

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30858

STATE OF SOUTH DAKOTA
Appellee,

v.

DANA VERHOEK,
Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

HONORABLE DAWN ELSHERE
Presiding Judge

APPELLANT'S BRIEF

AMANDA M. THOLE
Attorney at Law
25 First Ave. SW
Watertown, SD 57201
Attorney for Appellant

SARAH L. THORNE
Deputy Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501
Attorney for Appellee

NOTICE OF APPEAL WAS FILED OCTOBER 7, 2024

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	2
PRELIMINARY STATEMENT.....	3
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF LEGAL ISSUES.....	3
I. WHETHER THE CIRCUIT COURT ERRED IN ENTERING A SENTENCE FOR EIGHT(8)YEARS IN PRISION WITH CREDIT FOR NINTY (90) DAYS PREVIOUSLY SERVED AGAINST THE DEFENDANT AS A MATTER OF ABUSE OF DISCRETION.	3
II. WHETHER EXCEPTIONAL CIRCUMSTANCES JUSTIFY REVIEW THE DEFENDANTS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL.	5
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS.....	7
STANDARD OF REVIEW.....	9
ARGUMENTS.....	11
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE.....	17
REQUEST FOR ORAL ARGUMENT.....	17
CERTIFICATE OF SERVICE.....	18
APPENDIX.....	19

TABLE OF AUTHORITIES

Cases:	Page
<i>Reay v. Young</i> , 2019 S.D. 63.....	5, 14
<i>State v. Arabie</i> , 2003 S.D. 57.....	5, 10
<i>State v. Caffee</i> , 2023 S.D. 51, 996 N.W.2d 351, 360.....	4, 9
<i>State v. Cepplecha</i> , 2020 SD 11.....	4, 9, 12
<i>State v. Dillion</i> , 2001 S.D. 97, 632 N.W.2d 37, 48.....	5, 10
<i>State v. Holler</i> , 2020 S.D. 28.....	4, 9, 10
<i>State v. Manning</i> , 2023 S.D. 7, 985 N.W.2d 743, 758.....	4, 9
<i>State v. Seidel</i> , 2020 SD 73.....	4, 10
<i>State v. Spaniol</i> , 2022 S.D. 61.....	5, 14
<i>State v. Thomas</i> , 2011 SD 15.....	5, 10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	6, 10, 13, 14
<i>US v. Cronic</i> , 466 US 648 (1984).....	5, 6, 10, 13
Statutes:	
SDCL § 15-26A-3.....	3, 4, 5
SDCL § 16-18-1.....	6, 14, 15
SDCL § 16-18-1.3.....	6, 14
SDCL § 16-18-1.4.....	6, 14, 15
SDCL § 16-18-3.2.....	6, 15
SDCL § 22-42-2.....	4, 7, 9, 12
SDCL § 22-42-2.3.....	4, 7, 11, 12, 13, 16
U.S. Const. Amend. VI.....	6

PRELIMINARY STATEMENT

References to the transcript of the August 14th, 2024, Change of Plea Hearing are designated as “CoPH”. References to the September 11th, 2024, Sentencing Hearing are designated as “SH”. References to the Appendix to this brief are designated as “Appx”.

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of Conviction entered by the Court, the Honorable Dawn Elshere, Circuit Court Judge, on September 11, 2024. This Judgment of Conviction was entered by the Court after the Defendant entered a Guilty Plea to Count 1 and Count 2, as alleged in the Information, on August 14, 2024. A Sentencing Hearing was held on September 11, 2024. This appeal is taken as a matter of right pursuant to SDCL § 15-26A-3, the Appellant’s Notice of Appeal was filed with the Brookings County Clerk of Court on October 4th, 2024.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN ENTERING A SENTENCE FOR EIGHT(8)YEARS IN PRISION WITH CREDIT FOR NINTY (90) DAYS PREVIOUSLY SERVED AGAINST THE DEFENDANT AS A MATTER OF ABUSE OF DISCRETION.

Appellant seeks, as a matter of right pursuant to SDCL § 15-26A-3, review of the sentence levied against her by the Trial Court. The Defendant plead guilty to Count’s 1 and 2 as alleged in the Information filed June 12, 2023. Count 1, Distribution of Schedule I or II Substance, was a felony offense as was Count 2, Violation of a Drug Free Zone. The Defendant admitted the charges as alleged on August 14th, 2024, at her Change of Plea Hearing.

Appellant argues that the Trial Court, entering a sentence for eight (8) years of penitentiary time, failed to make appropriate acquaintance with Ms. Verhoek prior to

deciding the matter. In particular, the Appellant argues that the Trial Court failed to appropriately acknowledge the mitigating circumstances present prior to the Court's disposition. Thus, Appellant seeks review of the sentence levied against her by the Trial Court wherein Ms. Verhoek had previously plead guilty to Distribution of a Controlled Substance in a Drug Free Zone in this case. Appellant argues that although the maximum possible punishment for those offenses are up to ten (10) years imprisonment individually, and Ms. Verhoek received eight (8) years imprisonment, that the sentence levied evidences an abuse of discretion by the Trial Court. Ms. Verhoek, the Appellant, believes the Court failed to adequately consider or merely acknowledge her mitigating factors as presented to the Court.

The most relevant cases related to this issue are as follows:

- a. *State v. Caffee*, 2023 S.D. 51, 996 N.W.2d 351, 360.
- b. *State v. Ceplecha*, 2020 SD 11.
- c. *State v. Holler*, 2020 S.D. 28.
- d. *State v. Manning*, 2023 S.D. 7, 985 N.W.2d 743, 758.
- e. *State v. Seidel*, 2020 SD 73.

The most relevant statutes related to this issue are as follows:

- a. SDCL § 15-26A-3
- b. SDCL § 22-42-2
- c. SDCL § 22-42-2.3

II. WHETHER EXCEPTIONAL CIRCUMSTANCES JUSTIFY REVIEW OF THE DEFENDANTS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL.

Appellant seeks, as a matter of right pursuant to SDCL § 15-26A-3, review of her sentence on the grounds of ineffective assistance of counsel. Ms. Verhoek was represented primarily by Attorney Rick A. Ribstein.

Appellant argues that the appointed counsel failed to appropriately communicate with Ms. Verhoek both the effect of the plea agreement and the alternatives if she were not to take the plea. Appellant argues that the ineffectiveness of her counsel and his mistakes amount to exceptional circumstance in accordance with *US V. Cronin*. Appellant argues that had the effect of the plea agreement been impressed, the discourse of the State's action against her would have been effected. Additionally, had Mr. Ribstein shared the alternatives to the plea agreement at hand Ms. Verhoek would have been persuaded to select a different discourse.

As a result, the Appellant claims that Mr. Ribstein's actions violated her Sixth Amendment right to effective counsel based on her appointed counsel's errors. The actions of Appellant's attorney fell below an objective standard of reasonableness and there is a reasonable probability that but for Mr. Ribstien's unprofessional errors the criminal proceedings against Ms. Verhoek would have followed an alternative discourse.

The most relevant cases related to this issue are as follows:

- a. *Reay v. Young*, 2019 S.D. 63.
- b. *State v. Arabie*, 2003 S.D. 57.
- c. *State v. Dillion*, 2001 S.D. 97, 632 N.W.2d 37, 48.
- d. *State v Spaniol*, 2022 S.D. 61.
- e. *State v. Thomas*, 2011 SD 15.

- f. *Strickland v. Washington*, 466 U.S. 668 (1984).
- g. *US v. Cronin*, 466 US 648 (1984).

The most relevant statutes related to this issue are as follows:

- a. SDCL § 16-18-1
- b. SDCL § 16-18-1.3
- c. SDCL § 16-18-1.4
- d. SDCL § 16-18-3.2
- e. U.S. Const. Amend. VI

STATEMENT OF THE CASE

This appeal stems from both the Change of Plea Hearing that occurred on August 14th, 2024, and the associated Sentencing Hearing that took place on September 11th, 2024. Both hearings occurred in Brookings County, South Dakota. The Court, presided over by the Honorable Dawn M. Elshere, issued all of the relevant orders in this case, including the Order for Furlough and Transportation and Judgment of Conviction. Appx. (Order for Furlough and Transportation and Judgment of Conviction). It should be noted that the Honorable Dawn M. Elshere did not issue the Order appointing Rick Ribstein as appointed counsel for Ms. Verhoek.

The Appellant avers that under either an abuse of discretion standard as set forth in South Dakota case law or a Sixth Amendment Constitutional Standard of Review concerning effective assistance of counsel, that the trial court erred in sentencing the Defendant. The Trial Court ordered that she serve eight (8) years in prison, with credit for ninety (90) days served prior. Appellant was remanded immediately to the Sheriff for transportation to the South Dakota Women's Penitentiary.

The Appellant avers that in consideration of SDCL § 22-42-2.3, the length and severity of the punishment, as well as the words of the Judge, do not adequately consider or acknowledge the mitigating circumstances that allow the Court discretion to depart from the mandatory sentence impositions provided by SDCL § 22-42-2. With respect to abuse of discretion, the Appellant argues that the sentence imposed did not consider the mitigating factors presented because the amount of time prescribed was outside the range of permissible choices for which a reasonable sentencing court could reach in light of mitigating factors.

For the reasons stated above and explained more fully below, Appellant brings this appeal such that the Trial Court's decisions can be reviewed and asks that it be remanded back to the Trial Court.

STATEMENT OF THE FACTS

Dana Leigh Verhoek was charged in file 05-CRI-23-000387 pursuant to a Complaint filed on June 1, 2023, with subsequent Information filed June 12th, 2024. Appx. (Complaint and Information). On June 12, 2023, Ms. Verhoek and Mr. Ribstein waived the Preliminary Hearing. Arraignment Hearing pg. 2 at 11, 15 and 16. In the relevant part, Ms. Verhoek appeared at a Change of Plea Hearing and Sentencing Hearing with the appointed counsel, Mr. Rick Ribstein. Following brief discussions with counsel, she entered a plea at the Change of Plea Hearing on August 14th, 2024. CoPH pg. 6 at 4-9. The agreement Mr. Ribstein presented to the Defendant included pleading to Count 1 and Count 2 as alleged in the Complaint filed on June 1, 2023, and in return "the State would agree to a recommend a suspended execution of sentence and recommend that there are mitigating circumstances to deviate from the mandatory minimums." CoPH pg.

