

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

ASHLEE PRAY,

Defendant/Appellant.

No. 31389

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

HONORABLE MICHAEL W. DAY
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as “SR.” The transcript of the Initial Appearance held on October 4, 2024, is referred to as “IA.” The transcript of the Arraignment held on October 16, 2024, is referred to as “AH.” The transcript of the Status Hearing held on November 13, 2024, is referred to as “SH1.” The transcript of the Motions Hearing held on February 21, 2025, is referred to as “MH.” The transcript of the Status Hearing held on April 4, 2025, is referred to as “SH2.” The transcript of the Pretrial Conference held on July 18, 2025, is referred to as “PTC.” The transcript of the Status Hearing held on August 15, 2025, is referred to as “SH3.” The transcript of the Change of Plea Hearing, held on November 7, 2025, is referred to as “COP.” The transcript of the

Sentencing Hearing held on January 23, 2026, is referred to as “ST.” All references to documents will be followed by the appropriate page number. Defendant and Appellant, Ashlee Pray, will be referred to as “Pray.”

JURISDICTIONAL STATEMENT

Pray appeals the Judgment of Conviction entered January 26, 2026, by the Honorable Michael W. Day, Circuit Court Judge of the Fourth Judicial Circuit. SR 219-222. Pray timely filed her Notice of Appeal on February 5, 2026. SR 262-63. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ILLEGALLY SENTENCED PRAY BY EXCEEDING THE STATUTORY MAXIMUM UNDER SDCL 22-3-8 AND SDCL 22-42-5.

The circuit court sentenced Pray to five years in the South Dakota Women’s Prison with one year suspended.

State v. Kramer, 2008 S.D. 73, 754 N.W.2d 655

State v. Kaiser, 526 N.W.2d 722 (S.D. 1995)

State v. Roedder, 2019 S.D. 9, 923 N.W.2d 537

SDCL 22-3-8

II. WHETHER THE CIRCUIT COURT ERRED IN ITS APPLICATION OF SDCL 22-6-11.

The circuit court enumerated five aggravating circumstances which it concluded posed a significant risk to the public and required departure from presumptive probation under SDCL 22-6-11.

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

SDCL 22-6-11

STATEMENT OF CASE AND FACTS

On September 23, 2024, a Meade County Grand Jury returned a one-count Indictment, charging Pray with Conspiracy to Distribute a Controlled Drug or Substance, to wit: Fentanyl, in violation of SDCL 22-42-2.4, SDCL 22-42-2, SDCL 22-42-5, and SDCL 22-3-8. SR 1-2. The State filed the Indictment the same day. *Id.* On December 18, 2024, Pray filed an Affidavit for Change of Judge. SR 40. The Affidavit requested the case be reassigned from the Honorable John Fitzgerald. *Id.* The same day, Circuit Judge Michelle K. Comer¹ signed an Order Assigning Judge, assigning the Honorable Michael W. Day of the Fourth Judicial Circuit pursuant to SDCL 15-12-32. SR 41. A Clerk's Statement was filed listing Judge Fitzgerald as a disqualified judge. SR 42.

On February 21, 2025, Pray's counsel filed a letter requesting the circuit court recuse any judge for the Fourth Judicial Circuit. SR 46. In the letter, Pray's counsel explained that the charge against her involved "allegations that she was involved in providing the drugs that caused the death" of "an employee of the 4th Judicial Circuit Drug Court Program." *Id.* Pray was concerned that "it will be difficult for those within the [Fourth] Judicial Circuit to put aside their

¹ The Order designates Judge Comer as "Senior Circuit Judge" in the signature line.

knowledge and relationship to the decedent.” *Id.* Pray was a counselor at Compass Point who worked with the Fourth Circuit Treatment Courts. ST 15. Therefore, Pray requested an “out-of-circuit judge” be assigned to conduct further proceedings in the case. SR 46. At the Motions Hearing on February 21, 2025, Pray’s counsel indicated Pray wished to withdraw the request for a change of judge. MH 2-3. The Honorable Michael W. Day proceeded to hear further pre-trial motions from the parties. *See generally* MH.

On November 7, 2025, the State filed an Amended Complaint and a separate Information, each charging Pray with Conspiracy to Possess a Controlled Drug or Substance, to wit: Methamphetamine, in violation of SDCL 22-42-5 and SDCL 22-3-8. SR 85-87. The State also filed a Plea Agreement. SR 88. Under the plea agreement, Pray agreed to plead guilty to “Count 1 of the Amended Indictment/Information,”² and the State agreed to “recommend a probationary sentence.” *Id.*³ Pray and Pray’s counsel signed the Plea Agreement. *Id.* The circuit court⁴ held the Change of Plea Hearing the same day. *See generally* COP.

² In describing the charge to which Pray would plead guilty, the Plea Agreement contains a strikethrough on “Fentanyl” and handwritten notation stating “Methamphetamine.” SR 88.

³ The Plea Agreement also contained requirements that Pray make all court appearances and obey bond conditions. SR 88. It stated, “[f]ailure to do so will result in this offer being revoked, however, the plea of guilty cannot [be] withdrawn.” *Id.*

⁴ The Honorable Michael W. Day.

Pray's counsel disclosed the terms of the Plea Agreement, including Pray's guilty plea "to the sole count of an Amended Complaint and Information filed here today charging one count of conspiracy to possess a controlled drug or substance, methamphetamine." COP 2. The State agreed that it would recommend "a probationary sentence," and would not "be opposing a request for a suspended imposition of sentence." COP 2-3. The circuit court confirmed the written Plea Agreement contained pertinent terms. COP 3. The circuit court then asked Pray if she had reviewed the Amended Complaint and Information and referenced the statutory offenses in those documents. COP 4-5.⁵ The circuit court stated "[t]his is a Class 5 felony. Carries a maximum sentence of five years in the state penitentiary or a \$10,000 fine or both." COP 5. The circuit court inquired of Pray's understanding of the charge and Pray stated, "it's important for me that it's specified the substance that I conspired to possess on the record." COP 5. The circuit court specified that the guilty plea related to methamphetamine. *Id.*

The circuit court advised Pray of her rights, the waiver of those rights associated with the guilty plea, and ensured that Pray understood and waived her right to a preliminary hearing. COP 4-6. Ultimately the circuit court found

⁵ The transcript contains the circuit court's advisement of the charge, stating, "[n]amely, you sent electronic messages to third parties in an effort to obtain controlled drugs or substances, in violation of Chapter 22-42-5 and 23-3-8." COP 5. The Amended Complaint and Information cite to SDCL 22-42-5 and SDCL 22-3-8. SR 85-86.

