts in PSR used to support a sentence must be sufficiently reliable to support that sentence.

Although rules of evidence do not apply to sentencing courts use of facts in a PSR as basis for departure from Plea agreement, a defendant is afforded the right to refute or explain evidence used against him.

Any departure must be based on factual findings.

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PENNINGTON COUNTY, SOUTH DAKOTA

---

THE HONORABLE ROBERT GUSINSKY  
CIRCUIT COURT JUDGE

---

**APPELLEE'S BRIEF**

---

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AND APPELLANT

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Notice of Appeal filed September 30, 2024.

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*Defendant and Appellant.*

---

**PRELIMINARY STATEMENT**

In this brief, Defendant and Appellant, Timothy David Upton, is referred to as “Appellant” or “Upton.” Plaintiff and Appellee, the State of South Dakota, is referred to as “State.” The victim is referred to by her initials, C.U. All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Pennington County File CRI23-3109)..... SR

Arraignment (October 17, 2023) .....ARR

Status Hearing (January 9, 2024).....SH1

Change of Plea Hearing (July 23, 2024) .....COP

Sentencing Hearing (September 17, 2024) .....SENT

Appellant’s Brief.....AB

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

## **JURISDICTIONAL STATEMENT**

Upton appeals from a final judgment and sentence entered by the Honorable Robert Gusinsky, Circuit Court Judge, Seventh Judicial Circuit. A Judgment was filed on September 19, 2024, and an Amended Judgment was filed on October 8, 2024.<sup>1</sup> SR 138, 148. Upton filed a Notice of Appeal on September 30, 2024. SR 140-41. This Court has jurisdiction under SDCL 23A-32-2.

### **STATEMENT OF LEGAL ISSUES AND AUTHORITIES**

#### **PART A**

IN ACCORDANCE WITH *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2d 528, UPTON'S COUNSEL DID NOT RAISE ANY ISSUES IN APPELLANT'S BRIEF.

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

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

#### **PART B**

The State interprets Upton's Part B arguments as follows:

##### **I.**

WHETHER THERE WAS A BREACH OF THE PLEA AGREEMENT?

The circuit court did not rule on this issue.

*State v. Doherty*, 261 N.W.2d 677 (S.D. 1978).

*State v. Jones*, 2012 S.D. 7, 810 N.W.2d 202.

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<sup>1</sup> The only change made on the Amended Judgment was a correction of the date on which Upton entered a guilty plea.

SDCL 23A-7-8.

## II.

WHETHER THE CIRCUIT COURT PROPERLY CONSIDERED THE INFORMATION CONTAINED IN THE PRE-SENTENCE INVESTIGATION REPORT IN PRONOUNCING UPTON'S SENTENCE?

The circuit court did not rule on this issue. Upton was sentenced to fifteen years in the state penitentiary with three years suspended.

*State v. Toavs*, 2017 S.D. 93, 906 N.W.2d 354.

*State v. Whitfield*, 2015 S.D. 17, 826 N.W.2d 133.

SDCL 23A-27-6.

### **STATEMENT OF THE CASE AND FACTS<sup>2</sup>**

Officers Porter Wimp, Tom Grove, and Ron Miller of the Box Elder Police Department ("BEPD") responded to the residence at 246 Douglas Road, Box Elder, Pennington County on August 3, 2023, at approximately 2:02 a.m., for an open line 911 call and disturbance in progress. SR 5, 6, 8, 37, 106, 107, 109 (sealed documents).<sup>3</sup> The call taker heard arguing over the phone and a female telling someone to leave. SR 5, 106.

Upon arrival at the residence, the officers had contact with C.U., Upton's spouse of five years. SR 5, 32, 106. C.U. had dried blood on

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<sup>2</sup> The Statement of the Case and the Facts are combined for brevity and clarity.

<sup>3</sup> The facts set out in this section come from the Grand Jury Transcript (sealed document), as well as the confidential law enforcement reports that were both filed separately with the circuit court and contained within the pre-sentence investigation (also a sealed document).

multiple areas of her body, including her neck, arms, and face, as well as red marks on her neck, and she was very emotional. SR 5, 6, 8, 38, 106, 107, 109. The inside of the residence was in disarray, with two broken televisions, a broken lamp, damaged wall, and numerous blood droplets throughout. SR 5, 8, 106, 109. Upton was not present at the scene, and C.U. advised that he left on foot. SR 5, 38, 106. Officer Grove and Officer Miller unsuccessfully searched the area for Upton as Officer Wimp, and later Officer Miller, spoke with C.U. at the residence. SR 5, 6, 8, 38, 106, 107, 109.