2 at 15-17. Counts 3, 4, and 5, all Class 5 Felonies, were dismissed. *Id.* Additionally, at this hearing Mr. Ribstein stated that the “State would agree to recommend six years suspended, recommend time served and probation.” CoPH pg. 2 at 17-19. At this time the Court advised Ms. Verhoek that “the Court is not required to find mitigating circumstances to deviate from the mandatory minimums.” CoPH pg. 5 at 13-15.

On September 11, 2024, a Sentencing Hearing was held in Brookings County, South Dakota. Ms. Verhoek was sentenced according to the Judgment of Conviction filed September 11, 2024, to eight (8) years of prison time for file 05-CRI-23-000387 with credit given for time served. Appx. (Judgment of Conviction).

At the Sentencing Hearing, pursuant to a plea agreement, the State recommended a suspended execution of the prison sentence. SH pg. 2 at 22. They recommended six years of penitentiary time be imposed but fully suspended upon the terms and conditions of probation. SH pg. 2 at 22-24.

Following the States recommendation, counsel for the Defense, upon the request of the Court, argued in favor of a deviation from the mandatory minimum sentence by presenting a plethora of mitigating circumstances that apply to Ms. Verhoek. SH pg. 3 at 13-17. Mr. Ribstein advised the court that Ms. Verhoek had “recently gone through Human Service Center again with their program” and that she had “been given the opportunity to go to Glory House” where the Appellant had been residing while working a couple of jobs. SH pg. 3 at 13-16. Mr. Ribstein also stated that all had been going well and that the Appellant had “been monitored daily on 24/7 and all the condition through their program.” SH pg. 3 at 16 and 17.

The Honorable Judge Elshere then stated that though Ms. Verhoek was doing well in a program, that was not mitigating. SH pg. 4 at 8-14. She also stated that she did not hear from anyone mitigating factors. *Id.* As such, she did not deviate from the mandatory minimum sentences imposed by SDCL § 22-42-2 and sentenced Ms. Verhoek accordingly. SH pg. 4 at 23-25.

STANDARD OF REVIEW

I. Abuse of Discretion – Impermissible Choice

Upon appellate review of a circuit court's decision, said decision is reviewed under the abuse of discretion standard. *State v. Holler*, 2020 S.D. 28 (quoting *State v. Chipps*, 2016 SD 8). "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. Manning*, 2023 S.D. 7, ¶ 51, 985 N.W.2d 743, 758 (quoting *State v. Klinetobe*, 2021 S.D. 24, ¶ 26, 958 N.W.2d at 740). Thus, "[t]o arrive at an appropriate sentence the sentencing court should acquire a thorough acquaintance with the character and history of the man before it." *State v. Ceplecha*, 2020 SD 11 (quoting *State v. Larsen-Smith*, 2011 S.D. 93, 807 N.W.2d 817). The Court has "said that 'circuit courts must look at both the person before them and the nature and impact of the offenses.'" *State v. Caffee*, 2023 S.D. 51, ¶ 28, 996 N.W.2d 351, 360 (quoting *State v. Mitchell*, 2021 S.D. 46, ¶ 29, 963 N.W.2d 326, 333). Therefore, a court, under this analysis, is required to study 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." *State v. Ceplecha*, 2020 SD 11 (quoting *State v. Bonner*, 1998 S.D. 30 19, 577 N.W.2d 575). To overturn the circuit court's sentence, as

imposed, there needs to be “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. Seidel*, 2020 SD 73. (quoting *State v. Holler*, 2020 S.D. 28).

II. Sixth Amendment claims of ineffective assistance of counsel

To address the Appellant’s claim of ineffective assistance of counsel on direct appeal, there must be exceptional circumstances present. On appeal, it is well settled that “[a]bsent exceptional circumstances” the Court “will not address an ineffective assistance claim on direct appeal.” *State v. Dillion*, 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48. “The preferred arena for an ineffective assistance of counsel claim is a habeas corpus proceeding” where “attorneys charged with ineffectiveness can explain or defend their actions and strategies, and thus a more complete picture of what occurred is available for review. *Id.* “[O]nly when trial counsel was so ineffective and counsel’s representation so casual as to represent a manifest usurpation of the defendant’s constitutional rights” will the Court depart from the general rule of declining to address ineffective assistance of counsel claims on direct appeal. *State v. Arabie*, 2003 S.D. 57, ¶ 20.

To prevail on her claim, the Appellant must show that appointed trial counsel was so ineffective that she was prejudiced as a result. *State v. Thomas*, 2011 SD 15. The typical test for such is the two-pronged standard established in *Strickland v. Washington*. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed 2d 674, 693 (1984). However, the Supreme Court of the United States has acknowledged that there are cases where the defendant’s counsel was so ineffective that the defendant need not show prejudice under the second prong of the Strickland standard. *US v. Cronin*, 466 US 648 (1984). This acknowledgement of an alternative exists because there are occasions

when “there are, however, circumstances that are so likely to produce prejudice to the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* at 648.

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED IN ENTERING A SENTENCE FOR EIGHT(8)YEARS IN PRISION WITH CREDIT FOR NINTY (90) DAYS PREVIOUSLY SERVED AGAINST THE DEFENDANT AS A MATTER OF ABUSE OF DISCRETION.

Appellant argues that the Circuit Court abused its discretion when handing down the sentence it did in this case. In particular, the appellant argues that the circuit court erred in not taking the full measure of appellants concurrent and ongoing treatment for chemical dependency, accountability for wrongdoing, remorse for her actions, and other arguments of counsel that presented mitigating factors present in this case. The Appellant argues that the circuit court sentence disregarded her mitigating evidence.

Appellant avers that these factors, the Court not making appropriate acquaintance with the Defendant as well as not considering the mitigating factors as presented, merits finding that the Circuit Court reached an impermissible choice by handing down a decision absent recognition of Ms. Verhoek’s mitigating factors. Although the Appellant concedes that the sentencing considerations in every case are different, she appreciates both the significance and purpose of mandatory minimums. The Appellant offers that her relatively momentous mitigating circumstances, both in quality and quantity merit the Courts consideration as carved out by South Dakota law. In the very least, she believes her mitigating factors merit acknowledgement. Appellant argues that her case should be remanded to the Court for proceedings consistent with a lesser sentence being found appropriate in consideration of said mitigating circumstances as would be consistent with SDCL § 22-42-2.3.

Appellant believes the Circuit Court failed to take into consideration mitigating factors as presented by counsel as evidenced by the Courts rather abbreviated analysis on the record prior to handing down its sentence. SH pg. 4 at 8-14. Although Appellant, of course, concedes that she did in fact commit the offenses as admitted to the trial court, Appellant argues that the trial court reached a decision that is outside the range of permissible choices. Appellant argues that because the Court did not seem to put on the record that it had taken into account the Appellant's characteristics. In fact, the Court stated the opposite, prior to handing down a sentence. SH pg. 4 at 8-14. Thus, the court failed to "acquire a thorough acquaintance with the character and history of the man before it." *State v. Cepelcha*, 2020 SD 11 (quoting *State v. Larsen-Smith*, 2011 S.D. 93, 807 N.W. 2d 817).

In the Appellants view, the court failed to make appropriate findings evidencing its familiarity with the Defendant and failed to acknowledge any arguments or circumstances regarding mitigating factors. This is again evidenced by the Court's statement that the Appellants actions did not "amount to mitigation in this situation." SH pg. 4 at 13 and 14. Thus, the circuit court must have erred in reaching an impermissible conclusion, or more specifically, disposition on this case.

For the above reasons, Appellant argues that the Circuit Court reached an impermissible decision outside of the range of acceptable choices by not acknowledging the mitigating circumstances offered, instead the Court disregarded the presentation. Though SDCL § 22-42-2.3 states that a "sentencing court *may* impose a sentence other than that which is required by SDCL § 22-42-2 if the court finds the mitigating circumstances exist" the Circuit Court refused to acknowledge the existence of mitigating

factors as presented by counsel. SDCL § 22-42-2.3. Appellant believes the Supreme Court must remand to the Circuit Court with instruction to consider, or at least acknowledge, the present significant mitigating circumstances prior to crafting a permissible sentence that at least evidences that the court has gained a thorough acquaintance with the Defendant as required by South Dakota law.

II. WHETHER EXCEPTIONAL CIRCUMSTANCES JUSTIFY REVIEW OF THE DEFENDANTS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL.

Although the threshold requirement for the Appellant to prevail under the Strickland two-prong test is a high one, Appellant avers that her claim merits consideration. In accordance with *US v. Cronin*, The United States Supreme Court has acknowledged the existence of cases where the defendant's counsel does not need to show prejudice under the second prong of Strickland. *US v. Cronin*, 466 US 648 (1984). Although the Appellant believes that she was indeed prejudiced by counsel ineffectiveness, she encourages this Court to review counsel's performance in accordance with *US v. Cronin*.

The following establishes why Appellant was prejudiced and why *US v. Cronin* is applicable in this case. Mr. Ribstein, as appointed counsel, breached his duty to the Appellant as a client. He did so by breaching his duties of diligence, communication and expedition of litigation. Again, claims ineffective assistance of counsel are analyzed under the test established in *Strickland v. Washington*:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Reay v. Young, 2019 S.D. 63, ¶ 13 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). While the baseline presumption is that counsel is that counsel was competent, the question is whether counsels' performance was deficient in light of prevailing professional norms. *State v Spaniol*, 2022 S.D. 61, at 404.

Appellant argues that Mr. Ribstien provided her with ineffective assistance of counsel by breaching his duty of diligence prescribed by SDCL § 16-18-1.3 to provide her with "reasonable diligence and promptness" in representation. SDCL § 16-18-1.3. Specifically, Mr. Ribstein did not conform to the conduct of a reasonably prudent and competent attorney by not fully explaining the legal effect of the plea agreement or possible legal alternatives. Essentially, Mr. Ribstein provided Ms. Verhoek with the agreement, and she signed it. Appellant does not believe Mr. Ribstein afforded her the opportunity to fully discuss the plea agreement before she signed it.