Pray had been regularly held to answer, was represented by competent counsel, and that “she has been informed, and I believe she understands the nature of the charge,” as well as her rights. COP 7. The circuit court articulated the factual basis as “you sent electronic messages to third parties in an effort to obtain methamphetamine,” which Pray confirmed. COP 8. Upon accepting the factual basis for the plea, the circuit court ordered a presentence investigation and stated, “I’m going to order that you cooperate with Court Services in the preparation of that report.” *Id.*

The circuit court held the Sentencing Hearing on January 23, 2026. *See generally* ST. The circuit court recounted “Pray pled guilty to the August 14, 2025 Information, charging conspiracy to possess a controlled drug or substance, methamphetamine, which is a Class 5 felony,” which “[c]arries a maximum possible sentence of five years in the state penitentiary or a \$10,000 fine or both.” ST 2. In sentencing remarks, the State argued that the “facts of this case are very compelling. Ms. Pray was involved in obtaining controlled substances, which ended up in the death of Emily Gross.” ST 4. The State explained “[w]e made an offer based upon the facts of this case and based upon the fact that the person that actually gave the drugs is now serving 20 years in the penitentiary.” *Id.* The State acknowledged its promise to recommend a “probationary sentence,” but stated “the plea agreement required that she be honest with her Court Services Officer and cooperate.” *Id.* But, the State emphasized its assertion that “the actions of this Defendant were directly related to the death of Emily Gross.” ST 5.

Ultimately, the State submitted “the facts of this case, the plea, and the lack of cooperation with the Court Services Officer” and asked the circuit court to “sentence appropriately.” ST 5.⁶

Pray’s counsel described Pray’s ongoing struggles with drug addiction and detailed her efforts at treatment, including an instance of relapse. ST 5-6. Counsel reiterated that Pray denied involvement with fentanyl but accepted culpability for “conspiracy to possess methamphetamine, because that’s what she was doing.” ST 6. Further, counsel emphasized that Pray “has insisted from day one she was not involved in the actual transactions that led to the fentanyl and the death in this case.” *Id.* However, defense counsel submitted that Pray agreed “[s]he was guilty of getting back into the level of addiction that she had.” *Id.*

Defense counsel prospectively explained Pray’s efforts toward her own rehabilitation, describing her acceptance into Adult and Teen Challenge program in North Dakota. ST 7. The defense request was for “a sentence that allows her to get into that program,” which she could begin “immediately.” *Id.* Counsel repeated the request for the circuit court to “fashion a sentence that reflects what she actually pled to,” and to consider a suspended imposition of sentence, “to allow her to get into the treatment program that she so desperately needs.” ST 8.

⁶ The PSI contains the Court Services narrative of Pray’s cooperation with the presentence investigation. SR 97 (sealed).

The circuit court began its comments pronouncing sentence by stating Pray was “[h]ere for sentencing on a Class 5 felony. Pursuant to the plea agreement, a Class 4 felony is being dismissed.” ST 9. The circuit court observed this was Pray’s “first felony,” that she had been convicted of a DUI in 2002 when she was 18 years old, and “felony drug charges” against her were dismissed in 2023. *Id.* It next detailed Court Services’ attempted contacts with Pray regarding the PSI, restating that it had ordered Pray to cooperate with the PSI process. ST 9-10. The circuit court stated the PSI was filed without Pray’s involvement but acknowledged that Pray’s father delivered the completed PSI packet at the Court Services Office the day prior to sentencing. ST 10-11.

The circuit court detailed Pray’s employment as a clinical supervisor at Compass Point from December 2017 until December 2023, the date corresponding to the offense, when her counseling license was revoked. ST 11. It noted that Pray, thereafter, was employed as a bar manager and an Airbnb cleaner. *Id.* The circuit court noted that Pray has five children, ranging in age “from five through 19 years old,” and that Pray reported being “the only parent [the] children have.” *Id.* The circuit court also detailed Pray’s completion of treatment at Keystone in 2012 and again in January of 2025. ST 12. Pray had also attended treatment in Howard “for two weeks, followed by an outpatient program.” *Id.* The circuit court stated that in the inpatient program in Howard, Pray was “expelled after a few days, because at that time, [her] perceived boyfriend was also there and that was against policy.” ST 12-13.

In further remarks, the circuit court emphasized that Pray “served as the treatment team representative for our DUI and Drug Courts,” where she met Gross. ST 13. The circuit court stated:

During your tenure, you abused your position with both Compass Point and the treatment court system by engaging in inappropriate and unethical relationships with clients by discussing your personal substance use with clients, engaging in sexual relationships with a former client, and violating numerous Compass Point policies that are designed to protect vulnerable individuals and maintain the integrity of treatment.

In this case, you were uniquely positioned to support Emily Gross in her struggles with postpartum depression and substance use.

ST 13-14. The circuit court ultimately opined, “[b]ecause of your inactions and actions, Emily Gross is dead.” ST 14. Additionally, the circuit court referenced a letter from “the Compass Point Board of Directors,” which stated, “the consequences of your misconduct continue to reverberate within Compass Point.” ST 14.⁷

Regarding punishment, the circuit court stated, according to Pray’s PSI submissions, “[y]ou feel that because you’re an addict, you should get treatment, not punishment,” and that Pray’s recommendation was continued treatment, but

⁷ Included within the PSI is a letter from the Compass Point Board of Directors. SR 212-13. The letter states, “[w]e respectfully ask the Court to consider imposing a penitentiary sentence. Even a limited period of incarceration followed by probation would better reflect the gravity of the harm caused and reinforce the integrity of the system.” SR 213. The letter also commented on Pray’s “demeanor” at the Change of Plea Hearing, asserting she “appeared indignant when emphasizing that she wished the record to reflect that she was pleading specifically to conspiracy involving methamphetamine.” SR 213.

“[y]ou didn’t even feel that probation was necessary or needed.” *Id.* However, “in mitigation,” the circuit court observed Pray’s limited criminal history, her history of employment, and her familial support in her obligations as a single mother. ST 14-15. With this commentary preceding, the circuit court announced, “this Court finds aggravating circumstances exist that pose a significant risk to the public and requires a departure from presumptive probation under SDCL section 22-6-11.” ST 15. The circuit court explained:

Those circumstances are your failure to comply with the PSI process, despite a Court order to do so, you used methamphetamine while employed as a counselor at Compass Point and while working with the Fourth Circuit Treatment Courts, you have not taken responsibility for your actions to the extent that you made it clear at the change of plea hearing that you were pleading to conspiracy to obtain possession of methamphetamine, not fentanyl, when fentanyl is the consistent theme through all law enforcement reports. You have been through various forms of treatment and you continue to obtain and use controlled substances. Your actions have diminished the trust that this community has in Compass Point and in the treatment court system. Your actions and inactions are directly connected to the death of Emily Gross and the compelling facts of this case.

Id.