C.U. advised that she and Upton were at the Belle Star Gentleman's Club that night. SR 5, 106. They and some friends had been at the Robbinsdale Lounge earlier, and Upton drove them to the Belle Star as he only had a couple drinks. SR 32. However, Upton was determined to drive home from the Belle Star despite continuing to drink and C.U.'s concerns of him driving drunk. SR 33-34. Upton dropped their friends off first, then drove home. SR 33. When Upton and C.U. arrived back at their residence, they got into a verbal argument that turned physical, with Upton claiming that C.U. exaggerated that he was too drunk to drive. SR 5, 33, 106. Upton threw C.U. into a white trailer that was parked in the driveway, pinned her against the trailer, and placed his hands around her neck. SR 5, 34, 106. C.U. reported that

when he did so, she felt pain in her throat and was not able to breathe.<sup>4</sup>  
SR 5, 106.

Upton and C.U. then entered the residence. SR 5, 106. The argument continued inside, with Upton punching the bedroom and living room televisions, throwing a lamp, grabbing and pushing C.U., and placing both hands around her neck to choke her multiple times, again causing difficulty breathing and brief loss of consciousness from hitting her head on a table as Upton threw her around. SR 8, 35-36, 109. Officer Wimp viewed security camera footage from inside the residence which showed numerous instances of Upton throwing C.U. down, pushing her into the wall, and cursing at her, as well as C.U. telling Upton “you are going to kill me” and gasping for air. SR 5, 13, 38-39, 106, 114. C.U. also made multiple attempts to call 911, but Upton kept interfering. SR 5, 8, 13, 35, 36, 39, 106, 109, 114. C.U. advised she was able to punch Upton in the face to try to stop the assault. SR 6, 8, 35, 107, 109. Upton also acknowledged knowing the camera is recording but indicated that he did not care. SR 5, 13, 106, 114.

Officer Grove attempted to call Upton just after the incident as he could not be located in the area. SR 15, 116. The Box Elder Police Department also issued a local bulletin, advising area law enforcement that there was probable cause for Upton’s arrest. SR 11, 112. At approximately 8:41 p.m. that same day, Upton contacted dispatch,

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<sup>4</sup> C.U. testified at the grand jury proceeding that she was able to breathe normally at that time. SR 34.

asking to speak with Officer Grove. SR 13, 15, 114, 116. Officer Grove spoke to Upton on the telephone and asked if he was willing to meet up for an interview. SR 15, 116. Upton was hesitant and asked to do the interview over the phone. SR 15, 116.

Upton advised that he and C.U. had been at the Robbinsdale Lounge in Rapid City and the Belle Star Gentleman's Club in Box Elder that evening with friends. SR 15, 116. They were drinking alcohol at both locations. SR 15, 116. They returned to their residence and began arguing, but Upton could not say exactly what the argument was about. SR 15, 116. He admitted that the argument got "a little physical" but claimed that he only grabbed C.U.'s arms while she was on the couch and put them on her chest to calm her down. SR 15, 116. He alleged at that point, C.U. caused injury to him, including scratching his face, kicking him in the nose, and giving him a partial black eye. SR 15, 116.

Upton admitted that he punched the television and the wall, which led to C.U. attempting to call 911. SR 15, 116. He grabbed her phone and threw it off to the side because he wanted them to work it out. SR 15, 116. He then had to hold C.U.'s hands to her chest to keep her from hitting him as she started "flailing" around. SR 15, 116. Upton advised that when his attempt to subdue C.U. became ineffective, he left the residence and did not return. SR 15-16, 116-17. Upton refused to meet with Officer Grove and allow him to photograph any injuries. SR 16, 117.

Officer Grove requested assistance from the Rapid City Police Department in checking a residence in Rapid City for Upton. SR 16, 117. Officer Vincent Rudebusch of the Rapid City Police Department located Upton at the residence. SR 11, 13, 16, 112, 114, 117. He arrested Upton and transported him to the Pennington County Jail where he was turned over to Officer Wimp for booking on charges of aggravated assault domestic and interference with emergency communication. SR 3, 11, 13, 16, 104, 112, 114, 117.