Further, Appellant claims this constitutes a general breach of Mr. Ribstein's duty to communicate with her as his client in accordance with SDCL § 16-18-1.4. Specifically, by not fully informing the Appellant of the legal effect of the agreement he lacked her informed consent as required by SDCL § 16-18-1.4(a)(1). SDCL § 16-18-1.4(a)(1). This is further clarified by the definition of informed consent requiring communication of "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" whereby Appellant argues she received neither adequate information nor alternatives. SDCL § 16-18-1(e). Additionally, Mr. Ribstein did not reasonably consult with the Appellant about the means by which her

objectives were to be accomplished because he omitted the legal alternatives to the plea agreement. SDCL § 16-18-1.4(a)(2).

Lastly, Appellant avers counsel violated his duty of appropriate advocacy by expediting litigation in a manner inconsistent with her interest. SDCL § 16-18-3.2. The efforts made to expedite litigation were done both unreasonably and in manner inconsistent with Appellant's interests. Mr. Ribstein violated the conduct of a reasonably prudent and competent attorney by pushing an outcome inconsistent with the Appellants' interest.

As evidenced by Mr. Ribstein's performance, he violated the standard of a reasonably prudent and competent counsel because he breached his duties of diligence, communication, and expedition of litigation. In the aggregate these deficiencies by counsel fall below the objective standard of reasonableness and ultimately robbed the Appellant of a fair trial because litigation was unnecessarily expedited.

As a result of Mr. Ribstein's breach of diligence, specifically when he omitted the legal effect of the plea agreement or legal alternatives from conversation with the Appellant, she was prejudiced by his deficient performance. The same is true of counsel's deficient communication with the Appellant: had she the opportunity to become fully informed of the legal effect of the agreement, the outcome of her case would have been different. If Appellant received communication from her counsel that contained adequate information as well as an adequate explanation about the material risks of the agreement, such as the Court handing down an alternative sentence, she likely would not have accepted the plea agreement. Additionally, had the counsel provided Appellant with reasonably available alternatives, she likely would have pursued one instead of the plea

agreement at issue. Further, the expedition of this matter by counsel occurred in a manner inconsistent with the Appellant's best interest. Appellant argues that her best interest was to be fully informed of the legal effect and risks of the plea agreement. Appellant was not provided with the option to reject the plea agreement offered by the State, counter the State's offer, or proceed to trial. Lack of such alternatives was deficient performance on behalf of counsel that negatively prejudiced the outcome of Appellants case.

Although the Defendant does not attempt to diminish the seriousness and appropriateness of her actions constituting a felony, she does not feel as though she was given adequate counsel to help her competently navigate the legal system. Appellant asserts that the above analysis is sufficient to fulfill her burden to show that counsel's performance was deficient because he breached his duties of diligence, communication, and expedition of litigation amounting to exceptional circumstances because these are the basic considerations of counsel. This breach provided Appellant with deficient representation that directly affected the outcome of her case because had she received adequate information and available alternatives Appellant avers she would not have signed the agreement.

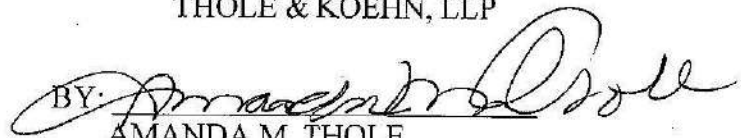
CONCLUSION

Appellant asks this court to find and order remand to the circuitry for sentencing on this matter on two grounds. First, that the circuit court erred by abusing its discretion and reaching an impermissible result where it had failed to make appropriate acquaintance with the defendant before it and failed to acknowledge the mitigating circumstances as prescribed by SDCL § 22-42-2.3. Second, the circuit court erred when the Appellants Sixth Amendment rights under the United States constitution were

violated by ineffective assistance of counsel. Appellant thus asks for a remand for a sentence that acknowledges and possibly considers her mitigating circumstances and counsel pursuant to her Sixth Amendment right.

Respectfully submitted this 16 day of January, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN, LLP

BY: 

AMANDA M. THOLE
Attorneys for Appellant
25 1st Ave. S.W.
Watertown, SD 57201
Telephone: (605) 886-5823

CERTIFICATE OF COMPLIANCE

I, Amanda M. Thole, attorney for the Appellant hereby certify that the Appellant's Brief complies with the type volume limitation as provided in SDCL 15-26A-66 and that the Appellant's Brief contains 3,153 words and is set in Times New Roman, size 12.

Dated this 16 day of January, 2025.

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

I, Amanda M. Thole, hereby certify that on the 10 day of January, 2025, I mailed the original Appellant's Brief and Appendix to the Supreme Court at the address below and emailed a Word version of the Appellant's Brief, along with a PDF version of the Appendix to the following address:

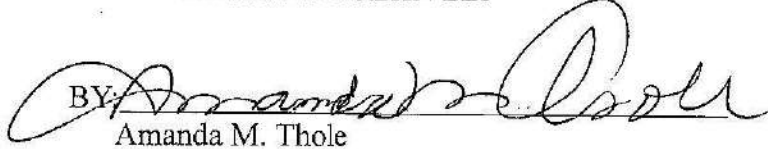
Supreme Court Clerk's Office
500 East Capital Avenue
Pierre, SD 57201-5070
SCClerkBriefs@ujs.state.sd.us

I further certify that I mailed one copy of the Appellant's Brief and Appendix via First Class United States Mail and an electronic copy via Electronic Mail to the following parties:

Sarah L. Thorne
Deputy Attorney General
1302 E Hwy 14, Suite 1
Pierre, South Dakota, 57501
atgservice@state.sd.us

This 10 day of January, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN LLP

BY: 
Amanda M. Thole
Attorneys at Law
25 1st Ave. S. W.
Watertown, SD 57201
605-886-5823

APPENDIX

TABLE OF CONTENTS

<u>No.</u>		<u>Appx. Page</u>
1.	ORDER FOR FURLOUGH	Appx. 1
2.	JUDGMENT OF CONVICTION	Appx. 2-4
3.	COMPLAINT	Appx. 5-6
4.	INFORMATION	Appx. 7-9
5.	ARRAIGNMENT HEARING TRANSCRIPT	Appx. 9-13
6.	BOND HEARING TRANSCRIPT	Appx. 14-21
7.	SENTENCING HEARING TRANSCRIPT	Appx. 22-28
8.	CHANGE OF PLEA HEARING TRANSCRIPT	Appx. 29-37

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)	05CRI23-387
Plaintiff,)	
vs.)	
	)	ORDER FOR FURLOUGH
DANA VERHOEK,	)	AND TRANSPORTATION
Defendant.)	

The above matter having been presented to the Court by and through Defendant's counsel, Rick A. Ribstein of Ribstein & Hogan Law Firm, and Defendant having requested the Court for a furlough to allow her to be released from the Brookings County Detention Center to attend inpatient treatment; and the Court having granted the same;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant, DANA VERHOEK, is granted a furlough for the purposes of attending inpatient treatment at Human Service Center on July 10, 2024;

IT IS FURTHER ORDERED that Defendant, DANA VERHOEK, shall be transported by the Brookings County Sheriff, or his Deputy, to Human Service Center in Yankton, South Dakota, on July 10, 2024, for inpatient treatment and upon completion of the program, return said Defendant, DANA VERHOEK, to the Brookings County Detention Center.

Dated this 10 day of July, 2024.

BY THE COURT:

Dawn M. Elshere

Circuit Court Judge

ATTEST:
CLERK OF COURTS

Attest:

Ahmann, Angel
Clerk/Deputy

By: _____

Deputy
(SEAL)



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,)	
)	
Plaintiff,	)	CRI23-387
)	
v.	)	JUDGMENT OF CONVICTION
)	
DANA L. VERHOEK,)	
)	
Defendant.)	
)	

An Information was filed with this Court on the 12th day of June, 2023, charging the Defendant with the crimes of Count 1: Distribution of a Schedule I or II Controlled Substance (SDCL 22-42-2); and Count 2: Drug Free Zones Violation as Felony (SDCL 22-42-19(1)). The Defendant was arraigned on said Information on the 14th day of August, 2024. The Defendant, the Defendant's attorney, Rick Ribstein, and Austin Oxner, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant pled guilty to the charge of Count 1: Distribution of a Schedule I or II Controlled Substance (SDCL 22-42-2); and pled guilty to the charge of Count 2: Drug Free Zones Violation as Felony (SDCL 22-42-19(1)).

It is the determination of this Court that the Defendant has been regularly held to answer for said offenses; 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 is guilty of Count 1: Distribution of a Schedule I or II Controlled Substance in violation of SDCL 22-42-2; and Count 2: Drug Free Zones Violation as Felony in violation of SDCL 22-42-19(1).

SENTENCE

On the 11th day of September, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

As to Count 1: Distribution of a Schedule I or II Controlled Substance, A Class 4 Felony- It is by the Court, ORDERED that the Defendant be imprisoned in the State Penitentiary of the State of South Dakota, Women's Reformatory, Pierre, South Dakota.

Verhoek, Dana L.
CRI23-387

FILED

SEP 11 2024

Appx. 2

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
[Signature]

at hard labor for the full term and period of one (1) year, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary, and in addition thereto, shall pay court costs in the amount of \$116.50; said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall abide by all the rules and regulations of the South Dakota Board of Pardon and Paroles.
2. That the Defendant remain a law-abiding citizen and commit no federal state or local crime.
3. That the Defendant shall pay the costs imposed.
4. That the costs and court appointed attorney fees heretofore Ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant shall repay Brookings County for the court-appointed attorney fees of Rick Ribstein, and Brookings County shall have a civil lien for said amount.

As to Count 2: Drug Free Zone Violation as Felony, A Class 4 Felony- It is by the Court, ORDERED that the Defendant be imprisoned in the State Penitentiary of the State of South Dakota, Women's Reformatory, Pierre, South Dakota, at hard labor for the full term and period of seven (7) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay court costs in the amount of \$116.50; provided however, the Court suspends execution of two (2) yeas of said sentence upon the following terms and conditions:

1. That the Defendant shall abide by all the rules and regulations of the South Dakota Board of Pardon and Paroles.
2. That the Defendant remain a law-abiding citizen and commit no federal state or local crime.
3. That the Defendant shall pay the costs imposed.
4. That the Defendant shall reimburse Brookings County \$200.50 for the cost of the blood test and analysis.
5. That said Defendant shall pay \$240.00 to the Brookings County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division of Criminal Investigation, E. Highway 34, Pierre, SD 57501) for the costs of the drug testing costs in this case.
6. That said Defendant make restitution in the amount of \$126.97 through the

Clerk of Court's Office to the victim of said offense: Dakota Soul Boutique.

