

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

PATRICK KEITH JOHNSON,

Defendant/Appellant.

No. 31357

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
JACKSON COUNTY, SOUTH DAKOTA

HONORABLE M. BRIDGET MAYER
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as “SR” and will be followed by the appropriate page number. Exhibits are referred to as “Ex.” followed by the exhibit number or letter. All references are followed by the appropriate page number. The transcripts are referred to as follows:

Initial Appearance (August 7, 2024)..... IA
Arraignment (September 11, 2024) AH
Status Hearing (November 13, 2024)..... SH1
Status Hearing (January 8, 2025)..... SH2
Status Hearing (March 12, 2025)..... SH3
Status Hearing (May 21, 2025) SH4
Status Hearing (July 9, 2025) SH5
Status Hearing (August 13, 2025) SH6

Warrant Hearing (November 12, 2025)..... WH

Change of Plea/Sentencing (January 7, 2026) SENT

Defendant and Appellant, Patrick Johnson, will be referred to as “Johnson.” The Jackson County State’s Attorney, Cassie J. Wendt, will be referred to as “the State.” Tina Friesner, Johnson’s friend who was a passenger on his motorcycle during the incident, will be referred to as “Friesner.”

JURISDICTIONAL STATEMENT

Johnson appeals from the Judgment and Sentence entered on January 16, 2026, by the Honorable M. Bridget Mayer, Circuit Court Judge of the Sixth Judicial Circuit. SR 209-11. Johnson timely filed Notice of Appeal on January 22, 2026. SR 212-13. 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 LACKED SUBJECT MATTER JURISDICTION TO IMPOSE A FELONY SENTENCE UNDER 22-42-5.1 PURSUANT TO AN AMENDED COMPLAINT

The circuit court entered judgment under SDCL 22-42-5.1 pursuant to an Amended Complaint.

S.D. Const. art. VI, § 10

SDCL 23A-6-1

Honomichl v. State, 333 N.W.2d 797 (S.D. 1983)

State v. Eidahl, 486 N.W.2d 257 (S.D. 1992)

II. WHETHER THE CIRCUIT COURT MISAPPLIED SDCL 22-6-11 BY CONSIDERING DISPUTED ELEMENTS OF A DISMISSED CHARGE

The circuit court listed “the severity of the injury to the victim and her family” as an “aggravating factor” which required deviation from presumptive probation.

SDCL 22-6-11

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

State v. Flowers, 2016 S.D. 63, 885 N.W.2d 783

III. WHETHER THE CIRCUIT COURT EXCEEDED ITS STATUTORY AUTHORITY IN REVOKING JOHNSON’S DRIVER’S LICENSE FOR LIFE UPON CONVICTION FOR DUI FIRST OFFENSE

The circuit court revoked Johnson’s driver’s license for life upon the DUI conviction.

SDCL 32-23-2

State v. Schwebach, 2000 S.D. 50, 609 N.W.2d 130

State v. Hatchett, 2003 S.D. 85, 667 N.W.2d 680

STATEMENT OF CASE AND FACTS

On August 4, 2024, Johnson and Friesner were involved in a motorcycle accident on Interstate 90 near mile marker 172 in Jackson County. SENT 18-19. Both Johnson and Friesner were injured. *Id.* Johnson was transported to the Philip hospital with non-life-threatening injuries. *Id.* Friesner was airlifted to Rapid City. *Id.* Friesner’s injuries were more extensive than Johnson’s. SENT 10. She suffered a traumatic brain injury and underwent significant rehabilitation

efforts as a result. SENT 36. She was eventually placed in assisted living. SENT 37.