On August 7, 2023, the State filed a Complaint charging Upton with one count of Aggravated Assault (Domestic Abuse) under SDCL 22-18-1.1(8) and one count of Interference with Emergency Communication under SDCL 49-31-29.2(1). SR 1. On August 16, 2023, a Pennington County Grand Jury issued an Indictment against Upton for the same two charges. SR 27-28. The State also filed a Part II Information, alleging that Upton had two prior felony convictions. SR 25-26.

Upton was later indicted on alternative counts of third-degree rape (Pennington Count file CRI23-3550) related to an incident alleged to have occurred about a year prior to the incident with C.U. SR 184-85, 200-01, 202; ARR 8-9; SH1 2-3, 4. Upton requested a trial in CRI23-3550, which was scheduled for July 2024 (with the present case continuing along pending resolution of CRI23-3550). SR 203-04; SH1 5-6.



On July 2, 2024, the parties notified the circuit court that Upton was accepting a plea agreement offered by the State. SR 71-73. Under the plea agreement, Upton would plead guilty to Aggravated Assault (Domestic Abuse) in the present case, with the State dismissing the remaining charge, the Part II Information, and CRI23-3550 in its entirety. SR 74. The plea agreement also stated that “[a]t the time of sentencing, both sides would be free to comment.” SR 74.

Upton appeared for a change of plea hearing on July 23, 2024. SR 167; COP 1. His attorney set out the terms of the plea agreement on the record, and a copy was sent to the circuit court. SR 168; COP 2. The circuit court advised Upton of the maximum penalty and waiver of his rights if he entered a guilty plea. SR 169-70; COP 3-4. Upton then pled guilty to Count 1: Aggravated Assault (Domestic Abuse). SR 170; COP 4. The State provided the factual basis for the guilty plea, with no disagreement from Upton or his attorney. SR 171-72; COP 5-6. The circuit court ordered a domestic violence pre-sentence investigation.<sup>5</sup> SR 172; COP 6.

The sentencing hearing was held on September 17, 2024. SR 214; SENT 1. The State recommended a penitentiary sentence. SR 221; SENT 8. Upton requested a probationary sentence. SR 222; SENT 9. The circuit court sentenced Upton to fifteen years in the state

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<sup>5</sup> For the domestic violence presentence investigation, the Court Services Officer and Upton reviewed all of Upton’s assaultive or violent arrests, including law enforcement reports and Upton’s statements. SR 83-86.

penitentiary, with three years suspended. SR 225; SENT 12. The Judgement was entered on September 19, 2024, with an Amended Judgment entered on October 8, 2024. SR 138, 148.

## **ARGUMENTS**

### **PART A**

IN ACCORDANCE WITH *STATE V. KORTH*, 2002 S.D. 101, 650 N.W.2d 528, UPTON'S COUNSEL DID NOT RAISE ANY ISSUES IN APPELLANT'S BRIEF.

Upton's counsel filed a brief in accordance with the procedure adopted by this Court in *State v. Korth*, 2002 S.D. 101, 650 N.W.2d 528. Upton's counsel certified that he thoroughly reviewed the Settled Record and discussed the case with Upton. AB 4. Based upon that review and those discussions, Upton's counsel concluded that no meritorious or non-frivolous issues existed for appeal. AB 5. The State has also reviewed the Settled Record and agrees it contains no meritorious issues for appeal. The State therefore respectfully requests that this Court affirm the circuit court's judgment and sentence.

### **PART B**

This Court considers an appellants Part B argument in the same manner as it considers and decides issues raised in any other direct criminal appeal. *State v. Arabie*, 2003 S.D. 57, ¶ 19, 663 N.W.2d 250, 256. The State is only able to identify two possible issues that Upton attempts to raise in Part B of Appellant's Brief: (1) whether there was a breach of the plea agreement, and (2) whether the circuit court properly

considered the information contained in the pre-sentence investigation report when pronouncing Upton's sentence. AB App. 2-3.

For the reasons set forth below, the State asserts that Upton's arguments on both issues fail because there was no breach of the plea agreement, and the circuit court did not abuse its discretion in imposing its sentence as it properly considered the information in front of it. In addition, Upton does not cite any supporting authority for his arguments. "[F]ailure to cite supporting authority in an appellate brief violates SDCL 15-26A-60(6) and waives the issue before this court."

*State v. Patterson*, 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (citing *First Nat'l Bank in Sioux Falls v. Drier*, 1998 S.D. 1, ¶ 20, 574 N.W.2d 597, 601).