The circuit court pronounced Pray’s sentence as “five years in the South Dakota Women’s Prison with credit for all time served in the Meade County Jail,” with one year suspended on the condition of compliance with treatment and aftercare and payment of costs. ST 15-16. The circuit court entered the Judgment of Conviction on January 26, 2026. SR 219-222. Regarding presumptive

probation under SDCL 22-6-11, the circuit court enumerated five aggravating factors justifying departure:

1. Failure to comply with Presentence Investigation.
2. Use Meth while a counselor and with 4th Circuit Specialty Court.
3. Not taking responsibility.
4. Multiple attempts at treatment have failed.
5. Action connected to death.

SR 221. The Judgment of Conviction imposed the five-year prison sentence pronounced at the Sentencing Hearing, with one year suspended, and cited Pray's guilty plea to "an Information alleging the offense of Conspiracy to Possess a Controlled Drug or Substance (CLASS 5 FELONY)." SR 219. On February 5, 2026, Pray filed her Notice of Appeal of the "entirety of the Judgment." SR 262.

ARGUMENT

I. THE CIRCUIT COURT ILLEGALLY SENTENCED PRAY BY EXCEEDING THE STATUTORY MAXIMUM UNDER SDCL 22-3-8 AND SDCL 22-42-5.

A. Standard of Review

Whether a sentence was illegally imposed is a question reviewed de novo. See *State v. Simonsen*, 2024 S.D. 21, ¶ 11, 5 N.W. 3d 843, 846 (stating "[w]hen a defendant asserts that their sentence was illegally imposed, this Court is presented with a question of law which we review de novo") (citing *State v. Cook*, 2015 S.D. 46, ¶ 6, 865 N.W.2d 878, 880). Likewise, "[s]tatutory interpretation is a question of law, reviewed de novo." *State v. Kramer*, 2008 S.D. 73, ¶ 11, 754

N.W.2d 655, 658 (quoting *State v. Burdick*, 2006 S.D. 23, ¶ 6, 712 N.W.2d 5, 7). *See also State v. Litschewski*, 2011 S.D. 88, ¶ 7, 807 N.W.2d 230, 232 (stating “[w]hether [the defendant’s] sentence was illegal is a question of statutory interpretation we review de novo”) (citing *State v. Goulding*, 2011 S.D. 25, ¶ 5, 799 N.W.2d 412, 414). The circuit court ordered Pray’s sentence for “Conspiracy to Possess a Controlled Drug or Substance.” SR 219. To determine the maximum penalty authorized by law in this case, this Court must interpret SDCL 22-3-8 and SDCL 22-42-5, and their relationship in application. *See* SR 86 (citing these statutes in Information); COP 4-5 (referencing Information and these statutes).⁸ Therefore, the correct standard of review is de novo.

B. *Punishment for Conspiracy to Commit an Offense Under SDCL 22-3-8 Establishes a Two-Year Maximum Prison Sentence.*

Under SDCL 22-3-8, each party to a conspiracy “may be punished up to the maximum penalty which may be imposed for a crime which is one level below the penalty prescribed for the crime underlying the conspiracy.” This Court has confirmed the “one classification less severe” rule is “a mandatory statutory scheme triggered by SDCL 22-3-8.” *State v. Kaiser*, 526 N.W.2d 722, 726 (S.D. 1995). Here, the underlying offense was unauthorized possession of a controlled drug or substance under SDCL 22-42-5. SR 273. Possession of

⁸ The circuit court stated “23-3-8” but was referencing the “Amended Complaint and Information filed.” COP 4-5. The Information cites SDCL 22-3-8 and SDCL 22-42-5. SR 86.

methamphetamine is a Class 5 felony. SDCL 22-42-5.⁹ Under SDCL 22-6-1(8), a Class 5 felony carries a maximum penalty of five years imprisonment in a state correctional facility and a fine of up to \$10,000, or both. The classification one level below is a Class 6 felony, punishable by a maximum of two years imprisonment in a state or correctional facility, or a fine of \$4,000 dollars, or both. SDCL 22-6-1(9).

The circuit court exceeded its authority in sentencing Pray to five years in the South Dakota Women's Prison. Pray entered a guilty plea to the Information which cited SDCL 22-42-5 and SDCL 22-3-8. SR 86. The circuit court entered judgment "for the crime of Conspiracy to Possess a Controlled Drug or Substance." SR 273. *See also* SR 94 (PSI). The circuit court overlooked the required reduction under SDCL 22-3-8 when it imposed five years imprisonment under SDCL 22-42-5. SR 273. *See also* SENT 9 (stating the circuit court was "[h]ere for sentencing on a Class 5 felony"). Pursuant to SDCL 22-3-8 and the "one classification less severe rule," the maximum prison sentence available to the circuit court was two years imprisonment.¹⁰

⁹ Methamphetamine is classified as a Schedule II controlled substance. SDCL 34-20B-16(6).

¹⁰ In the Indictment, the State initially charged Pray under SDCL 22-42-2.4, SDCL 22-42-2, SDCL 22-42-5, and SDCL 22-3-8. SR 1-2. Under SDCL 22-42-2.4, "[n]otwithstanding subdivision 22-3-8(1), the punishment for conspiracy to commit a violation of § 22-42-2 is the same as the punishment for violating § 22-42-2." But here, because the charges in the Indictment were amended in the Information, SDCL 22-42-2.4 is inapplicable and SDCL 22-3-8 controls.

C. The Circuit Court's Sentence was Illegal and Must be Corrected.

In *State v. Sieler*, this Court stated “illegal sentences are essentially only those which exceed the relevant statutory maximum limits or violate double jeopardy or are ambiguous or internally contradictory.” 1996 S.D. 114, ¶ 7, 554 N.W.2d 477, 480 (S.D. 1996) (citation modified). See also *Kramer*, 2008 S.D. 73, ¶ 12, 754 N.W.2d at 659 (stating “[n]o matter what purpose or public benefit the circuit court considered,” it “cannot exceed the sentence authorized by law”). Here, any sentence exceeding two years is an illegal sentence. The appropriate remedy is to remand for resentencing. In *Kramer*, this Court vacated the portion of the sentence that exceeded the statutory maximum. 2008 S.D. 73, ¶¶ 12-13, 754 N.W.2d at 658-59.¹¹ In *State v. Roedder*, the Court vacated and remanded for resentencing where the circuit court misapplied the sentencing enhancement framework and exceeded lawful bounds. 2019 S.D. 9, ¶¶ 39-41, 923 N.W.2d 537, 548-49.¹² Here, the circuit court’s sentence plainly exceeded the statutory maximum. Under SDCL 23A-31-1, “[a] court may correct an illegal sentence at any time.” Like *Kramer* and *Roedder*, the circuit court exceeded its authority in

¹¹ In *Kramer*, the circuit court exceeded its authority in revoking the defendant’s hunting license for three years based on consecutive one-year terms. 2008 S.D. 73, ¶¶ 12-13, 754 N.W.2d at 658-59.