Hospital staff located a small bag in Johnson's pocket which contained methamphetamine. SENT 19. In statements to law enforcement, Johnson admitted to methamphetamine use earlier that morning in Rapid City, and law enforcement obtained a blood sample. *Id.* The sample tested positive for the presence of methamphetamine. *Id.*

On August 29, 2024, a Jackson County Grand Jury indicted Johnson on six counts, charging Johnson with following offenses: Count 1 - Vehicular Battery in violation of SDCL 22-18-36; Count 2 - Unauthorized Possession of Controlled Drug or Substance in violation of SDCL 22-42-5; Count 3 - Driving While Under the Influence of a Controlled Drug or Substance in violation of SDCL 32-23-1(2) ("DUI"); Count 4 - Driving Under Revocation in violation of SDCL 32-12-65(1); Count 5 - Possession of Drug Paraphernalia in violation of SDCL 22-42A-3; and Count 6 - Improper Lane Change in violation of SDCL 32-26-6. SR 32-34. The Indictment was filed on August 30, 2024. SR 32.

On September 30, 2025, Johnson, through his attorney, filed a Motion for Pre-Plea Presentence Investigation, stating "[t]here is currently a written plea agreement that has been offered by the State and has been signed by the defendant," and citing Johnson's residence in Iowa, Johnson's transportation difficulties, and judicial economy. SR 40. The same day, the circuit court signed an Order for Pre-Plea Presentence Investigation. SR 41.

On October 13, 2025, the State filed an Amended Complaint alleging that on August 4, 2024, Johnson committed the offenses of Unauthorized Possession of a Controlled Drug or Substance in violation of SDCL 22-42-5 and Unauthorized Ingestion of a Controlled Drug or Substance in violation of SDCL 22-42-5.1. SR 42-43.

On January 7, 2026, the circuit court¹ held a Change of Plea and Sentencing Hearing. *See generally* SENT. The circuit court began by inviting sentencing argument from defense counsel. SENT 9-10. Defense counsel began offering remarks related to sentencing when the circuit court interjected: “before we go any further, do we need to change the pleas?” SENT 10. The circuit court then engaged in the following discussion with the State:

The Court: All right. So the Indictment, I believe, is the most recent document. Is that right Ms. Wendt?

The State: That’s correct, Judge. No, that’s – hold on.

The Court: There’s an Amended Complaint.

The State: Yes, the Amended Complaint and Amended Information should be the most recent.

The Court: I don’t see the Amended Information filed unless it is behind the Complaint? That’s got – the Amended Complaint is for the two Class 5 felonies, the unauthorized possession of methamphetamine and then the unauthorized ingestion of methamphetamine.

The State: Correct.

The Court: and then are you pulling the Indictment charge of the DUI as well?

The State: Yes.

¹ The Honorable M. Bridget Mayer, Circuit Court Judge of the Sixth Judicial Circuit.

SENT 13. The circuit court then advised Johnson on the contents of the Amended Complaint and asked whether he would waive his right to a preliminary hearing on the felony charges. SENT 13-14. Johnson confirmed, and Johnson's counsel agreed, stating "there would have been a finding during the Indictment stage on those specific charges." SENT 14. The circuit court then stated that with a waiver of the probable cause finding, "the Information will mimic totally the Amended Complaint," and asked for Johnson's consent for the State to file the Information "within the next 48 hours." SENT 14-15. Johnson and his counsel agreed. SENT 15. The circuit court proceeded to accept Johnson's guilty plea to the allegations contained in the Amended Complaint and to Count 3 of the Indictment (DUI). SENT 16-23.²

Under the plea agreement,³ the State agreed to dismiss the remainder of the charges in the Indictment. SENT 21. The State clarified, however, its concession under the agreement to recommend any certain sentence was

² The circuit court inquired of Johnson: "what are your pleas to the two charges, the felonies that I've discussed and to this misdemeanor in the Indictment? How do you plead to these three charges?" SENT 16. Johnson responded "Guilty." *Id.*

³ The plea agreement was attached to the Presentence Investigation Report (PSI). SR 61-65. The circuit court referenced the "unsigned" plea agreement at the Change of Plea and Sentencing Hearing, and the parties agreed the document contained the pertinent terms of the agreement, with the exception of the State's promise to recommend "consecutive, suspended penitentiary sentence and an extended period of probation" with "a period of several days in jail" to be served. SR 64.

revoked, and “[i]t’s an open sentencing today.” SENT 21. Johnson and his counsel confirmed these terms. SENT 21-22.