Should this Court identify any other arguably meritorious issues for appeal, the State will comply with any directions issued. See *Korth*, 2002 S.D. 101, ¶ 16 n.6, 650 N.W.2d at 536 n.6; *Arabie*, 2003 S.D. 57, ¶ 19, 663 N.W.2d at 256.

## I.

### THERE WAS NO BREACH OF THE PLEA AGREEMENT.

#### A. *Standard of Review.*

In Part B of his brief, Upton inquires "was there a breach of plea[?]" AB App. 2. However, Upton did not allege any breach of the plea agreement at the sentencing hearing or object to the State's argument as constituting such breach. "[I]f the appellant did not make a timely

objection at sentencing to an alleged breach of a plea agreement, the claim is forfeited, and the lower court's sentence is reviewed for plain error . . . .” *State v. Jones*, 2012 S.D. 7, ¶ 7, 810 N.W.2d 202, 204 (citing *Puckett v. United States*, 556 U.S. 129, 142-43, 129 S.Ct. 1423, 1433 (2009)).

In order to establish plain error, Upton 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.” *Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d at 206 (citing *State v. Beck*, 2010 S.D. 52, ¶ 11, 785 N.W.2d 288, 293). In addition, Upton 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 (citing *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)).

This Court invokes its discretion under the plain error rule “cautiously and only in ‘exceptional circumstances.’” *Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d at 205 (citing *State v. Bowker*, 2008 S.D. 61, ¶ 46, 754 N.W.2d 56, 70).

*B. There was no breach of the plea agreement.*

Parties in criminal cases are allowed to resolve them through plea agreements. SDCL 23A-7-8. In exchange for a defendant's guilty plea, the prosecutor may agree to any of the following:

- (1) Move for dismissal of other charges or not file additional charges arising out of a different occurrence;
- (2) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court;
- (3) Agree that a specific sentence is the appropriate disposition of the case; or
- (4) Perform other specified acts to be made a part of the agreement.

*Id.* "If a plea agreement has been reached, the court must require the full disclosure of the terms of the agreement and a verbatim record made thereof at the time the plea is offered." *State v. Doherty*, 261 N.W.2d 677, 682 (S.D. 1978).

This Court has held that a breach of a plea agreement establishes error, that it was plain, and that it implicates a defendant's substantial rights. *See State v. Olvera*, 2012 S.D. 84, ¶ 12, 824 N.W.2d 112, 115. Because there was no breach of the plea agreement in this case, Upton is unable to establish plain error.

Under the plea agreement at issue, the State agreed to dismiss other charges, including Upton's other criminal file in its entirety, and the Part II Information. However, the State did not have an obligation under the plea agreement to recommend a specific sentence, and the

circuit court was not bound by the plea agreement to order a specific sentence. Rather, both parties were free to comment at the time of sentencing and to argue for any sentence they believed was appropriate. SR 74.

In addition, the terms of the plea agreement were set out on the record at the change of plea hearing, with a copy sent to the circuit court. SR 168; COP 2. Upton indicated his understanding that the circuit court was not bound by the plea agreement and could sentence him to the maximum penalty. SR 171; COP 5. Upton denied receiving any promises other than those contained in the plea agreement. SR 171; COP 5.

Upton cannot now complain that the State did not recommend a specific sentence when that was never a term of the agreement he accepted. Nor can he complain about the circuit court ordering a penitentiary sentence. By entering into a plea agreement in which both parties were free to comment at sentencing, Upton placed himself at the mercy of the circuit court. However, the circuit court's decision to not show Upton the judicial leniency he sought does not amount to plain error, and the sentence should be upheld.

## II.

THE CIRCUIT COURT PROPERLY CONSIDERED THE INFORMATION CONTAINED IN THE PRE-SENTENCE INVESTIGATION REPORT IN PRONOUNCING UPTON'S SENTENCE.

### A. *Standard of Review.*

“Sentencing courts ‘exercise broad discretion when deciding the extent and kind of punishment to be imposed.’” *State v. Toavs*, 2017 S.D. 93, ¶ 6, 906 N.W.2d 354, 356 (citing *State v. Bausch*, 2017 S.D. 1, ¶ 39, 889 N.W.2d 404, 415, *cert. denied*, 583 U.S. 836, 138 S.Ct. 87 (2017)). Therefore, this Court will “generally review a circuit court’s decision regarding sentencing for abuse of discretion.” *Toavs*, 2017 S.D. 93, ¶ 6, 906 N.W.2d at 356.