7. That the costs, court appointed attorney fees and restitution heretofore Ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant shall repay Brookings County for the court-appointed attorney fees of Rick Ribstein, and Brookings County shall have a civil lien for said amount.

ORDERED that said Defendant receive credit of ninety (90) days for time previously served as a result of said offense.

ORDERED that Defendant shall reimburse Brookings County for the transportation costs in the amount of \$408.57.

As to Count 1: Distribution of a Schedule I or II Substance; and Count 2: Drug Free Zones Created, Violation as Felony; ORDERED that the penitentiary sentences herein imposed shall run consecutively to each other.

ORDERED that said Defendant stand committed to the Sheriff in and for Brookings County for transportation to the South Dakota Women's Reformatory, Pierre, South Dakota, to commence serving said penitentiary sentence.

Dated this 11th day of September, 2024, at Brookings, South Dakota.

BY THE COURT:

Dawn M. Elshere

Dawn Elshere
Circuit Court Judge

ATTEST:

Gr. Gries
Clerk of Courts



COUNT 2:

commit the offense set forth in Count 1 above at 600 6th Street, in the City of Brookings, Brookings County, South Dakota, said location being within 1000 feet of the Children's Museum of South Dakota, located at 521 4th Street, in the City of Brookings, Brookings County, South Dakota;

COUNT 3:

keep or maintain a place which was resorted to by persons using controlled drugs and substances, namely: 930 Southland Lane #12, located in the City of Brookings, Brookings County, South Dakota, for the purpose of using such substances, or which is used for keeping and selling of such substances;

COUNT 4:

knowingly possess a controlled drug or substance, Methamphetamine, A Schedule II Substance; such not having been obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice; and

COUNT 5:

knowingly ingest a controlled drug or substance, Methamphetamine, A Schedule II Substance; such not having been obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice; contrary to statutes in such case made and provided against the peace and dignity of the State of South Dakota.

That Complainant states that he is the States Attorney in and for Brookings County and in such capacity files this Complaint based upon an investigation into said matter by the City of Brookings Police Department, such investigation evidencing that the foregoing Complaint is true and correct to the best of your Complainant's knowledge, information and belief.


Dated this 1st day of June, 2023, at Brookings, South Dakota.


Complainant

Subscribed and sworn to before me on this 1st day of June, 2023.

My Commission Expires
April 16, 2024




Notary Public - South Dakota

STATE OF SOUTH DAKOTA)
COUNTY OF BROOKINGS) SS

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
Plaintiff,)
vs.)
DANA L. VERHOEK,)
Defendant.)

CRI23-387
INFORMATION FOR:

**COUNT 1: DISTRIBUTION OF
A SCHEDULE I OR II
CONTROLLED SUBSTANCE
A CLASS 4 FELONY
VIOLATION OF SDCL 22-42-2**

**COUNT 2: DRUG FREE ZONES
VIOLATION AS FELONY
A CLASS 4 FELONY
VIOLATION OF SDCL 22-42-19(1)**

**COUNT 3: MAINTAINING A
PLACE WHERE DRUGS
ARE SOLD OR KEPT
A CLASS 5 FELONY
VIOLATION OF SDCL 22-42-10**

**COUNT 4: UNAUTHORIZED
POSSESSION OF CONTROLLED
SUBSTANCE AS FELONY
A CLASS 5 FELONY
VIOLATION OF SDCL 22-42-5**

**COUNT 5: UNAUTHORIZED
INGESTION OF CONTROLLED
SUBSTANCE AS FELONY
A CLASS 5 FELONY
VIOLATION OF SDCL 22-42-5.1**

Dan C. Nelson, as prosecuting attorney, in the name of and by the authority of the State of South Dakota, makes and files this Information against Dana L. Verhoek, and charges as to:

That Dana L. Verhoek did commit the public offenses of Count 1: Distribution of a Schedule I or II Controlled Substance, a Class 4 Felony, as defined by SDCL 22-42-2; Count 2: Drug Free Zones – Violation as Felony, a Class 4 Felony, as defined by SDCL 22-42-19(1); Count 3: Maintaining a Place Where Drugs are Sold or Kept, a Class 5 Felony, as defined by SDCL 22-42-10; Count 4: Unauthorized Possession of Controlled Substance as Felony, a Class 5 Felony, as defined by SDCL 22-42-5; and Count 5: Unauthorized Ingestion of Controlled Substance as Felony, a Class 5 Felony, as defined by SDCL 22-42-5.1, in that on or between the 14th day of May, 2023, and the

FILED JUN 12 2023
SOUTH DAKOTA JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

31st day of May, 2023, both inclusive, in the County of Brookings, State of South Dakota, she did:

COUNT 1:

distribute a substance listed in Schedule II of SDCL Chapter 34-20B, namely: Methamphetamine;

COUNT 2:

commit the offense set forth in Count 1 above at 600 6th Street, in the City of Brookings, Brookings County, South Dakota, said location being within 1000 feet of the Children's Museum of South Dakota, located at 521 4th Street, in the City of Brookings, Brookings County, South Dakota;

COUNT 3:

keep or maintain a place which was resorted to by persons using controlled drugs and substances, namely: 930 Southland Lane #12, located in the City of Brookings, Brookings County, South Dakota, for the purpose of using such substances, or which is used for keeping and selling of such substances;

COUNT 4:

knowingly possess a controlled drug or substance, namely: Methamphetamine, A Schedule II Substance; such not having been obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of her professional practice; and

COUNT 5:

knowingly ingest a controlled drug or substance, namely: Methamphetamine, A Schedule II Substance; such not having been obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of her professional practice; contrary to statutes in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 12th day of June, 2023, at Brookings, South Dakota.


Prosecuting Attorney

1 STATE OF SOUTH DAKOTA) IN MAGISTRATE COURT
2) :SS
3 COUNTY OF BROOKINGS) THIRD JUDICIAL CIRCUIT
4 * * * * *
5 STATE OF SOUTH DAKOTA,
6 Plaintiff, 05-CRI-23-387
7 vs. ARRAIGNMENT HEARING
8 DANA L. VERHOEK,
9 Defendant.
10 * * * * *
11 BEFORE: The Honorable Abigail A. Howard
12 Magistrate Court Judge
13
14 APPEARANCES: Mr. Austin J. Oxner
15 Brookings County State's Attorneys Office
16 Brookings, South Dakota
17 Appearing on behalf of the Plaintiff
18
19 Mr. Rick Ribstein
20 Ribstein & Hogan
21 Brookings, South Dakota
22 Appearing on behalf of the Defendant
23
24 PROCEEDINGS: The above-entitled proceeding commenced at
25 1:38 p.m. on the 12th day of June, 2023,
at the Brookings County Courthouse,
Brookings, South Dakota.
TRANSCRIBED BY: Kristin A. Woodall, RPR, CRR, CRC
Official Court Reporter
314 6th Avenue
Brookings, South Dakota 57006
(605) 688-4206

P R O C E E D I N G S

1
2
3 THE COURT: All right. We will next take up the matter of
4 *State of South Dakota vs. Dana Verhoek*. This is file CRI
5 23-387. Ms. Verhoek appears personally through the ITV system
6 as she is currently in custody. Go ahead. I have this
7 scheduled either for a prelim or arraignment hearing. Go
8 ahead, Mr. Ribstein.

9 MR. RIBSTEIN: Your Honor, Rick Ribstein appearing along
10 with Dana Verhoek. Judge, pursuant to a discussion with the
11 State, she'd be waiving the preliminary hearing today and
12 entering not guilty pleas to all counts.

13 THE COURT: All right. And, Ms. Verhoek, is that correct
14 that your attorney has indicated today you are agreeable to
15 waiving your right to a preliminary hearing in this matter?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: All right. With that waiver, I'll have the
18 State file an information with the Court, provide a copy to
19 counsel.

20 Mr. Ribstein, would you acknowledge receipt, waive
21 reading?

22 MR. RIBSTEIN: Yes, Your Honor.

23 THE COURT: And I'll just ask again then. To the charges
24 contained therein, how does the defendant wish to plead at this
25 time?

1 MR. RIBSTEIN: Not guilty to all five counts.

2 THE COURT: All right. I will accept the not guilty pleas
3 on the defendant's behalf. I will set this matter for a jury
4 trial in circuit court before Judge Elshere to commence
5 September 20th at 9:00 a.m. Pretrial motions due on or before
6 5:00 p.m., August 18th. And I will enter a trial order to that
7 effect today.

8 So, Ms. Verhoek, those are -- that's the extent of the
9 hearings you'd have here in magistrate court on this file. It
10 gets moved over to circuit court now. So Mr. Ribstein will
11 likely just be in touch with you if there are any pretrial
12 hearings that need to get set up and addressed. Okay?

13 THE DEFENDANT: Okay. Thank you, Your Honor.

14 THE COURT: Do you have any questions today?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: All right. Good luck to you.

17 THE DEFENDANT: Thank you.

18 THE COURT: That's all we'll do for that matter so we can
19 hang up the ITV call.

20

21 (The proceedings were concluded at 1:40 p.m.)

22

23

24

25

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF BROOKINGS)

I, KRISTIN A. WOODALL, RPR, CRR, CRC, Official Court
Reporter for the Circuit Court, Third Judicial Circuit,
Brookings, Brookings County, South Dakota, transcribed the
proceedings of the foregoing case and that the foregoing 3
typewritten pages contain a full, true, and accurate
transcription of said recording.

Dated at Brookings, South Dakota, this 7th day of
November, 2024.

/s/Kristin A Woodall

Kristin A. Woodall, RPR, CRR, CRC

Certified Court Reporter

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2) :SS
 2 COUNTY OF BROOKINGS) THIRD JUDICIAL CIRCUIT

3 * * * * *

4 STATE OF SOUTH DAKOTA,

5 Plaintiff,

05-CRI-23-387

6 vs.