The parties offered competing opinions regarding whether Johnson acted negligently and the causation of the accident. Johnson filed a report from Charles Potts, who stated he had “extensive expertise in both the mechanical repair and operation of motorcycles.” SR 53; SR 129. The State did not object to the admission of the report, which was included in the PSI. SENT 8. Potts opined “the crash resulted from a rapid deflation of the motorcycle’s rear tire due to a valve stem malfunction,” and “that even an experienced motorcycle rider would struggle to maintain control of the vehicle.” SR 53; SR 129. Potts’ opinion was based on his review of dashcam video from a semi-truck that preserved a recording of the accident. SENT 26.

In providing a factual basis for the plea, the State referenced “law enforcement reports by one of the law enforcement officers who indicated that he had a knowledge in motorcycles and motorcycle accidents and he believed had the Defendant been sober, he would have been able to keep that motorcycle upright and safely get to the side of the road.” SENT 19-20. *Id.*

In sentencing remarks, Johnson’s counsel urged the circuit court to consider the offenses, Class 5 felonies and a Class 1 misdemeanor, as triggering presumptive probation. SENT 10. The State argued “there are substantial aggravating factors” justifying departure. SENT 38. First, the State asserted “[t]hese are the Defendant’s fourth and fifth life felony convictions,” and stated

Johnson “has used substances for 35 years.” *Id.* The State also emphasized Johnson’s recent arrest in Iowa for “possession with intent to deliver methamphetamine,” a felony offense. SENT 38-39. Further, the State listed Johnson’s prior criminal history, which “dates back to 1987,” and referenced Johnson’s urinalysis testing positive for methamphetamine while on bond conditions. SENT 39-40. In reference to Friesner not wearing a helmet, the State said “we’ve heard a lot of blame being placed on the victim,” but emphasized that Johnson did not have a valid driver’s license or maintain sobriety to operate a vehicle. SENT 41. Regarding rehabilitation, the State claimed that Johnson’s new charges in Iowa demonstrate he was not a “good candidate for probation.” SENT 41.

The State asserted that Johnson “was under the influence that day and completely unable to respond to what was going on.” SENT 42. Defense counsel objected, arguing the State was “bringing in new facts into evidence.” *Id.* The circuit court overruled the objection but stated “I’ll give it the weight and credibility it deserves.” SENT 42-43. The State then emphasized Friesner’s injuries, inability to care for herself, and the impact on her family. SENT 43-45. Ultimately, the State argued “the Court has aggravating circumstances and has more than enough information before it to order a consecutive penitentiary sentence on each of these felony charges and sentence the Defendant to ten years.” SENT 45. Alternatively, the State argued, “if you’re going to suspend

that, that he be placed on supervised release for a period of ten years,” and the felony sentences be consecutive. SENT 49-50.

Friesner’s daughter then provided a statement to the circuit court. SENT 50-52. She detailed the family’s emotional suffering and asked for “justice for my mother and our family.” SENT 51-52.⁴ Friesner’s sister next provided a statement. SENT 53.⁵ She detailed the horrific events of the accident and Friesner’s difficult recovery efforts. SENT 53-56. She stated, “[i]t’s a tragedy in that my sister Tina was the victim of a dangerous motorcycle accident,” and reiterated that “[w]e demand justice and true accountability for the irreversible damage you inflicted.” SENT 59-61.

Johnson’s counsel asked to be heard and “respond to a couple of the factors that have been mentioned.” SENT 61-62. In response, Johnson’s counsel argued the circuit court should limit its consideration of sentencing factors to those related to the charges to which Johnson pleaded guilty. SENT 65. Counsel argued, “[w]hile they can say there are negligences that are involved, it was not proven before this Court.” SENT 65. Further, counsel stated “the key causation to this was the valve stem blowing out on an 80-mile-an-hour speedway while

⁴ Friesner’s daughter stated, “Your Honor, this was not just an accident. It was a result of a choice, a choice that forever changed my mom’s life and it destroyed the future she deserved.” SENT 51-52.