“An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable.” *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109 (citing *Thurman v. CUNA Mut. Ins. Soc’y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616).

“[T]he trial courts of this state exercise broad discretion when deciding the extent and kind of punishment to be imposed.” *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (citing *State v. Grosh*, 387 N.W.2d 503, 508 (S.D. 1986)). “[A] sentence within the statutory maximum [generally] will not be disturbed on appeal.” *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83 (citing *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796

N.W.2d 397, 406). Also, “[a]bsent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” *Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d at 359 (citing *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61).

*B. The trial court properly considered the information contained in the pre-sentence investigation report in pronouncing Upton’s sentence.*

When making a sentencing decision, the circuit court should be guided by the traditional sentencing factors of retribution, deterrence (both individual and general), rehabilitation, and incapacitation. *State v. Banks*, 2023 S.D. 39, ¶ 18, 994 N.W.2d 230, 235. These factors are to be weighed “on a case-by-case basis’ depending on the circumstances of the particular case.” *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741.

In addition, 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, 826 N.W.2d 133, 140 (citing *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412). “[I]t is settled that the range of evidence that may be considered at sentencing is extremely broad.” *Arabie*, 2003 S.D. 57, ¶ 21, 663 N.W.2d



at 257. Such evidence “even includes inquiry into ‘uncharged conduct or even conduct that was acquitted.’” *Id.* (citing *United States v. Schaefer*, 291 F.3d 932, 944 (7th Cir. 2002)).

In this case, the circuit court became acquainted with Upton’s character and history by ordering a domestic violence pre-sentence investigation report. SR 172; COP 6.

The report of a presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

SDCL 23A-27-6.

The pre-sentence investigation report in this case contained such information as Upton’s statements regarding this incident, family and relationships, education, employment history, financial situation and accommodations, any drug/alcohol/gambling issues and treatment, feelings about the crime and how it has affected the family, plans for the future, law enforcement reports, criminal history, victim impact statement, letters of support, and LSI-R score which showed him to be in the high supervision level. *See generally* SR 82-133 (sealed document). Because this was a domestic violence case, the report also contained information regarding Upton’s prior assaultive or violent arrests. Specifically, the report discussed (1) a 2022 arrest for aggravated assault-strangulation in which C.U. was also alleged to be the victim, (2)

the pending third-degree rape case that was dismissed by the State as part of the plea agreement, (3) two protection order cases brought by C.U. against Upton in 2021 and 2023, and (4) a prior juvenile charge. SR 83-86. Finally, the report contained information about Upton's relationship with C.U. and history of domestic violence in that relationship. SR 86.

It is important to note that Upton's statements regarding the incident contained in the pre-sentence investigation report are contradictory to the statements he made to Officer Grove the night of the incident. While Upton was fairly detailed in the events of that night when speaking to Officer Grove, he stated in the pre-sentence investigation report that he could not remember everything that happened, that he "seems to black out," and that while he did recall strangling C.U., it was only because they are into BDSM and he uses strangulation on C.U. to see if it turns into sex. SR 84-85.

When a pre-sentence investigation report has been prepared, the circuit court is to give the parties "an opportunity to comment thereon and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy" contained in the report. SDCL 23A-27-7. In this case, the circuit court asked both parties at the beginning of the sentencing hearing if they had an opportunity to review the pre-sentence investigation report. SR 215; SENT 2. The State had no additions or corrections, and Upton's counsel

offered medical records to be included in the report<sup>6</sup>, but had no other additions or corrections. SR 215; SENT 2.

C.U. spoke at the sentencing hearing, in addition to providing a victim impact statement for the pre-sentence investigation report. She talked about the impact this incident had on their family and her desire for Upton to get help and stay out of jail so he could help with their children. SR 216; SENT 3. She called Upton “a great person” who “just has a lot to work through” and “he’ll be doing what he needs to do to get help.” SR 216; SENT 3. The circuit court acknowledged receiving and reviewing the letters submitted by C.U. SR 217; SENT 4.