¹² In *Roedder*, the Court applied de novo review to Roedder’s argument that the circuit court improperly determined he was ineligible for presumptive probation under SDCL 22-6-11. 2019 S.D. 9, ¶ 12, 923 N.W.2d 537, 542.

sentencing Pray. Therefore, this Court should vacate the illegal sentence and remand for resentencing consistent with SDCL 22-3-8.

II. THE CIRCUIT COURT MISAPPLIED SDCL 22-6-11 IN ENUMERATING AGGRAVATING CIRCUMSTANCES WITHOUT CONNECTING THEM TO A SIGNIFICANT PUBLIC SAFETY RISK.

A. Standard of Review

A circuit court's decision to depart from presumptive probation under SDCL 22-6-11 may be reviewed under the abuse of discretion standard. *State v. Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d 57, 59. However, "[w]hether the circuit court misinterpreted or misapplied SDCL 22-6-11 involves a question of statutory interpretation, which [this Court] review[s] de novo, with no deference given to the circuit court's legal conclusions." *State v. Kurtz*, 2024 S.D. 13, ¶ 12, 4 N.W.3d 1, 4. While certain factors may justify departure, "the sentencing court's required finding under SDCL 22-6-11 must focus on the relationship of those circumstances to public safety." *Id.* at ¶ 15, 5. Because the circuit court did not connect the enumerated aggravating circumstances to a significant risk to the public, it misapplied SDCL 22-6-11, and the de novo standard of review is applicable to the circuit court's misapplication of the statute. *Id.* at ¶ 12, 4.

If this Court determines that this issue is not properly characterized as a misapplication of SDCL 22-6-11, then this Court should, as it did in *Beckwith*, "apply the abuse of discretion standard in reviewing a sentencing court's decision to depart from presumptive probation." *Beckwith*, 2015 S.D. 76, ¶ 7, 871

N.W.2d at 59. And because Pray is not alleging the circuit court's sentencing procedure was flawed, the plain error standard does not apply. *See, e.g., State v. Feucht*, 2024 S.D. 16, ¶ 22, 5 N.W.3d 561, 568 (this Court finding errors which relate to sentencing procedure, i.e., the circuit court's "failure to state aggravating circumstances on the record at sentencing or failure to include them in the judgment of conviction[,]” must be preserved with an objection, unlike errors alleging “the circuit court abused its discretion in imposing a penitentiary sentence under the circumstances before the court.”).

B. *The Circuit Court Misapplied SDCL 22-6-11 When it Failed to Make a Public-Risk Finding Connected to the Aggravating Circumstances.*

The circuit court cannot rely on the mere existence of aggravating circumstances alone but must affirmatively find those circumstances pose a significant public risk. *See Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5 (stating “while a defendant's history may present aggravating circumstances, the sentencing court's required finding under SDCL 22-6-11 must focus on the relationship of those circumstances to public safety”). Under *Kurtz*, SDCL 22-6-11 requires that aggravating circumstances be specifically connected to the public risk finding. *Id.*

Here, the circuit court misapplied SDCL 22-6-11 because it did not base its finding on a public-risk assessment. Rather, it simply stated as a conclusion “this Court finds aggravating circumstances exist that pose a significant risk to the public and requires a departure from presumptive probation.” ST 15. The circuit court’s improper application is apparent in its explanatory remarks:

Those circumstances are your failure to comply with the PSI process, despite a Court order to do so, you used methamphetamine while employed as a counselor at Compass Point and while working with the Fourth Circuit Treatment Courts, you have not taken responsibility for your actions to the extent that you made it clear at the change of plea hearing that you were pleading to conspiracy to obtain possession of methamphetamine, not fentanyl, when fentanyl is the consistent theme through all law enforcement reports. You have been through various many forms of treatment and you continue to obtain and use controlled substances. Your actions have diminished the trust that this community has in Compass Point and in the treatment court system. Your actions and inactions are directly connected to the death of Emily Gross and the compelling facts of this case.

Id. Upon this statement, the circuit court pronounced its sentence. In its remarks, the circuit court simply “commented generally” without constituting a finding that these circumstances “pose a significant risk to the public.” *Roedder*. 2019 S.D. 9, ¶ 36, 923 N.W.2d at 548.

Pray acknowledges that failure to comply with a PSI process may, in some instances, constitute an aggravating circumstance. *Beckwith*, 2015 S.D. 76, ¶ 11, 871 N.W.2d at 60. Likewise with regard to failed attempts at treatment. *State v. Hernandez*, 2014 S.D. 16, ¶ 12, 845 N.W.2d 21, 23. But *Beckwith* reasoned that failure to comply with PSI process may be aggravating because it could leave a circuit court without relevant sentencing information, and thereby a defendant may pose a public-safety risk under probation. *Beckwith*, 2015 S.D. 76, ¶ 10, 871 N.W.2d at 59. Contrary to this case, in *Beckwith*, the defendant “not only failed to call his CSO as scheduled, but the CSO’s subsequent attempts to contact

Beckwith were unsuccessful and Beckwith made no further effort to contact his CSO whatsoever.” *Id.* at ¶ 9, 59.

Here, Pray initially “met with Court Services Officer Bostrom and picked up her PSI packet” after the Change of Plea Hearing. ST 9-10. Although admittedly tardy, Pray submitted the PSI packet through her father. ST 10-11. The circuit court even relied on the information from the PSI packet in characterizing Pray’s lack of accountability as an aggravating circumstance. ST 14. This circular reasoning is a misapplication of SDCL 22-6-11 because the circuit court used all of these factors without relating them to an ongoing and significant public-safety risk. The circuit court’s decision demonstrates it was merely listing Pray’s historical misconduct without rationally connecting her past failures to public safety risks.

Furthermore, the circuit court’s failure to consider recent prognostic indicators was contrary to the dictates of SDCL 22-6-11. While the circuit court found that Pray had failed treatment attempts, *Kurtz* establishes that sentencing courts “should not, as a matter of course, ignore recent prognostic indicators suggesting the defendant does not presently pose a significant risk to the public.” 2024 S.D. 13, ¶ 15, 4 N.W.3d 1, 5. Here, the circuit court improperly disregarded Pray’s engagement with Teen Challenge and impending admission to that program. ST 7. The circuit court glossed over “mitigation,” describing Pray’s limited criminal history, education, employment, and her family support. ST 14-15. Sentencing under SDCL 22-6-11 “involves considering the totality of the

circumstances as to the *individual* defendant before the court.” *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. And even circumstances that have supported departure in prior cases do not automatically establish a significant public risk for every defendant. *Kurtz* suggests that simply listing these historical aggravating factors, without a causal connection to a significant public-safety risk, does not constitute a proper application of SDCL 22-6-11. *Id.*

The policy and purpose at the foundation of SDCL 22-6-11 is to prioritize rehabilitation in lieu of incarceration for drug offenders that do not pose a *significant risk to the public*. Because the circuit court’s conclusory commentary did not establish the required finding of a present, significant public safety risk, it misapplied SDCL 22-6-11.