⁵ Friesner’s sister read her statement filed within the PSI. SR 67-69. In the statement, she attributed Johnson with “negligence, recklessness, and ignorance,” in allowing Friesner to ride on his motorcycle. SR 68. *See also* SENT 57-58.

there's a trailer behind the motorcycle. That is the causation of the damage."

SENT 65-66. Counsel then referenced Friesner's "helmet not being worn," and stated Johnson "feels terrible about the fact there was not a helmet being worn but there was a helmet available." SENT 66.

Ultimately, counsel argued that Johnson's crimes and the accident were "concurrent," but emphasized the level of criminality, and requested "that the Court not place accountability for other factors that were beyond his causation and control. And that would be my rebuttal." SENT 66-67.

At the outset of its comments pronouncing sentence, the circuit court referenced the sentencing factors of rehabilitation, deterrence, retribution, and incapacitation. SENT 67-68. The circuit court also referenced Friesner not wearing a helmet during the accident, but attributed the decision to Johnson not requiring a helmet of his passenger, stating "[t]hat's what the person that's in charge of the vehicle needs to do and you didn't do it." SENT 70-71. The circuit court continued, "I am not here on a vehicular battery case. That was pled away. I understand that and I am weighing that this was pled down and other charges dismissed in leniency." SENT 71.

The circuit court addressed presumptive probation under SDCL 22-6-11 and described aggravating circumstances that it found stating that "Defendant poses a serious risk to the public that requires the Court to depart from giving presumptive probation." SENT 73. First, the circuit court listed the "severity of these injuries on not only the passenger but her family, physically, emotionally,

mentally, financially, are mammoth.” *Id.* The circuit court expressed condolences to Friesner’s family members. SENT 73-74. Second, the circuit court identified “the danger that [Johnson] presented to the motoring public that day.” SENT 74. Next, it stated Johnson had “an extensive criminal history,” and had used methamphetamine prior to the accident. SENT 74. The circuit court described Johnson’s “numerous misdemeanor history” and stated “you’re not safe by even having access to methamphetamine while you’re on a moving vehicle.” SENT 75. It concluded, “there is more than sufficient and ample factors which make you a danger to the community as stated, in addition to the factors that were stated by the State that may be added into the judgment as well.” *Id.* Finally, the circuit court again referenced the “lenience and great leniency” of the plea agreement. *Id.*

The circuit court pronounced its sentence: five years in the South Dakota Penitentiary on Count 1 (Possession of a Controlled Substance), four years consecutive on Count 2 “the unauthorized ingestion.” *Id.* On the DUI, the circuit court sentenced Johnson to credit for 61 days served in jail, and revoked Johnson’s license for “lifetime.” SENT 72-73. The circuit court filed the written Judgment and Sentence on January 16, 2026. SR 209-211.⁶ The Judgment referenced the Amended Complaint, and stated Johnson waived his right to a

⁶ The Settled Record contains a Denied Judgment and Sentence, filed on January 13, 2026. SR 206-208. The document contains a notation: “[p]lease put in fines, ct costs, atty fees on felony cts as well.” SR 208.

preliminary hearing and “granted the filling of an Information.” SR 209. It further stated that “[o]n January 8, *nun pro tunc* to January 7, 2026, an Information was filed,” charging Johnson with Possession of Controlled Substance and Ingestion of Controlled Substance. SR 209. The Settled Record does not contain an Information and does not contain any document filed on January 8, 2026. *See generally* SR.

Regarding presumptive probation, the Judgment listed aggravating factors as:

the severity of the injury to the victim and her family; the danger Defendant poses to the public; Defendant’s extensive criminal history; [the] fact that drugs were found on Defendant’s person and in his system at the time of these charges; Defendant’s failure to follow Court Orders; Defendant having been arrested in Iowa while out on bond in this matter for additional Methamphetamine charges, to include Intent to Distribute; Defendant testing positive for the presence of Methamphetamine in his system while out on bond for this matter; Defendant’s use of substances for 35 years.