BOND HEARING

7 DANA L. VERHOEK,

8 Defendant.

9 * * * * *

10 BEFORE: The Honorable Dawn M. Elshere
 11 Circuit Court Judge

12 APPEARANCES: Mr. Dan C. Nelson
 13 Brookings County State's Attorneys Office
 14 Brookings, South Dakota
 Appearing on behalf of the Plaintiff

15 Mr. Brian Zielinski
 16 Ribstein & Hogan
 Brookings, South Dakota
 Appearing on behalf of the Defendant

17
 18
 19 PROCEEDINGS: The above-entitled proceeding commenced at
 20 10:29 a.m. on the 24th day of April, 2024,
 21 at the Brookings County Courthouse,
 Brookings, South Dakota.

22
 23 REPORTED BY: Kristin A. Woodall, RPR, CRR, CRC
 24 Official Court Reporter
 25 314 6th Avenue
 Brookings, South Dakota 57006
 (605) 688-4206

P R O C E E D I N G S

THE COURT: Good morning. Can you hear us okay, ma'am?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. This is criminal file 23-387 regarding Dana Verhoek who is appearing via the ITV system from Codington County. And I'll have counsel make their appearances.

MR. NELSON: Dan Nelson representing the State.

MR. ZIELINSKI: Brian Zielinski appearing on behalf of Dana Verhoek.

THE COURT: And how are we proceeding today, Mr. Zielinski?

MR. ZIELINSKI: There are two petitions for revoking bond that have been filed by the State; one dated April 23rd, the other dated April 9th. It's my understanding that the defendant will be admitting those petitions and requesting a new bond from the Court.

THE COURT: So the most recent petition looks like it's alleging that she violated conditions of bond by being arrested in Codington County. Is that correct, Mr. Nelson?

MR. NELSON: Yes.

THE COURT: And then the first petition she's not addressed yet either?

MR. NELSON: No.

THE COURT: And that one is from April 9th and the

1 allegation of that one is that ...

2 MR. NELSON: 24/7 violation.

3 THE COURT: 24/7 violations. Is that your understanding,
4 Mr. Zielinski?

5 MR. ZIELINSKI: It is, yes.

6 THE COURT: So, ma'am, do you understand what the
7 allegations are in those petitions to revoke bond?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: So I'll address that first petition alleging
10 that you were on the 24/7 program and that you failed to turn
11 yourself in for a 48-hour hold. Do you admit that allegation?

12 THE DEFENDANT: I admit, yes.

13 THE COURT: And then the second petition alleges that you
14 were out on bond and were to remain law-abiding and the
15 allegation is that you have been arrested for an offense in
16 Codington County. Do you admit that violation?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: The Court will take judicial notice of the
19 attachments to those petitions and find a factual basis for
20 both of the admissions. And I'll hear from counsel regarding a
21 request for a new bond. Mr. Nelson.

22 MR. NELSON: Judge, we're requesting a 10,000 cash only
23 bond. The defendant is currently on parole. There is a parole
24 hold that has been placed on her, but given the defendant's
25 criminal history and also the charges that are pending here in

1 Brookings, we have distribution of a controlled substance as
2 well as doing so within a drug-free zone, maintaining a place
3 where drugs are sold or kept, and then additional Class 5
4 felonies.

5 Based on that, Judge, I think she is a danger to the
6 community. She's not just a drug user, but it's alleged that
7 she's a drug distributor as well. And given the fact that
8 she's been failing to abide by the terms of supervision for
9 parole, but also this Court's order, I think there needs to be
10 a consequence for that. All of these allegations are pretty
11 recent and so I think a 10,000 cash only bond would be
12 appropriate. Thank you.

13 THE COURT: Mr. Zielinski.

14 MR. ZIELINSKI: Thank you, Judge. Just briefly, I believe
15 Mr. Nelson is correct that there is a parole hold. I also
16 believe there may be a cash bond in relation to the Codington
17 County charge that has been admitted to today.

18 I would just note for the Court that this defendant is
19 under the supervision of a parole officer. She's been working
20 with that parole officer and, if able to make bond in this case
21 and her other case, is looking forward to continuing employment
22 at both Perkins and Super 8 in Watertown I believe. She was
23 intending to start the Perkins job which is full time I believe
24 that has already started, was doing training for a number of
25 weeks at the Super 8 hotel for a front desk position.

1 Through her parole officer, she's also involved in Moving
2 On classes two times a week. It's unclear to me whether she's
3 still involved in that while incarcerated, but she had
4 participated in those for about a month. Her parole officer
5 would also like to see her in a sober living home. I believe
6 it's Brothers and Sisters up in Codrington County. So she's
7 under supervision already. There are a lot of -- there's a lot
8 of good that can be done by her ability to be out on bond.

9 Furthermore, we're here on what appears to be a first
10 violation for one missed appointment. So I think my assumption
11 is that there was a period of compliance with the 24/7 testing
12 itself.

13 As for this other case in Watertown, in Codrington County,
14 that will have to be sorted out, but it is just an allegation.
15 In speaking with Ms. Verhoek, she has some serious concerns
16 about those charges as they relate to her.

17 So we're asking that the Court not issue a \$10,000 cash
18 bond. We're asking the Court to issue whatever bond it finds
19 appropriate keeping in mind that this defendant does not have
20 much in the way of financial means and it took her a bit to
21 scrape together the previous bond that was ordered.

22 THE COURT: This case has been pending for sometime,
23 correct, Mr. Nelson?

24 MR. NELSON: Yeah, Judge. Been trying to resolve it, but
25 have been unsuccessful up until now, just the back and forth

1 with defense counsel on this.

2 THE COURT: There were two separate bonds posted in this
3 matter. Am I correct in looking at that? So two different
4 bonds set at two different times, correct? And why were there
5 two different bonds previously? I'm just trying to figure that
6 out. One was \$5,000 cash and then the other one was a \$1500
7 surety.

8 MR. NELSON: So the 5,000 was the initial and then the
9 second one she had posted on the first petition to revoke bond.

10 THE COURT: For this most -- the one on April 9th?

11 MR. NELSON: Yes.

12 THE COURT: Okay. I'm going to go ahead and set a bond in
13 the amount of \$10,000 cash only. The concern the Court has is
14 that she's a flight risk and that she's got a lot of things
15 pending. So I'm not going to forfeit those previous bonds
16 which Ms. Verhoek should consider herself lucky because that's
17 a lot of cash to forfeit, but I'm going to set bond in the
18 amount of \$10,000 cash only.

19 And this is on our stack date so do we need to schedule
20 hearings on the motions, Mr. Zielinski?

21 MR. ZIELINSKI: I'm not familiar with the file in order to
22 say whether that's doable or not.

23 THE COURT: Then you'll need to be in contact with the
24 State about getting motion hearing dates set if they are needed
25 to be resolved.

1 Is there anything further then on this file, Mr. Nelson?

2 MR. NELSON: No, Judge, thank you.

3 THE COURT: Mr. Zielinski?

4 MR. ZIELINSKI: No, Judge.

5 THE COURT: Thank you. We're going to go ahead and
6 terminate the ITV hearing.

7

8 (The proceedings were concluded at 10:37 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF BROOKINGS)

I, KRISTIN A. WOODALL, RPR, CRR, CRC, Official Court
Reporter for the Circuit Court, Third Judicial Circuit,
Brookings, Brookings County, South Dakota, reported the
proceedings of the foregoing case and that the foregoing
typewritten pages contain a full, true, and accurate transcript
of said record.

Dated at Brookings, South Dakota, this 7th day of
November, 2024.

/s/Kristin A Woodall

Kristin A. Woodall, RPR, CRR, CRC
Certified Court Reporter

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
 COUNTY OF BROOKINGS) THIRD JUDICIAL CIRCUIT

* * * * *

STATE OF SOUTH DAKOTA,

Plaintiff,

05-CRI-23-387

vs.

SENTENCING HEARING

DANA L. VERHOEK,

Defendant.

* * * * *

BEFORE: The Honorable Dawn M. Elshere
 Circuit Court Judge

APPEARANCES: Mr. Dan C. Nelson
 Brookings County State's Attorneys Office
 Brookings, South Dakota
 Appearing on behalf of the Plaintiff

Mr. Rick Ribstein
 Ribstein & Hogan
 Brookings, South Dakota
 Appearing on behalf of the Defendant

PROCEEDINGS: The above-entitled proceeding commenced at
 9:40 a.m. on the 11th day of September, 2024,
 at the Brookings County Courthouse,
 Brookings, South Dakota.

REPORTED BY: Kristin A. Woodall, RPR, CRR, CRC
 Official Court Reporter
 314 6th Avenue
 Brookings, South Dakota 57006
 (605) 688-4206

P R O C E E D I N G S

MR. NELSON: Next matter, *State of South Dakota vs. Dana Verhoek*. This is criminal file 23-387. This is the time and place set for sentencing.

THE COURT: Mr. Ribstein, you can make your appearance.

MR. RIBSTEIN: Your Honor, Rick Ribstein appears along with Dana Verhoek.

THE COURT: And this is the time and place set for sentencing. A presentence investigation has been prepared. And, Mr. Ribstein, have you had a chance to review that with your client?

MR. RIBSTEIN: I have, Your Honor. We do not have any changes or corrections.

THE COURT: And, Mr. Nelson, have you had that chance as well?

MR. NELSON: Yes. No additions or corrections.

THE COURT: So this would be the time and place set for an argument regarding the sentence in this matter and I'll hear from the State first.

MR. NELSON: Judge, pursuant to that plea agreement, the State is recommending a suspended execution. It is recommending that the six years of penitentiary time be imposed, but suspended upon terms and conditions of probation. And the State is requesting restitution in the amount of

1 \$126.97. And I have no further comments.

2 THE COURT: Mr. Ribstein.

3 MR. RIBSTEIN: Thank you, Your Honor. Just as a
4 follow-up, Judge, we would ask that you go along with the plea
5 agreement and recommendation as set forth in the PSI. I know
6 the Court will have concerns. It is a concern to read through
7 the PSI based upon some of the concerns with her history, her
8 time line, the three times she's been to treatment. And I'm
9 sure there are individuals that might take a look at this and
10 have some concern and may be pessimistic about her future and
11 there are others that she's been working with in the last four
12 to six months who are more optimistic about her future.

13 She has recently gone through Human Service Center again
14 with their program. She's been given the opportunity to go to
15 Glory House where she's currently been residing, working a
16 couple of jobs. That's going well. She's been monitored daily
17 on 24/7 and all the conditions through their program.