C. *The Departure Was Impermissibly Grounded in Punishment Rather than Public Safety.*

In *Kurtz*, the sentencing “court’s further statement that departure is warranted because ‘at some point, we don't deal any longer with whether you're a threat to society, but it's simply punishment’ is flatly contrary to the mandate in SDCL 22-6-11.” *Id.* ¶ 13, 4 N.W.3d at 5. This Court’s primary concern in *Kurtz* was the circuit court’s express finding that the defendant was “not much of a threat to society.” *Id.* (citation modified). Still, under *Kurtz*, a departure is impermissible if the circuit court’s reasoning reflects a rationale grounded in punishment rather than a genuine public safety finding. *Id.*

Here, the circuit court's findings of 'action connected to death' and 'use meth while a counselor' focused on community retribution on behalf of Gross and the Compass Point, rather than "the relationship of those circumstances to public safety." *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. The death of Gross was a tragedy that undoubtedly shocked and devastated the community. Pray does not suggest otherwise. Certainly, an action connected to death may itself be an aggravating circumstance. However, the circuit court's bare conclusions were not public-safety findings. The circuit court must still articulate how that specific connection, in this case and for this individual defendant, poses a significant risk to the public going forward. Notably, the circuit court did not explain how Pray's offense posed a prospective public-safety risk, but stated "[b]ecause of your inactions and actions, Emily Gross is dead." ST 14. Similarly, in citing Pray's status as a counselor as an aggravating circumstance, the circuit court's focus was Pray's moral culpability and the need to send a message in the form of retributive justice for Compass Point. *See* ST 14-15 (stating "the consequences of your misconduct continue to reverberate within Compass Point," and "[y]our actions have diminished the trust that this community has in Compass Point and the treatment court system"). The circuit court's findings failed to connect these circumstances to a significant public risk.

Retribution, deterrence, incapacitation, and rehabilitation are each distinct

penological goals and none are preeminent over any other. *State v. Talla*, 2017 S.D. 34, ¶ 14, 897 N.W.2d 351, 355. Generally, these factors “are to be weighed ‘on a case-by-case basis’ depending on the circumstances of the particular case.” *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741 (quoting *State v. Toavs*, 2017 S.D. 93, ¶ 10, 906 N.W.2d 354, 357). Within the framework of SDCL 22-6-11, however, this general balancing principle yields to the more specific legislative mandate: Pray is “entitled to presumptive probation unless the court found aggravating circumstances ‘that pose a significant risk to the public.’” *Beckwith*, 2015 S.D. 76, ¶ 5, 871 N.W.2d at 59 (quoting SDCL 22-6-11) (emphasis added). The circuit court misapplied SDCL 22-6-11 by disregarding rehabilitation and emphasizing retribution.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court vacate the sentence and remand for resentencing.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Ashlee Pray, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 23rd day of April, 2026.

/s/ Derek D. Friese

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type.
Appellant's Brief contains 5,444 words
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 23rd day of April, 2026.

/s/ Derek D. Frieze
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31389

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ASHLEE PRAY,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL W. DAY
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed February 5, 2026

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31389

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ASHLEE PRAY,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Ashlee Pray, is referred to as “Defendant” or “Pray.” Plaintiff and Appellee, the State of South Dakota, is referred to as “State.” The deceased individual in this case is referred to by her initials, E.G. All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Meade Co. File 46CRI24-1024)SR

Change of Plea Hearing (November 7, 2025).....COP

Sentencing Hearing (January 23, 2026).....SENT

Appellant’s Brief.....AB

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

JURISDICTIONAL STATEMENT

Pray appeals the Judgment of Conviction and Amended Judgment of Conviction entered by the Honorable Michael W. Day, Circuit Court Judge, Meade County, Fourth Judicial Circuit.¹ SR 219-22, 273-76.

The Judgment of Conviction was filed on January 26, 2026, and the Amended Judgment of Conviction was filed on February 25, 2026.

SR 219. Defendant filed a Notice of Appeal on February 5, 2026.²

SR 262-63. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT EXCEEDED THE
STATUTORY MAXIMUM UNDER SDCL 22-3-8 AND SDCL 22-
42-5 WHEN SENTENCING PRAY?

The trial court sentenced Pray to five years in the state penitentiary, with one year suspended.

State v. Humpal, 2017 S.D. 82, 905 N.W.2d 117

State v. Long Soldier, 2023 S.D. 37, 994 N.W.2d 212

SDCL 22-3-8

SDCL 22-42-5

¹ The only difference between the Judgment of Conviction and the Amended Judgment of Conviction is the addition of a provision requiring Pray to reimburse the county for investigator's fees. SR 274.

² The Notice of Appeal was filed after the original Judgment of Conviction, but before the Amended Judgment of Conviction.

II

WHETHER THE CIRCUIT COURT ERRED IN DEPARTING FROM PRESUMPTIVE PROBATION UNDER SDCL 22-6-11?

The trial court found aggravating circumstances exist that pose a significant risk to the public to depart from presumptive probation and imposed a penitentiary sentence.

State v. Feucht, 2024 S.D. 16, 5 N.W.3d 561

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

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

SDCL 22-6-11

STATEMENT OF THE CASE AND FACTS³

Pray was a chemical dependency counselor and clinical supervisor at Compass Point, a chemical dependency treatment facility and program licensed and accredited by the South Dakota Department of Health and the South Dakota Department of Social Services, Division of Behavioral Health.⁴ She was also the treatment team representative for the Fourth Circuit drug court program. SR 115, 131, 163, 194, 212 (sealed). Pray met her boyfriend, Kolten Ware, while he was a participant in the drug court program. SR 115, 131, 152, 154, 163, 194 (sealed). She also met

³ The Statement of the Case and the Statement of Facts are combined for brevity and clarity. The facts come from the Grand Jury transcript and law enforcement reports contained within the Pre-Sentence Investigation report, a sealed document in the Settled Record.

⁴ The program is also called Northern Hills Alcohol and Drug Services d/b/a Compass Point. See <https://www.sdhls.org/verify/results/?5> (last visited 6/2/26) and <https://olapublic.sd.gov/behavioral-health-program-profile/78647?phone=6053473003> (last visited 6/2/26).

and became friends with E.G., who was the drug court coordinator. SR 112, 115, 131, 163, 190-92, 194 (sealed).

Pray, Ware, and E.G. all had a prior history of drug use. SR 152, 163, 192-94, 216 (sealed). Starting in October 2023, E.G. asked Pray to get her drugs. SR 112, 115-16, 153 (sealed). Pray asked Ware through phone calls and text messages to obtain the drugs for E.G.⁵ SR 112-13, 115-17, 153, 163, 165, 196-97 (sealed). Although Ware was resistant at first, he did obtain fentanyl pills on several occasions, which he gave to Pray to pass on to E.G. SR 113, 115-16, 153, 163-64, 196-97 (sealed). E.G. sent money directly to Ware on one of those occasions. SR 143-44, 153, 164, 166, 196 (sealed).