SR 210. The Judgment imposed the sentence pronounced at the Change of Plea and Sentencing hearing – five years on Count 1, four years on Count 2 consecutive to Count 1, credit for time served on Count 3 (DUI), and a lifetime driver’s license revocation. SR 210-11.⁷

ARGUMENT

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO SENTENCE JOHNSON FOR VIOLATION OF FELONY UNAUTHORIZED INGESTION UNDER SDCL 22-42-5.1

⁷ The Judgment stated “Defendant’s driver license shall be *suspended* for the Defendant’s lifetime.” SR 211 (emphasis added).

A. Standard of Review

The Constitution of South Dakota provides:

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

S.D. Const. art. VI, § 10. This constitutional command is statutorily implemented under SDCL 23A-6-1, which states every public offense must be prosecuted by “indictment or by an information signed by a prosecuting attorney,” with enumerated exceptions not applicable to felony prosecutions. Therefore, this Court has stated, “[w]ithout a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction and thus an accused may not be punished for a crime.” *Honomichl v. State*, 333 N.W.2d 797, 798 (S.D. 1983) (citing *Albrecht v. United States*, 273 U.S. 1, 47 (1927)). See also *State v. Neitge*, 2000 S.D. 37, ¶ 10, 607 N.W.2d 258, 260-61 (stating “subject-matter jurisdiction entails the power of a court to hear a case, determine the facts, apply the law and set a penalty”) (citation modified)

Jurisdictional questions are reviewed de novo. *Neitge*, 2000 S.D. 37, ¶ 10, 607 N.W.2d at 260 (citing *In re Estate of Galada*, 1999 S.D. 21, ¶ 8, 589 N.W.2d 221, 222). See also *State v. Bettelyoun*, 2022 S.D. 14, ¶ 16, 972 N.W.2d 124, 128-29 (stating “[q]uestions of jurisdiction are legal questions reviewed under a de novo standard”) (quoting *State v. Owen*, 2007 S.D. 21, ¶ 10, 729 N.W.2d 356, 362). Even

when not preserved below, this Court “is required to consider the issue of subject matter jurisdiction where it was not raised below in order to avoid an unwarranted exercise of authority.” *State v. Eidahl*, 486 N.W.2d 257, 259 (S.D. 1992).

B. *The Circuit Court Was Without Jurisdiction in Imposing Sentence Under SDCL 22-42-5.1.*

The circuit court entered its sentence under SDCL 22-42-5.1 (“Ingestion”) pursuant to the Amended Complaint. SR 209. The Amended Complaint is the only document alleging Ingestion.⁸ Although the Judgment stated that an Information was filed “nunc pro tunc,” none exists in the record. *Id.* See generally SR. This Court has consistently held that a formal Indictment or Information is a jurisdictional prerequisite. See *Honomichl*, 333 N.W.2d at 798 (stating “[w]ithout a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction and thus an accused may not be punished for a crime”); *Eidahl*, 486 N.W.2d at 259 (stating “failure to file the information narrows the appeal to jurisdiction and the law is settled that [the circuit court] had no jurisdiction”); *State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107 (stating subject matter jurisdiction is “the courts’ statutory or constitutional power to adjudicate the case,” and “is determined by the indictment”) (quoting *United*

⁸ Although the circuit court accepted Johnson’s guilty plea for SDCL 22-42-5 (Possession of a Controlled Substance) pursuant to the Amended Complaint, that charge was instituted in the Indictment. SR 32-33. The DUI sentence was imposed pursuant to the charge “contained within the Indictment.” SR 209.

States v. Cotton, 535 U.S. 625, 630 (2002)). See also *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 44, 835 N.W.2d 886, 902 (applying jurisdictional requirement to Part II habitual offender proceedings). All these cases demonstrate a strict requirement. The circuit court never obtained subject matter jurisdiction over the Ingestion count, which was not contained in the Indictment. SR 32-34. Therefore, it could not impose sentence on that charge.