18 So her future looks good. She absolutely understands what
19 she has hanging over her head and what an opportunity she would
20 have if the Court is to go along with this proposal and allow
21 her to prove to the State, the Court, and everyone else that
22 she can remain law-abiding and move forward and stay clean.
23 Hopefully, the Court will give her that opportunity, but I
24 guess we'll see. It's up to her, Judge, and she knows that,
25 so ...

1 THE COURT: Mr. Nelson, is there any legal reason why a
2 sentence should not now be imposed?

3 MR. NELSON: No.

4 THE COURT: Mr. Ribstein?

5 MR. RIBSTEIN: No, Your Honor.

6 THE COURT: Ms. Verhoek, what I hear from the attorneys
7 here today is everybody working hard to try to give you another
8 opportunity to get your life turned around, but what I don't
9 hear from really anybody is how that's mitigating, what's
10 mitigating here because these are mandatory offenses that the
11 Court is statutorily required to give certain sentences absent
12 mitigating circumstances. And the fact that you are doing well
13 and in a program now I don't think amounts to mitigation in
14 this situation.

15 You've had several opportunities. You've been through
16 drug court or that was terminated. You've been through three
17 in-patients. You were out on bond and obtained new charges in
18 another county. I think those are still pending. And then you
19 get another bond violation and now you've gone through another
20 in-patient and things seem to be going well, but I think you're
21 good at talking the talk but not walking the walk because
22 you've not made any real attempts to change your life and have
23 been given several opportunities to do so. So I can't find any
24 mitigation in this matter to deviate from those mandatory
25 sentences that are required.

1 So on the charge of manufacturing or possession with the
2 intent to distribute charge, it's going to be the judgment of
3 the Court that you be imprisoned in the State penitentiary for
4 the term of one year. I'm going to order that you pay court
5 costs on that file.

6 On the other charge of distribution in a drug-free zone,
7 it will be the judgment of the Court that you be imprisoned in
8 the State Penitentiary for a term of seven years. I'm going to
9 order that you pay court costs. I'm going to suspend two of
10 those years on that sentence upon the following terms: That
11 you abide by the rules and regulations of the Board of Pardons
12 and Parole, that you pay your costs, that you be law-abiding,
13 that you reimburse for the cost of your court-appointed
14 attorneys fees. I have \$240 in drug testing costs, \$200.50 in
15 blood testing, \$408.57 in transportation, and \$126.97 in
16 restitution for a magistrate file, 22-201. Those fines and
17 costs and restitution and attorneys fees can be on a payment
18 plan established by the Board of Pardons and Parole. You will
19 be eligible for parole pursuant to an initial parole date
20 established in accordance with the statutory guidelines. Those
21 sentences will run consecutively in this matter. I believe
22 there is credit for pretrial detention in the amount of 90
23 days. Is that a correct number?

24 THE DEPUTY: Yes.

25 THE COURT: And you'd be remanded to the custody of the

1 sheriff to serve your sentences to the State penitentiary. Is
2 there anything further from the State?

3 MR. NELSON: No.

4 THE COURT: Mr. Ribstein?

5 MR. RIBSTEIN: No, Your Honor.

6

7 (The proceedings were concluded at 9:47 a.m.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

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

I, KRISTIN A. WOODALL, RPR, CRR, CRC, Official Court Reporter for the Circuit Court, Third Judicial Circuit, Brookings, Brookings County, South Dakota, reported the proceedings of the foregoing case and that the foregoing 6 typewritten pages contain a full, true, and accurate transcript of said record.

Dated at Brookings, South Dakota, this 7th day of
November, 2024.

/s/ Kristin A Woodall

Kristin A. Woodall, RPR, CRR, CRC
Certified Court Reporter

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 :SS
 2 COUNTY OF BROOKINGS) THIRD JUDICIAL CIRCUIT

3 * * * * *

4 STATE OF SOUTH DAKOTA,

5 Plaintiff, 05-CRI-23-387

6 vs. CHANGE OF PLEA HEARING

7 DANA L. VERHOEK,

8 Defendant.

9 * * * * *

10 BEFORE: The Honorable Dawn M. Elshere
 Circuit Court Judge

12 APPEARANCES: Mr. Austin J. Oxner
 Brookings County State's Attorneys Office
 Brookings, South Dakota
 Appearing on behalf of the Plaintiff

14 Mr. Rick Ribstein
 Ribstein & Hogan
 Brookings, South Dakota
 Appearing on behalf of the Defendant

19 PROCEEDINGS: The above-entitled proceeding commenced at
 9:51 a.m. on the 14th day of August, 2024,
 at the Brookings County Courthouse,
 Brookings, South Dakota.

23 REPORTED BY: Kristin A. Woodall, RPR, CRR, CRC
 Official Court Reporter
 314 6th Avenue
 Brookings, South Dakota 57006
 (605) 688-4206

P R O C E E D I N G S

MR. OXNER: The State would next call *State vs. Dana Verhoek*. Your Honor, it's the State's understanding an agreement has been reached. This matter is set for a change of plea.

THE COURT: Mr. Ribstein, you can make your appearance.

MR. RIBSTEIN: Your Honor, Rick Ribstein appears along with Dana Verhoek. That is correct. Pursuant to an agreement with the State, she will be entering a plea to Count 1 and Count 2, and I can go through the remainder of the agreement at the appropriate time.

THE COURT: Go ahead.

MR. RIBSTEIN: Judge, in addition to pleading to Count 1 and Count 2, the State would agree to recommend a suspended execution of sentence and recommend that there are mitigating circumstances to deviate from the mandatory minimums. State would agree to recommend six years suspended, recommend time served and probation. There would be restitution involved. Remaining charges would be dismissed and no additional charges would be brought. And she currently just finished treatment at Human Service Center and through that process they have reached out and secured a recommendation to Glory House. She has a bed date of Monday, the 19th. And if that would work, we'd ask that that be made part of the process moving forward until

1 sentencing could take place.

2 THE COURT: Is that the State's understanding of the plea
3 agreement?

4 MR. OXNER: Your Honor, that is the State's understanding.
5 Additionally, there is an older file being disposed of as well.
6 That's MAG 22-201. Restitution from that will be requested in
7 this file, but that is otherwise the State's understanding of
8 the agreement.

9 THE COURT: In the file, there is an acknowledgment and
10 waiver of rights and an authorization to plead guilty.

11 Ms. Verhoek, did you go over that document with your attorney?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Do you have any questions about your rights?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: And you are represented by Mr. Ribstein. Are
16 you satisfied with his representation to this point?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Then at this time the State's going to read
19 Counts 1 and 2 out loud to you and I'll ask you some questions
20 about that.

21 (Information read.)

22 THE COURT: Ms. Verhoek, in Count 1, the State's charged
23 you with distribution of a controlled substance. The elements
24 the State would need to prove are that on or about that 14th
25 day of May 2023 and the 31st day of May 2023, inclusive, here

1 in Brookings County, in Count 1, that you did distribute a
2 substance listed in Schedule II, namely methamphetamine. Do
3 you understand what the State would need to prove in that
4 count?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And then in Count 2, the State's alleged that
7 you committed that offense in Count 1. The elements they would
8 need to prove there is that on or about those same dates, you
9 did commit the offense of Count 1 within -- at 600 6th Street
10 here in Brookings County within 1,000 feet of the Children's
11 Museum. Do you understand what the State would need to prove
12 in that count?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Count 1 is a Class 4 felony. It has a maximum
15 penalty of 10 years in the State penitentiary or a \$20,000 fine
16 or both. There is a mandatory minimum sentence of one year in
17 the State penitentiary on that count. Do you understand that
18 maximum penalty?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Count 2 is also a Class 4 felony and it has a
21 mandatory minimum of five years in the State penitentiary. Do
22 you understand that mandatory minimum?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Mr. Ribstein, you have explained rights,
25 penalties, and an effect of a waiver of those rights?

1 MR. RIBSTEIN: I have, Your Honor, and I believe she
2 understands her rights.

3 THE COURT: And, Ms. Verhoek, are you here today to enter
4 a plea of your own free will?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Other than the plea agreement, have any
7 threats or promises been made to get you to enter this plea?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Do you understand that the plea agreement is
10 not binding on the Court and the Court could impose whatever
11 sentence I deem appropriate up to the maximum permitted by law?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you also understand that the Court is not
14 required to find mitigating circumstances to deviate from the
15 mandatory minimums?

16 THE DEFENDANT: Yes.

17 THE COURT: Are you under the influence of drugs or
18 alcohol today?

19 THE DEFENDANT: No, Your Honor.

20 THE COURT: Are you taking a prescription medication which
21 may interfere with your ability to understand the proceedings?

22 THE DEFENDANT: No.

23 THE COURT: I will find that the defendant's been
24 regularly held to answer and is represented by competent
25 counsel, that she's been informed of and I believe understands

1 the nature of the charges, the constitutional and statutory
2 rights, the maximum possible punishment, and that she's
3 competent to enter a plea.

4 So, Ms. Verhoek, to that charge in Count 1 of distribution
5 of a controlled substance, how do you plead?

6 THE DEFENDANT: Guilty.

7 THE COURT: And to Count 2 that that distribution took
8 place in a drug-free zone, how do you plead?

9 THE DEFENDANT: Guilty, Your Honor.

10 THE COURT: Would the State provide a factual basis.

11 MR. OXNER: On May 14th of 2023, in Brookings County, this
12 defendant did sell methamphetamine to a confidential informant
13 at the Route 66 gas station casino in the City of Brookings
14 which is within 1,000 feet of a Head Start program and the
15 South Dakota Children's Museum.

16 THE COURT: Ms. Verhoek, is what the State just told me
17 true?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Then I will find a factual basis for your plea
20 and find you to be guilty of the charges.

21 Mr. Ribstein, you're asking for a presentence
22 investigation?

23 MR. RIBSTEIN: Yes, Your Honor.

24 THE COURT: I will authorize that presentence
25 investigation. Our next court date for sentencing then would

1 be September 11th. So she'll need to cooperate with that and
2 then be back on that date for sentencing.

3 And I'll have counsel make the request again for the Glory
4 House so that you can tell me again what's going on,
5 Mr. Ribstein.