Pray became aware that E.G. was sick and throwing up and Ware believed E.G. was overdosing. SR 153, 164, 196-97 (sealed). On December 14, 2023, law enforcement responded to E.G.'s house after receiving a report that she had not picked her child up from daycare. SR 130, 188-90, 192 (sealed). Officers found E.G. deceased in her bathtub of a suspected drug overdose. SR 109, 130, 188-90 (sealed). They also found drug items, including suspected fentanyl pills and paraphernalia in the residence. SR 109, 120, 130, 189, 191 (sealed). An autopsy revealed that E.G. died of fentanyl toxicity. SR 121, 138, 193, 203 (sealed).

⁵ A search of data from Pray's iCloud account shows no messages stored in the month of December 2023, indicating to law enforcement that messages had possibly been deleted. SR 157-58, 195 (sealed).

E.G.'s boyfriend also contacted Pray on December 14, 2023, after he was unable to contact E.G. SR 153, 164 (sealed). Pray drove by E.G.'s house and saw law enforcement outside. SR 153, 164, 197 (sealed). Pray and Ware learned about E.G.'s death a few hours later. SR 164 (sealed). They left the state and went on the run to Colorado for a couple weeks, fearing they would be tied to E.G.'s death. SR 131, 152-53, 164-65, 196-97 (sealed).

On September 23, 2024, the Meade County Grand Jury indicted Pray on one charge of Conspiracy to Distribute a Controlled Drug or Substance (Fentanyl), in violation of SDCL 22-42-2 and SDCL 22-3-8, a Class 4 Felony. SR 1-2. The case was originally set for trial, but the parties reached a plea agreement for Pray to plead to an amended charge of Conspiracy to Possess a Controlled Drug or Substance (Methamphetamine), in violation of SDCL 22-42-5 and SDCL 22-3-8, with the State to recommend a probationary sentence. SR 88, 303; COP 2.

An Information for the amended charge was filed on November 7, 2025. SR 86-87. Both the plea agreement and the Information stated that the amended charge was a Class 5 Felony. SR 86-88. At the Change of Plea hearing held on November 7, 2025, the court advised Pray of the amended charge, stating "[t]his is a Class 5 felony. Carries a maximum sentence of five years in the state penitentiary or a \$10,000

fine or both.” SR 306; COP 5. Pray’s counsel⁶ confirmed that he had discussed the nature of the charge and maximum penalties with Pray. SR 307; COP 6. Pray pled guilty to the amended charge, admitting that she conspired to possess methamphetamine and sent electronic messages to third parties in an effort to obtain methamphetamine. SR 308-09; COP 7-8. However, Pray stated, “it’s important for me that it’s specified the substance I conspired to possess on the record” which the circuit court confirmed was methamphetamine. SR 306; COP 5.

The circuit court ordered the preparation of a Pre-Sentence Investigation (PSI) report and that Pray cooperate with Court Services in the preparation of the PSI. SR 89, 309; COP 8. The PSI was filed on January 16, 2026, noting that Pray “did not participate in the PSI process” so some of the pertinent information contained within the PSI was unknown. SR 95-97 (sealed). Specifically, Court Services noted Pray’s lack of cooperation with the PSI process:

On November 7, 2025, the Defendant entered a plea of guilty. The Defendant met with Court Services and picked up her PSI Packet after Court. The Defendant was instructed to contact Court Services on November 10, 2025, to schedule a PSI Interview.

On November 20, 2025, Court Services attempted contact with the Defendant, there was no answer. A message was left advising the Defendant to contact the Sturgis Court Service Office regarding her PSI.

On December 29, 2025, Court Services sent an email to the Defendant’s attorney advising there had been no contact with the Defendant.

⁶ Pray’s counsel in the circuit court is different from appellate counsel.

On January 7, 2026, Court Services spoke with the Defendant's attorney and was advised that the Defendant was in South Dakota, and she had been advised to contact Court Services immediately.

On January 14, 2026, Court Services had a message stating the Defendant called the Court Services Office on January 13, 2026.

On January 14, 2026, Court Services attempted telephone contact with the Defendant. The phone call went directly to voice mail and Court Services received a message advising the voice mailbox had not been set up.

SR 97 (sealed).

After the PSI was filed, Pray's father provided her handwritten portion of the PSI to Court Services, which was filed as an addendum on January 23, 2026. SR 223 (sealed). Pray only admitted to texting Ware to obtain methamphetamine and denied playing any part in obtaining fentanyl for E.G. SR 225 (sealed). She did admit to knowing E.G. was using fentanyl: "When [E.G.] died & [Ware] was held responsible I too felt responsible in some way because I knew she was using and I didn't try harder to stop him or her b/c [sic] I was using meth" and "My use condoned the ultimate victim here which was [E.G.] b/c [sic] [Ware] & [E.G.] were opiate users. I knew they were using and didn't to [sic] stop it." SR 225, 243 (sealed). However, Pray felt that no sentence was appropriate for her as she should not be punished for relapsing. SR 244 (sealed).

Pray's father also wrote a letter that was attached as an addendum to the PSI. SR 216 (sealed). In the letter, he details Pray's attempts at treatment, including:

- Addiction Treatment Center in Howard, South Dakota in February 2024, with inpatient treatment for two weeks followed by outpatient treatment "which helped temporarily";
- Avera treatment program in Aberdeen, South Dakota in September 2024 in which Pray "left after a few days";
- Keystone treatment program in Canton, South Dakota in January 2025 in which Pray completed the program and was sober "for a couple of months"; and
- Inpatient treatment program in Howard, South Dakota in August 2025 in which Pray was "expelled after a few days" as an individual believed to be her boyfriend was also in the program, which was against policy.

SR 216 (sealed).

The sentencing hearing was held on January 23, 2026. The circuit court again stated the amended charge was a Class 5 felony with a maximum possible sentence of five years in the state penitentiary.

SR 327, 334; SENT 2, 9. After hearing arguments from the parties, the circuit court sentenced Pray to a five-year penitentiary sentence, with one year suspended. SR 219, 340-41; SENT 15-16.

The circuit court also found aggravating circumstances exist that pose a significant risk to the public to require a departure from presumptive probation, stating them on the record at the sentencing hearing. SR 340; SENT 15. Both the Judgment of Conviction and the Amended Judgment of Conviction list the aggravating circumstances as well. SR 221, 275.

ARGUMENTS

I

THE CIRCUIT COURT EXCEEDED THE STATUTORY
MAXIMUM UNDER SDCL 22-3-8 AND SDCL 22-42-5 WHEN
SENTENCING PRAY.