Furthermore, even if Johnson waived his right to a preliminary hearing or probable cause finding, subject matter jurisdiction “cannot be conferred by agreement, consent, or waiver,” and it “cannot be acquired by estoppel.” *Honomichl*, 333 N.W.2d at 799. See also *Eidahl*, 486 N.W.2d at 259 (holding “jurisdiction may not be conferred by agreement, consent or waiver,” even when “the omission of the filing of the information was completely overlooked”). Under well-established law, Johnson cannot confer subject matter jurisdiction onto the circuit court. Nor can the circuit court confer jurisdiction upon itself. The authority to institute felony charges by filing of an Indictment or Information is exclusive to the prosecutor. Although Johnson did not identify this jurisdictional defect in the circuit court,⁹ the issue can be raised at any time. And because this is a clear jurisdictional defect, Johnson’s conviction under SDCL 22-45-5.1 cannot stand. *LaCroix v. Fluke*, 2022 S.D. 29, ¶ 20, 975 N.W.2d 150, 159 (stating “a judgment rendered by a court without jurisdiction to pronounce it

⁹ The circuit court and the State discussed filing the Information during the Chang of Plea and Sentencing Hearing. Still, none was ever filed. SENT 13.

is wholly void and without any force or effect whatever”) (quoting *State v. Haase*, 446 N.W.2d 62, 64 (S.D. 1989)).

II. THE CIRCUIT COURT MISAPPLIED SDCL 22-6-11 WHEN IT CONSIDERED ELEMENTS OF A DISMISSED CHARGE, EMPHASIZED RETRIBUTION, AND FAILED TO CONNECT THE AGGRAVATING CIRCUMSTANCES TO PUBLIC SAFETY RISK

A. Standard of Review

“Whether 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. In *Kurtz*, this Court found it “apparent that the circuit court did not properly apply” SDCL 22-6-11 when it failed to find “aggravating circumstances that reveal Kurtz poses a significant risk to the public, as required by the statute to depart from presumptive probation...” *Id.* at ¶ 13, 5. Similarly, in *State v. Flowers*, this Court characterized the applicability and scope of SDCL 22-6-11 as “a matter of statutory interpretation,” subject to de novo review. 2016 S.D. 63, ¶ 5 n.1, 885 N.W.2d 783, 784 n.1. In *Flowers*, the Court examined whether an admission to a Part II Information enhanced “the classification of the defendant’s crime,” and thereby rendered presumptive probation inapplicable. *Id.* at ¶ 5, 784-85. *See also State v. Underwood*, 2017 S.D. 3, ¶¶ 5-8, 890 N.W.2d 240, 241-43 (reviewing under de novo standard the issue of whether “a circumstance is not aggravating within the meaning of SDCL 22-6-11 unless it demonstrates a risk of violence or career criminality”).

Here, similar to the issue in *Flowers*, Johnson asserts the circuit court misapplied SDCL 22-6-11 when it sentenced him on Class 5 felonies, but considered disputed and unproven elements of a dismissed Class 4 felony (i.e. Vehicular Battery requirements of “negligence” causing serious bodily injury).¹⁰ Johnson argues that because this is not a procedural defect subject to plain error review, but a misapplication of SDCL 22-6-11, this Court should review this issue under the de novo standard of review. *See State v. Feucht*, 2024 S.D. 16, ¶ 22, 5 N.W.3d 561, 569 (finding the circuit court’s failure to “state the aggravating circumstances on the record at the time of sentencing” to be an alleged procedural error that, if not preserved at the trial court level, is subject to plain error review).

B. *The Circuit Court Misapplied SDCL 22-6-11 When it Considered the Disputed Elements of Negligence and Causation from the Dismissed Vehicular Battery Charge.*

In sentencing Johnson, the circuit court emphasized that the primary aggravating circumstance was Friesner’s injuries and the effect on her and her family “physically, emotionally, mentally, [and] financially.” SENT 73. However, it acknowledged that the Vehicular Battery charge was dismissed and its elements disputed. SENT 71. This case is similar to the situation in *Flowers*,

¹⁰ Defense counsel argued that, given the cause of the accident, attributing the causation of Friesner’s injuries to him was improper, asking “the Court not place accountability for other factors that were beyond his causation and control. And that would be my rebuttal.” SENT 66-67.

where the State argued the defendant's admission to a Part II Information effectively enhanced the crime's classification, and resulted in presumptive probation being inapplicable. 2016 S.D. 63, ¶ 6, 885 N.W.2d at 784-85. In rejecting the State's argument, this Court noted the defendant's "principal offense was a Class 5 felony. Therefore, the presumptive probation requirements of SDCL 22-6-11 applied." *Flowers*, 2016 S.D. 63, ¶ 7, 885 N.W.2d at 785.