6 MR. RIBSTEIN: Thank you, Judge. Judge, she's just
7 completed as of yesterday the program at Human Service Center.
8 I've been working with the social worker there, Erin Brown, and
9 Ms. Brown has communicated that they have reached out to try to
10 secure a bed date for Ms. Verhoek. That would be at the Glory
11 House and the bed date would be available this coming Monday.
12 I've discussed that with Ms. Verhoek. She understands she's in
13 custody and even if the Court grants that request she would be
14 in custody, still would have to comply with all conditions,
15 remain law-abiding, but that's part of the aftercare that we
16 would like the Court to consider, allow her to continue in that
17 process and then of course return for sentencing.

18 THE COURT: What is the State's position, Mr. Oxner?

19 MR. OXNER: Your Honor, the State has no objection to a
20 furlough for purposes of treatment at the Glory House.

21 THE COURT: I will authorize her to go to the Glory House
22 as part of a furlough. She will need to make sure that she
23 gets that PSI completed before she leaves so that we don't have
24 any delays and you need to be back on that September 11th date
25 for sentencing. And you are still in custody. You're just

1 granted a furlough. Do you understand that?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Is there anything further then from the State?

4 MR. OXNER: Nothing further at this time.

5 THE COURT: Mr. Ribstein?

6 MR. RIBSTEIN: No, Your Honor, thank you.

7

8 (The proceedings were concluded at 10:01 a.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF BROOKINGS)

I, KRISTIN A. WOODALL, RPR, CRR, CRC, Official Court
Reporter for the Circuit Court, Third Judicial Circuit,
Brookings, Brookings County, South Dakota, reported the
proceedings of the foregoing case and that the foregoing
typewritten pages contain a full, true, and accurate transcript
of said record.

Dated at Brookings, South Dakota, this 7th day of
November, 2024.

/s/Kristin A Woodall

Kristin A. Woodall, RPR, CRR, CRC
Certified Court Reporter

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30858

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANA VERHOEK,

Defendant and Appellant.

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

THE HONORABLE DAWN ELSHERE
Circuit Court Judge

APPELLEE'S BRIEF

Amanda M. Thole
25 First Avenue South West
Watertown, SD 57201
Email: amanda@austinlawsd.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

MARTY J. JACKLEY
ATTORNEY GENERAL

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed October 3, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF LEGAL ISSUES AND AUTHORITIES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	5
ARGUMENTS	
I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN SENTENCING VERHOEK.....	7
II. VERHOEK’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPROPRIATE ON DIRECT APPEAL.....	11
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES CITED:

<i>Argus Leader v. Hagan</i> , 2007 S.D. 96, 739 N.W.2d 475.....	7
<i>McBride v. Weber</i> , 2009 S.D. 14, 763 N.W.2d 527	12
<i>State v. Alvarez</i> , 2022 S.D. 66, 982 N.W.2d 12	11, 13
<i>State v. Arabie</i> , 2003 S.D. 57, 663 N.W.2d 250	11
<i>State v. Blair</i> , 2006 S.D. 75, 721 N.W.2d 55.....	7
<i>State v. Caffee</i> , 2023 S.D. 51, 996 N.W.2d 351	8
<i>State v. Holler</i> , 2020 S.D. 28, 944 N.W.2d 339	8
<i>State v. Klinetobe</i> , 2021 S.D. 24, 958 N.W.2d 734	8, 10
<i>State v. Malcolm</i> , 2023 S.D. 6, 985 N.W.2d 732.....	11, 14
<i>State v. Rice</i> , 2016 S.D. 18, 877 N.W.2d 75.....	7, 10
<i>State v. Thomas</i> , 2011 S.D. 15, 796 N.W.2d 706	11, 12, 14
<i>State v. Toavs</i> , 2017 S.D. 93, 906 N.W.2d 354	7
<i>State v. Vortherms</i> , 2020 S.D. 67, 952 N.W.2d 113.....	11
<i>State v. Washington</i> , 2024 S.D. 64, 13 N.W.3d 492	11
<i>Steichen v. Weber</i> , 2009 S.D. 4 760 N.W.2d 381.....	12
<i>U.S. v. Cronic</i> , 466 U.S. 648 (1984).....	12

STATUTES CITED:

SDCL 22-42-2	10
SDCL 22-42-2.3.....	10

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30858

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DANA VERHOEK,

Defendant and Appellant.

PRELIMINARY STATEMENT

Dana Verhoek pled guilty to distribution of methamphetamine (“meth”), a schedule II-controlled substance, and distribution of meth in a drug free zone. The circuit court sentenced her to eight years imprisonment with two suspended. Verhoek appeals her sentence arguing the circuit court abused its discretion by not considering any mitigating circumstances. However, the record shows the circuit court considered the fullest information possible, including mitigating circumstances, when sentencing Verhoek.

Verhoek also argues her counsel was ineffective. Conversely, because Verhoek fails to show exceptional circumstance or a manifest usurpation of her rights, her argument should not be heard on direct appeal.

References to documents are designated as follows:

Settled Record..... SR

Appellant's Brief..... AB

Corresponding page numbers follow all document designations.

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence entered by the Honorable Dawn Elshere, Circuit Court Judge, Third Judicial Circuit, Brookings County, South Dakota. SR:96-98. The circuit court entered the Judgment on September 11, 2024, and Verhoek timely filed a Notice of Appeal on October 3, 2024. SR:115, 96-98; SDCL 23A-32-15. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION
WHEN SENTENCING VERHOEK?

The circuit court did not rule on this issue.

- *State v. Caffee*, 2023 S.D. 51, 996 N.W.2d 351
- *State v. Klinetobe*, 2021 S.D. 24, 958 N.W.2d 734
- *State v. Rice*, 2016 S.D. 18, 877 N.W.2d 75

II.

WHETHER VERHOEK'S CLAIM OF INEFFECTIVE
ASSISTANCE OF COUNSEL IS APPROPRIATE ON DIRECT
APPEAL?

The circuit court did not rule on this issue.

- *State v. Alvarez*, 2022 S.D. 66, 982 N.W.2d 12
- *State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d 732

STATEMENT OF THE CASE

Verhoek was charged with five felonies: distribution of meth; distribution of meth in a drug free zone; maintaining a place where drugs are sold or kept; possession of meth; and ingestion of meth. SR:9-10. On June 12, 2023, Verhoek appeared with her counsel for her arraignment and was fully advised of her rights. SR:125-26. Verhoek waived her right to a preliminary hearing and entered not guilty pleas. SR:125. On January 26, 2024, a third party paid \$5,000 in cash, and Verhoek was granted pretrial release. SR:28-29.

On April 24, 2024, the court held a bond hearing where Verhoek admitted to violating two bond petitions and requested a new bond. SR:129-34. Verhoek admitted she violated her bond by failing to turn herself in for a 48-hour hold, as dictated by her 24/7 program, and failing to remain law-abiding, as she was arrested for possession of a controlled substance. SR:130. Verhoek's counsel requested a new bond. SR:130-31. Verhoek's counsel argued Verhoek had many positive characteristics that support her being granted pretrial release, including her employment, involvement in Moving On classes, and the opportunity to go to a sober living home. SR:131-32. The circuit court determined Verhoek was a flight risk and set a cash bond in the amount of \$10,000. SR:133.

On August 14, 2024, Verhoek entered into a written plea agreement with the State where she agreed to pled guilty to distribution

of meth and distribution of meth in a drug free zone. SR:61-63. The plea agreement included the maximum possible penalties, an advisement of rights, and waiver by plea of guilty. *Id.* In exchange for Verhoek's plea, the State agreed to dismiss the remaining counts, "agree[d] to [] recommend a suspended execution of sentence[,] and "recommend mitigating circumstances existed to deviate from the mandatory minimums." SR:62-63. On the same date, a change of plea hearing was held, and Verhoek was again advised of her rights. SR:138. She confirmed she understood "the Court [was] not required to find mitigating circumstances to deviate from the mandatory minimums." SR:140. At the conclusion of the hearing, Verhoek's request for a furlough to the Glory House was granted. SR:142-43.

Verhoek's sentencing occurred on September 11, 2024. SR:146-50. Pursuant to a plea agreement, the State recommended six years of penitentiary time be imposed but fully suspended upon the terms and conditions of probation. SR:146. Defense counsel argued for a deviation from the mandatory minimum sentence based on the presence of mitigating circumstances. SR:147. Defense counsel informed the court that Verhoek was being monitored under the 24/7 program, recently went through Human Service Center's program, and was "given the opportunity to go to Glory House" where she was previously residing while being employed. *Id.* The circuit court listened to the arguments and determined Verhoek was "good at talking the talk but not walking

the walk because [she had] not made any real attempts to change [her life] and ha[d] been given several opportunities to do so[.]” SR:148. The circuit court sentenced Verhoek to one year imprisonment for committing the offense of distribution of meth and seven years with two years suspended for distribution of meth in a drug free zone; the sentences were to run consecutively. SR:96-97, 149.

STATEMENT OF THE FACTS

On May 15, 2023, the Brookings Police Department began investigating Verhoek for selling meth. SR:2, 76-79. On that date, Officer Rogers interviewed a male subject who admitted to buying \$15 worth of meth from Verhoek the previous evening at the Phillips 66 gas station. SR:76.¹ The man confessed he ingested the meth before he turned himself in for a parole violation. SR:77. After he turned himself into jail, it was determined that he was under the influence of meth and was having health complications due to ingesting meth. *Id.* Because of his condition, he was transported to the Brookings Emergency Room. *Id.*

A few months prior to May 2023, Officer Rogers received a call from the Flandreau Sioux Tribe who asked him to identify a female who dropped a baggie of meth on the casino floor. *Id.* After receiving images from the casino’s security cameras, Officer Rogers identified the female as Verhoek. *Id.*

¹ Phillips 66’s video surveillance shows Verhoek hand the male subject something in a manner that appears as though they wanted it hidden from others. SR:77. Then, the male quickly left the casino. *Id.*

On May 22, 2023, Brookings Crimestoppers received a tip that Verhoek was involved in the distribution of marijuana mixed with fentanyl. *Id.* The tipster claimed to be a victim of buying the laced marijuana and worried the substance may kill someone. *Id.*

On May 31, 2023, Officer Rogers went to Verhoek's residence to contact her about her outstanding warrant and his investigation into her meth distribution. SR:77-78. Verhoek refused to open the door but spoke to Officer Rogers through the closed door. SR:78. Officer Rogers sought and obtained a search warrant for her residence. *Id.* During the execution of the warrant, Verhoek was arrested, and police located meth residue, a meth pipe, a pill bottle with residue, and a baggie containing an unknown substance. *Id.*

After the execution of the search warrant, Officer Rogers went to the jail and spoke with Verhoek. *Id.* Verhoek indicated she wished to waive her rights and speak to Officer Rogers. *Id.* During their first conversation, Verhoek denied selling meth and claimed to just be a user. *Id.* During their second conversation, Verhoek stated she was having money problems, so she agreed to sell the male subject, whom Officer Rogers previously interviewed, meth but instead sold him crushed up caffeine pills. *Id.* Verhoek admitted to selling him meth on more than five occasions. *Id.* Verhoek also stated she sold meth to other people, not to gain a profit, but to have drugs to consume. *Id.* At the completion of the interview, Verhoek was booked into the jail. *Id.*

ARGUMENTS

I.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN SENTENCING VERHOEK.