At the sentencing hearing, the State requested a penitentiary sentence, noting several concerns from the information in the pre-sentence investigation report. SR 221; SENT 8. Specifically, while Upton admitted to physical abuse of C.U., he did not seem to actually take responsibility for it, instead engaging in victim blaming and suggesting that the strangulation was a lead-up to sex. SR 218-19; SENT 5-6. Strangulation is one of the most dangerous forms of violence, yet Upton was heard on camera strangling C.U. while indicating that he did not care when she said he was going to kill her. SR 220; SENT 7. C.U.’s children were in the home during the incident, and as C.U. indicated, they have been impacted. SR 216, 220; SENT 3, 7. Upton was facing multiple charges, including a rape, and his criminal history “indicates

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<sup>6</sup> The medical records reportedly contained a mental health evaluation, but they do not appear to be part of the Settled Record. SR 217; SENT 4.

that he also has no intentions of changing his behavior.” SR 219; SENT 6. While he did get an evaluation done, there was little to no follow-up for treatment. SR 219; SENT 6. The aggravated assault is Upton’s third felony conviction as an adult and is a crime of violence. SR 87, 220-21; SENT 7-8.

Upton’s attorney argued for a probationary sentence, pointing out that even though Upton’s LSI-R score put him in the high-risk category, he is at the low end of that category. SR 221; SENT 8. He acknowledged his alcohol and drug use, and is taking steps to address his mental health, especially in dealing with his father’s death. SR 221-22; SENT 8-9. Upton spoke on his own behalf, apologizing to the court and his family for his behavior, noting that he was in a “very bad place” after losing his father. SR 222; SENT 9. He said he does take accountability for things that happened but does not really remember what happened the night of the incident. SR 222; SENT 9. Finally, he noted receiving the mental health evaluation and participating in some therapy. SR 222-23; SENT 9-10.

The circuit court imposed a penitentiary sentence after reviewing the entire pre-sentence investigation report – including letters of support for Upton and C.U.’s victim impact statement – and hearing arguments from the State, Upton’s attorney, and Upton himself. SR 225; SENT 12. The circuit court’s statements in pronouncing the sentence show that it became acquainted with Upton’s character and history and considered

the sentencing factors in light of the information before it. Specifically, the circuit court stated that the pre-sentence investigation “did a really good job of explaining to me who you are.” SR 224-25; SENT 11-12.

The circuit court referred to C.U. as “a textbook victim” who is caught up in a cycle of violence. SR 224; SENT 11. The court noted the prior aggravated assault-strangulation involving C.U. in 2022, pointing out that C.U. was “in such a bad state” that she told law enforcement that she took a bottle of pills because she was afraid that Upton would kill her, and she wanted to die on her own terms. SR 225; SENT 12. She dropped those charges because she thought Upton could change. SR 225; SENT 12. “And then you do this. You strangle her. And she’s telling you you’re going to kill me and you don’t care. You don’t care.” SR 225; SENT 12.

The circuit court did not think Upton accepted responsibility or was genuine with his excuses and apologies, noting “[y]ou blame everybody for everything.” SR 224; SENT 11. Upton blamed his behavior on his father’s passing, but the court noted that did not explain his prior criminal history. SR 224; SENT 11. Upton blamed a blackout for not remembering the events of this incident, but that is not reflected in the videos. SR 224; SENT 11. The court concluded that Upton was a very serious or extreme danger to society and anybody who is a romantic partner. SR 225; SENT 12.

There is no evidence in the record suggesting that the circuit court abused its discretion when it imposed a penitentiary sentence, and Upton has not shown such abuse of discretion. The circuit court properly considered the information provided through the pre-sentence investigation report. The information in the report primarily came from law enforcement records and Upton himself. He fully participated in the interview with the Court Services Officer and was able to provide information as requested. SR 83-92. Upton and his attorney were also given the opportunity at the sentencing hearing to comment on the pre-sentence investigation report, add to it, or correct any inaccuracy. SR 215; SENT 2. Upton cannot now bring up additional information that was not before the circuit court. AB App. 2. Therefore, because the circuit court fulfilled its duty to become acquainted with Upton, his character, and his history, and properly considered the information presented to it, any claim of abuse of discretion fails.

## **CONCLUSION**

For the reasons stated above, the State respectfully requests that the judgment and Upton'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 4,631 words.

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

Dated this 6th day of March, 2025.

/s/ Angela R. Shute

Angela R. Shute  
Assistant Attorney General

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 6th day of March, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Timothy David Upton* was served via electronic mail upon Paul Eisenbraun at [paul@greyeisenbraunlaw.com](mailto:paul@greyeisenbraunlaw.com).

/s/ Angela R. Shute

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