“[W]hether a defendant’s sentence exceeds the jurisdiction and authority of the court is reviewed de novo.” *State v. Humpal*, 2017 S.D. 82, ¶ 6, 905 N.W.2d 117, 119 (citing *State v. Orr*, 2015 S.D. 89, ¶ 3, 871 N.W.2d 834, 835). In addition, issues of statutory interpretation are also reviewed de novo. *State v. Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d 212, 217 (citing *State v. Bettelyoun*, 2022 S.D. 14, ¶ 16, 972 N.W.2d 124, 129).

Pray was originally charged with one count of Conspiracy to Distribute a Controlled Drug or Substance (Fentanyl), in violation of SDCL 22-42-2 (distribution statute) and SDCL 22-3-8 (conspiracy statute). SR 1-2. Each party to a conspiracy “may be punished up to the maximum penalty which may be imposed for a crime which is one level below the penalty prescribed for the crime underlying the conspiracy.” SDCL 22-3-8. However, “the punishment for conspiracy to commit a violation of § 22-42-2 is *the same* as the punishment for violating § 22-42-2.” SDCL 22-42-2.4 (emphasis added). Therefore, as distribution of a controlled substance would be a Class 4 Felony under SDCL 22-42-2, the original charge for Conspiracy to Distribute a Controlled Drug or Substance (Fentanyl) was also a Class 4 Felony under SDCL 22-42-2.4.

There is no similar statutory provision making the punishment for possession of a controlled substance under SDCL 22-42-5 the same as the punishment for the amended charge of Conspiracy to Possess a Controlled Drug or Substance (Methamphetamine). Rather, under SDCL 22-3-8, the maximum penalty for the amended charge is one level below the penalty prescribed for possession of a controlled substance. As possession of a controlled substance is a Class 5 felony under SDCL 22-42-5, then the amended charge would be a Class 6 felony, with a maximum penalty of two years imprisonment, a \$4,000 fine, or both. SDCL 22-6-1.

The circuit court and both parties presented Pray's crime as a Class 5 felony. There was no objection by Pray about the statutory maximum to be considered at sentencing. However, on appellate review, the State must agree that the circuit court exceeded the statutory maximum when sentencing Pray. This Court should remand only for the limited purpose of resentencing within the statutory maximum. The State will address the second issue raised in Pray's brief below as it relates to the circuit court's departure from presumptive probation under SDCL 22-6-11 and will be pertinent in resentencing.

II

THE CIRCUIT COURT DID NOT ERR IN DEPARTING FROM PRESUMPTIVE PROBATION UNDER SDCL 22-6-11.

SDCL 22-6-11 mandates a probationary sentence for certain Class 5 and Class 6 felonies. However, the circuit court can depart from the presumptive probation requirement “if the court finds aggravating circumstances exist that pose a significant risk to the public” and “state[s] the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” *Id.*

The circuit court found aggravating circumstances exist that pose a significant risk to the public and imposed a penitentiary sentence in this case. SR 221, 275, 340; SENT 15. Pray argues that the circuit court failed to connect the aggravating factors to a significant public safety risk. AB 16. However, Pray failed to object to the circuit court’s application of SDCL 22-6-11 and departure from presumptive probation.

“To preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons.” *State v. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 443 (citing SDCL 23A-44-13). “Issues not advanced at trial cannot ordinarily be raised for the first time on appeal.” *Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d at 443 (citing *State v. Henjum*, 1996 S.D. 7, ¶ 13, 542 N.W.2d 760, 763). And specifically in cases involving the application of SDCL 22-6-11, “parties must first raise the

issue to the circuit court to preserve the error for appeal and avoid plain error review.” *State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d 561, 569.

“[W]hen ‘an issue has not been preserved by objection at trial,’ this Court *may* conduct a limited review to consider ‘whether the circuit court committed plain error.’” *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338 (quoting *State v. Buchhold*, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821) (emphasis added). To establish plain error, Pray must show that there was “‘(1) error, (2) that is plain, (3) affecting substantial rights; and only then may [this Court] exercise [its] discretion to notice the error if (4) it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.’” *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206 (quoting *State v. Beck*, 2010 S.D. 52, ¶ 11, 785 N.W.2d 288, 293).

Pray must also show prejudice under the third prong. “Without prejudice, the error does not ‘affect substantial rights’ under the third prong of plain error review and ‘[an appellate court] ha[s] no authority to correct it.’” *Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d at 206 (quoting *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)).

“‘Prejudice’ in the context of plain error requires a showing of a ‘reasonable probability’ that, but for the error, the result of the proceeding would have been different.” *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763 (quoting *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283).

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

Even if this Court finds the decision to deviate from presumptive probation without objection is reviewed for an abuse of discretion, Pray cannot meet this burden. *State v. Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d 57, 59. "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.'" *Id.* (quoting *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616). If that standard applies, this Court generally "will not disturb a sentence that is within the statutory maximum." *State v. Yeager*, 2019 S.D. 12, ¶ 16, 925 N.W.2d 105, 111.

Before imposing a sentence, a circuit court should "acquire a thorough acquaintance with the character and history of the [defendant] before it" including examining 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. Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d 133, 140 (citing *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412). “[S]entencing involves considering the totality of the circumstances as to the *individual* defendant before the court, and this same governing principle applies when a court makes its ultimate determination whether to depart from the otherwise mandated presumptive probation.” *State v. Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d 1, 5 (emphasis in original).

At the sentencing hearing, the circuit court noted that it had reviewed the PSI, Pray’s handwritten portion of the PSI, the letter from Pray’s father, and the level of service inventory. SR 328; SENT 3. Neither party objected to the contents of the PSI. SR 328-29; SENT 3-4. The State asked for an appropriate sentence under the facts of the case and the plea, noting that Pray did not cooperate with Court Services and that her actions were directly related to E.G.’s death. SR 329-30; SENT 4-5. Pray’s counsel reiterated her denial of any involvement in the transactions to provide fentanyl to E.G. and stated that even though Pray knew the others were using fentanyl, her offense was conspiracy to possess methamphetamine due to her addiction and relapse. SR 330-31, 333; SENT 5-6, 8. Finally, Pray’s counsel asked for a sentence allowing her to attend a long-term treatment program in North Dakota. SR 331-33; SENT 6-8.

The circuit court engaged in a lengthy analysis of the information contained in the PSI, including Pray’s criminal history, education,

training, employment, family, substance use history, treatment history, and lack of cooperation in the PSI process. SR 334-38; SENT 9-13. The circuit court also noted that Pray abused her position with Compass Point and the treatment court system “by engaging in inappropriate and unethical relationships with clients” and “violating numerous Compass Point policies that are designed to protect vulnerable individuals and maintain the integrity of treatment.” SR 338-39; SENT 13-14. Specifically, the circuit court stated to Pray “[b]ecause of your inactions and actions, [E.G.] is dead. As noted by the Compass Point Board of Directors, the consequences of your misconduct continue to reverberate within Compass Point.” SR 339; SENT 14. Finally, the circuit court mentioned Pray’s belief that she should not receive any punishment because of her addiction. SR 339; SENT 14.