Verhoek challenges her sentence as an abuse of discretion. “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. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (internal citation omitted); *Argus Leader v. Hagan*, 2007 S.D. 96, ¶ 7, 739 N.W.2d 475, 478 (“abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence”). Additionally, this Court has stated, “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.” *State v. Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d 354, 358 (quoting *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61). It comes as a consequence of these circumstances that 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 (internal citation omitted).

A circuit court possesses “broad discretion when deciding the extent and kind of punishment to be imposed.” *Id.* In determining an appropriate sentence, “[c]ourts should consider the traditional sentencing factors of retribution, deterrence—both individual and

general—rehabilitation, and incapacitation.” *State v. Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d 351, 360 (quoting *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741). Courts should weigh these factors “on a case-by-case basis” and may determine “which theory is accorded priority” in a particular case. *Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d at 360 (internal citation omitted). As part of its consideration, “[t]he sentencing court should have access to ‘the fullest information possible concerning the defendant’s life and characteristics. Information which should be available to the court includes general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record.’ ” *Id.* (quoting *State v. Holler*, 2020 S.D. 28, ¶ 18, 944 N.W.2d 339, 344).

Here, the circuit court did not abuse its discretion in sentencing Verhoek. To assist in fashioning an appropriate sentence, the circuit court ordered court services to conduct a Presentence Investigation (PSI). SR:141. The PSI contained, among other things, information regarding Verhoek’s extensive criminal history, family history, education, employment history, and social circumstances. SR:66-73. The PSI stated while Verhoek was on bond for this offense, she failed to turn herself in for violating 24/7 and was arrested for possession of a controlled substance. SR:73. Verhoek admitted to the violations and a \$10,000 cash bond was set. SR:129, 133.

In considering Verhoek's circumstances, the circuit court stated:

[W]hat I hear from the attorneys here today is everybody working hard to try to give you another opportunity to get your life turned around, but what I don't hear from really anybody is how that's mitigating, what's mitigating here because these are mandatory offenses that the court is statutorily required to give certain sentences absent mitigating circumstances. And the fact that you are doing well and in a program now I don't think amounts to mitigation in this situation.

You've had several opportunities. You've been through drug court or that was terminated. You've been through three in-patients. You were out on bond and obtained new charges in another county. I think those are still pending. And then you get another bond violation and now you've gone through another in-patient and things seem to be going well, but I think you're good at talking the talk but not walking the walk because you've not made any real attempts to change your life and have been given several opportunities to do so. So I can't find any mitigation in this matter to deviate from those mandatory sentences that are required.

SR:148. Such commentary illustrates that the circuit court considered the traditional sentencing factors of retribution, deterrence, incapacitation, and rehabilitation in making its decision.

Verhoek pled guilty to two Class 4 felonies. SR:61. For the offense of distribution of meth, the maximum penalty was ten years imprisonment, and the mandatory minimum sentence was one year imprisonment. For the offense of distribution of meth in a drug free zone the maximum penalty was ten years imprisonment, and the mandatory minimum sentence was five years imprisonment. The circuit court sentenced Verhoek to one year imprisonment for committing the offense of distribution of meth and seven years with two suspended for

committing the offense of a distribution of meth in a drug free zone. SR:96-97, 149. Verhoek’s sentence was within the statutory maximum; therefore, her sentence should not be disturbed on appeal. *See Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83.

In her brief, Verhoek contends the circuit court refused to consider mitigating evidence, specifically information related to Verhoek’s “concurrent and ongoing treatment for chemical dependency, accountability for wrongdoing, [and] remorse for actions[.]” AB:11. However, “the mere presence of mitigating evidence does not entitle a defendant to a diminished sentence, but rather forms a part of the larger sentencing record, all of which the sentencing court must consider.” *Klinetobe*, 2021 S.D. 24, ¶ 41, 958 N.W.2d at 744. Contrary to Verhoek’s statement, the circuit court did fully consider whether any mitigating circumstances existed. It is clear from the record that the circuit court listened to counsels’ arguments and determined no mitigating circumstance existed. SR:218. Further, even if mitigating circumstances were found, the circuit court retains discretion on whether to deviate from the mandatory minimum. *See* SDCL 22-42-2.3.² Therefore, the circuit court did not abuse its discretion in sentencing Verhoek.

² SDCL 22-42-2.3 states: “The sentencing court *may* impose a sentence other than that which is required by § 22-42-2 *if* the court finds that mitigating circumstances exist which require a departure from the mandatory sentence imposed by § 22-42-2.” (emphasis added)

II.

VERHOEK'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPROPRIATE ON DIRECT APPEAL.

This Court will not address ineffective assistance of counsel claims on direct appeal without exceptional circumstances. *State v. Malcolm*, 2023 S.D. 6, ¶ 41, 985 N.W.2d 732, 742 (citing *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 120-21). “The rule is a practical one, necessitated by the fact that the record on direct appeal typically does not afford a basis to review the performance of trial counsel.” *State v. Washington*, 2024 S.D. 64, ¶ 39, 13 N.W.3d 492, 503 (quoting *State v. Alvarez*, 2022 S.D. 66, ¶ 34, 982 N.W.2d 12, 20). “The reason is to allow ‘attorneys charged with ineffectiveness [to] explain or defend their actions and strategies, and thus a more complete picture of what occurred is available for review.’ ” *State v. Thomas*, 2011 S.D. 15, ¶ 23, 796 N.W.2d 706, 714 (quoting *State v. Arabie*, 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 256).

Ineffective assistance claims are heard on direct appeal only when trial counsel was so ineffective and counsel’s representation so casual as to represent a manifest usurpation of the defendant’s constitutional rights. *Washington*, 2024 S.D. 64, ¶ 39, 13 N.W.3d at 503 (citing *Arabie*, 2003 S.D. 57, ¶ 20, 663 N.W.2d at 256). “There is a strong presumption that counsel’s performance falls within the wide range of professional assistance and the reasonableness of counsel’s performance is to be

evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances." *Thomas*, 2011 S.D. 15, ¶ 21, 796 N.W.2d at 713 (quoting *Steichen v. Weber*, 2009 S.D. 4, ¶ 25, 760 N.W.2d 381, 392-93).

Verhoek urges this Court to review defense counsel's performance in accordance with *Cronic*. AB:13. *Cronic* and its progeny are only applicable in cases where the defendant is denied the right to counsel completely or where counsel is prevented from assisting during a critical stage. *U.S. v. Cronic*, 466 U.S. 648, 649, fn.25 (1984); see *McBride v. Weber*, 2009 S.D. 14, ¶ 7, 763 N.W.2d 527, 531. In this case, there is no evidence that Verhoek's counsel was prevented from assisting during any critical stage of the proceeding. See SR. Moreover, because Verhoek failed to establish that exceptional circumstances exist, the argument of what standard applies when reviewing Verhoek's ineffective assistance of counsel claim is irrelevant.

Verhoek argues her defense counsel breached his duty and provided ineffective assistance of counsel for three reasons. AB:13-15.³

First, Verhoek complains her counsel breached his duty of diligence by failing to fully explain the legal effect of the plea agreement. AB:14. Contrary to her assertion, before entering her plea of guilt, Verhoek confirmed she fully understood the plea agreement in her written plea and at her change of plea hearing. SR:61-63, 138-40.

³ Verhoek failed to cite to record in making her argument.

Verhoek failed to establish that this claim rises to the level of exceptional circumstance necessary to be reviewed on direct appeal.

Second, according to Verhoek her counsel breached his duty to communicate by not fully informing Verhoek of the legal effect of her plea agreement. AB:14. Verhoek also states her counsel “did not reasonably consult with [Verhoek] about the means by which her objectives were to be accomplished[.]” *Id.* at 14-15. As stated previously, Verhoek confirmed she fully understood the plea agreement twice prior to entering her plea of guilt. SR:61-63, 138-40. Further, if Verhoek did not understand the effects of her plea agreement, it was her duty to inform the circuit court as such. This claim fails to rise to the level of exceptional circumstance necessary to be reviewed on direct appeal.

Third, Verhoek argues her counsel “violated his duty of appropriate advocacy by expediting litigation in a matter inconsistent with [Verhoek’s] interest.” AB:15. Verhoek fails to specify how her counsel breached his duty or what her specific interest was. Verhoek instead made a blanket statement regarding her counsel’s performance. Without further elaboration, this claim fails to rise to the level of exceptional circumstance necessary to be reviewed on direct appeal.

Verhoek’s claims would be more appropriate for habeas review, allowing her defense counsel to “explain or defend their actions and strategies, and thus a more complete picture of what occurred [would be] available for review.” *Alvarez*, 2022 S.D. 66, ¶¶ 34-35, 982 N.W.2d at 20

(citing *Thomas*, 2011 S.D. 15, ¶ 23, 796 N.W.2d at 714). Because the record does not reveal exceptional circumstances or a manifest usurpation of Verhoek's rights, this Court should decline to review Verhoek's ineffective assistance of counsel claim on direct appeal. *Malcolm*, 2023 S.D. 6, ¶ 41, 985 N.W.2d at 742.

CONCLUSION

The State requests this Court affirm Verhoek's Judgment of Conviction.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 2,879 words.

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

Dated this 20th day of February 2025.

/s/ Renee Stellagher

Renee Stellagher
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Dana Verhoek* was served electronically through Odyssey File and Serve upon Amanda M. Thole at amanda@austinlawsd.com.

/s/ Renee Stellagher

Renee Stellagher
Assistant Attorney General