Although the circuit court acknowledged the dismissal of the Vehicular Battery charge, the circuit court attributed negligence and causation to Johnson in its sentence. It stated Friesner's serious bodily injury, and the injuries to her family, were "mammoth" in pronouncing sentence. SENT 73. The record demonstrates Friesner's injuries and her family's statements were the circuit court's primary consideration under the aggravating circumstances analysis. However, the elements of negligence and causation¹¹ were not within the circuit court's directives under SDCL 22-6-11, and furthermore, were heavily disputed. The circuit court did not sufficiently connect Friesner's injuries to a danger to the public because it did not make any finding related to the *cause* of the accident (actual or proximate) or the *cause* of Friesner's injuries. Therefore, the circuit court misapplied SDCL 22-6-11 because it conflated its sentencing considerations

¹¹ Vehicular Battery is described as when any person under the influence "drives a motor vehicle of any kind in a negligent manner and thereby causes the serious bodily injury of another person." SDCL 22-18-36.

with Class 4 felony conduct, assuming without finding negligence and causation.¹²

C. The Circuit Court Misapplied SDCL 22-6-11 When it Used Punishment on Behalf of Friesner and Her Family to Justify Departure from Presumptive Probation.

In *Kurtz*, this Court reversed the circuit court because it considered “simply punishment,” overlooking the statute’s requirements. 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5 (quoting the circuit court’s statements). The Court found this to be “flatly contrary to the mandate in SDCL 22-6-11.” *Id.* Under *Kurtz*, the circuit court must connect the aggravating circumstances to the defendant’s risk to public safety – and the reasoning from *Kurtz* is clear: “while it is true that prior felonies and prior probation violations can constitute aggravating circumstances that pose such a risk, it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant risk to the public.” *Id.* at ¶ 15, 5. Without an explanation from the circuit court as to *why* the aggravating circumstances listed in the judgment of conviction relate to public safety concerns, simply listing prior felonies, prior

¹² SDCL 22-6-11 relates to convictions for Class 5 or Class 6 felonies. See *Kurtz*, 2024 S.D. 13, ¶ 11, 4 N.W.3d at 4 (stating “[c]riminal defendants, like Kurtz, who are convicted of a Class 5 or Class 6 felony that is not specifically excluded from the provisions of SDCL 22-6-11, must be sentenced in accord with the directives of this statute”). As an example, SDCL 22-18-1 (Simple Assault) which can be proven through a showing of negligence is specifically excluded from presumptive probation. The circuit court’s consideration of negligence was outside the scope of its sentencing considerations under SDCL 22-6-11.

probation or parole violations, or a lengthy criminal history *would* make departure from presumptive probation or parole a foregone conclusion.

The question is not whether aggravating circumstances exist, but whether “aggravating circumstances exist *that pose a significant risk to the public.*” SDCL 22-6-11 (emphasis added). In departing from a presumptively suspended sentence, the circuit court cannot simply create a list showcasing the defendant’s irritatingly flawed past. Rather, it must elucidate why the defendant, and the associated aggravating circumstances, pose a significant risk to the public. Certainly, if the circuit court can find that “[the] fact that drugs were found on Defendant’s person and in his system at the time of these charges[,]” is a qualifying aggravating circumstance, as it did here, then the entire purpose of SDCL 22-6-11 is upended. SR 210. In other words, if the circular logic suggesting that the factual basis underpinning the conviction itself is justification to depart from a presumptively suspended sentence, SDCL 22-6-11 is rendered meaningless.