The circuit court listed mitigating factors such as Pray’s lack of significant criminal history, education, employment, family, and parental support. SR 339-40; SENT 14-15. However, the circuit court found “aggravating circumstances exist that pose a significant risk to the public [which require] a departure from presumptive probation under SDCL Section 22-6-11.” SR 340; SENT 15.

Those circumstances are your failure to comply with the PSI process, despite a Court order to do so, you used methamphetamine while employed as a counselor at Compass Point and while working with the Fourth Circuit Treatment Courts, you have not taken responsibility for your actions to the extent that you made it clear at the change of plea hearing that you were pleading to conspiracy to obtain possession of methamphetamine, not fentanyl, when fentanyl is the

consistent them through all law enforcement reports. You have been through many forms of treatment and you continue to obtain and use controlled substances. Your actions have diminished the trust that this community has in Compass Point and in the treatment court system. Your actions and inactions are directly connected to the death of [E.G.] and the compelling facts of this case.

SR 340; SENT 15. After the circuit court pronounced its sentence, it asked if either party had any questions. SR 341-42; SENT 16-17.

Neither Pray nor her attorney raised any questions or objections regarding the circuit court's finding of aggravating circumstances or imposition of a penitentiary sentence. SR 341-42; SENT 16-17. The Judgment of Conviction and Amended Judgment of Conviction set out the aggravating circumstances as well:

[T]hat pursuant to SDCL 22-6-11, a Court shall sentence a Defendant to a term of probation unless the Court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation and the Court having found the following aggravating factors exist justifying a deviation, to-wit:

1. Failure to comply with Presentence Investigation.
2. Use Meth while a counselor and with 4th Circuit Specialty Court.
3. Not taking responsibility.
4. Multiple attempts at treatment have failed.
5. Action connected to death.

SR 221, 275.

“What constitutes aggravating circumstances posing ‘a significant risk to the public’ is not defined by statute.” *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d at 5. “Likewise, this Court has not provided a definition of this phrase, perhaps because it is not one that can be precisely defined.” *Id.*

“Our precedent, however, offers some guidance as to what this Court has or has not deemed to be aggravating circumstances constituting a significant risk to the public.” *Id.*

The aggravating factors found by the circuit court in this case are similar to those upheld by this Court in other cases. *See, e.g., State v. Hernandez*, 2014 S.D. 16, ¶ 12, 845 N.W.2d 21, 23 (noting Hernandez’ “repeated attempts to undergo treatment and not follow through with that” and “statements that [Hernandez is] making not evidencing a true change and intention to change [his] behavior”); *Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d at 61 (noting that Beckwith “deprived the CSO and the court of the information necessary to determine an appropriate sentence,” had prior felonies and a “long history of illegal drug usage,” “demonstrated a willingness to use violence against a law enforcement officer,” and failed “to acknowledge culpability and remorse for his acts”).

The State acknowledges that the circumstances of each case are unique, and as sentencing and the departure from presumptive probation must be based on the totality of the circumstances as related to the individual defendant, what may constitute an aggravating circumstance in one case may not in a different case. But the aggravating circumstances found by the circuit court in this case—failure to cooperate with CSO on the PSI, behavior that negatively affected others through her work at Compass Point and the Fourth Circuit drug court program including loss of trust for those programs in

the community, continued drug use and history of failed treatment attempts, and failure to accept responsibility despite the direction connection between her actions and inactions and E.G.'s death—demonstrate a significant risk to the public and support a departure from presumptive probation.

Pray has failed to show that the circuit court erred in departing from presumptive probation. The circuit court carefully reviewed all of the information in the PSI, including the facts of this case and Pray's lack of cooperation with the PSI process. In considering the totality of the information before it, the circuit court properly found aggravating circumstances existed that pose a significant risk to the public, stating them on the record and in the Judgment of Conviction and Amended Judgment of Conviction.

Finally, Pray is unable to show prejudice or any reasonable probability that the result of the proceeding would have been different as it relates to the imposition of a penitentiary sentence instead of a probationary sentence.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that this Court enter a limited remand for the sole purpose of resentencing Pray within the statutory maximum, but affirming the circuit court's departure from presumptive probation and the imposition of a penitentiary sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,946 words.

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

Dated this 4th day of June.

/s/ Angela R. Shute

Angela R. Shute

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of June, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ashlee Pray* was served via electronic mail upon Derek D. Friese at Derek.Friese@state.sd.us.

/s/ Angela R. Shute

Angela R. Shute

Assistant Attorney General

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

ASHLEE PRAY,

Defendant/Appellant.

No. 31389

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

HONORABLE MICHAEL W. DAY
Circuit Court Judge

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Notice of Appeal Filed on February 5, 2026

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

ASHLEE PRAY,

Defendant and Appellant.

No. 31389

PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Ashlee Pray, will limit discussion to the issues that need further development or argument. Any matter raised in Pray's initial brief, but not specifically mentioned herein, is not intended to be waived. Pray will attempt to avoid revisiting matters adequately addressed in the initial brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." All citations will be followed by the appropriate page number. Pray relies upon the Jurisdictional Statement, Statement of the Case and Facts, and Statement of Legal Issues presented in her initial brief, filed with the Court on April 23, 2026.

ARGUMENT

I. THE CIRCUIT COURT ILLEGALLY SENTENCED PRAY BY EXCEEDING THE STATUTORY MAXIMUM UNDER SDCL 22-3-8 AND SDCL 22-42-5.

The State concedes it “must agree that the circuit court exceeded the statutory maximum when sentencing Pray.” SB 10. Pray agrees, because SDCL 22-3-8 and SDCL 22-42-5, and their relationship in application, provide for a two-year statutory maximum sentence. Pray asks this Court to remand for resentencing within the appropriate statutory framework. *See State v. Roedder*, 2019 S.D. 9, ¶¶ 39-41, 923 N.W.2d 537, 548-49 (remanding for resentencing where the circuit court “overlooked the applicability” of the appropriate statutory framework in sentencing).

II. THE CIRCUIT COURT MISAPPLIED SDCL 22-6-11 IN ENUMERATING AGGRAVATING CIRCUMSTANCES WITHOUT CONNECTING THEM TO A SIGNIFICANT PUBLIC SAFETY RISK

Pray does not provide an additional, substantive reply to Issue II in this Reply Brief. Pray respectfully refers this Court to the argument in the initial Appellant’s Brief on this issue and asserts that the issue remains preserved and is not waived.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court vacate the illegal sentence and remand for resentencing.

Respectfully submitted this 6th day of July, 2026.

/s/ Derek D. Frieze

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1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Reply Brief contains 364 words
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 6th day of July, 2026.

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The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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