Similar to *Kurtz*, where the sentencing court did not draw a connection between aggravating circumstances and the defendant, the circuit court here did not make a finding that Johnson’s crimes were sufficiently connected to Friesner’s injuries. Johnson’s negligence and the causation of Friesner’s injuries were heavily disputed. *See* SR 129 (expressing opinion that valve malfunction caused accident); SENT 32 (discussing Friesner’s decision to not wear helmet). Friesner’s severe and tragic injuries were the result of an unfortunate and

unforeseeable accident, not Johnson's deliberate or negligent action. Still, the circuit court emphasized retributive punishment, deterrence, and incapacitation at the forefront of its sentencing decision. This is contrary to the statute's public-safety departure standard. *Kurtz* makes clear that even if retribution is a legitimate general penological goal, it cannot substitute for the public-safety finding that SDCL 22-6-11 demands. 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5.

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: the only legally permissible basis for departing from presumptive probation is a finding of aggravating circumstances posing a significant public risk. The circuit court misapplied SDCL 22-6-11 because it grounded its departure decision primarily in retribution and punishment on behalf of Friesner and her family.

Johnson certainly does not dispute that Friesner suffered serious bodily injury. As Johnson acknowledged in his remarks at sentencing, Friesner's injuries and the ongoing effect of this accident are tragic, and he is deeply remorseful. SENT 31-34. However, the circuit court misapplied SDCL 22-6-11 because it

emphasized punishment in enumerating Friesner's injuries as an aggravating factor without articulating it as an ongoing risk to public safety.

**III. THE CIRCUIT COURT EXCEEDED ITS STATUTORY
AUTHORITY IN REVOKING JOHNSON'S DRIVER'S LICENSE
FOR LIFE UPON CONVICTION FOR DUI FIRST OFFENSE**

A. Standard of Review

This Court has observed that “[a] penalty must be authorized by law.” *State v. Schwebach*, 2000 S.D. 50, ¶ 8, 609 N.W.2d 130, 131 (citing 21 Am.Jur.2d *Criminal Law* § 336). The circuit court’s authority to revoke a driver’s license for DUI (first offense) is expressed in SDCL 32-23-2. Therefore, this issue is “a matter of statutory interpretation,” subject to de novo review. *Flowers*, 2016 S.D. 63, ¶ 5, n.1, 885 N.W.2d at 784 n.1 (2016). *See also State v. French*, 509 N.W.2d 693, 695 (S.D. 1993) (stating “[m]atters of statutory construction are questions of law,” which this Court reviews de novo).

*B. The Circuit Court Exceeded its Statutory Authority in Revoking
Johnson's Driver's License for Life on a First-Offense DUI.*

A first-offense DUI mandates a driver’s license revocation for a minimum of 30 days, with discretion for an additional period, “not to exceed one year.” SDCL 32-23-2. The statute clearly does not authorize a lifetime revocation for a

first offense.¹³ However, here, Johnson’s DUI conviction was not enhanced in classification or penalty, and therefore SDCL 32-23-2 controls.¹⁴

This Court has consistently held that circuit courts must adhere to statutory limits on license revocations. *See Schwebach*, 2000 S.D. 50, ¶ 8, 609 N.W.2d at 131 (reversing and remanding “that portion of the circuit court’s sentence revoking [defendant]’s driver’s license for life,” where the court “exceeded its statutory authority”); *State v. Hatchett*, 2003 S.D. 85, ¶ 8, 667 N.W.2d 680, 683-84 (reversing and remanding indefinite revocation of driving privileges when the circuit court lacked the statutory authority). A lifetime revocation for a first offense DUI contravenes these precedents,¹⁵ in addition to the statute itself. The circuit court exceeded its authority.

¹³ SDCL 32-23-4.2 requires “a separate supporting information” formally alleging “any former convictions.” No such document was filed and nothing in the record indicates the circuit court considered Johnson’s DUI conviction to be enhanced in classification or penalty by way of prior convictions.

¹⁴ Broadly, the statutory framework reflects a graduated penalty system, with increased revocation durations upon subsequent DUI convictions. A second-offense or third-offense DUI requires revocation for “not less than one year.” SDCL 32-23-3; SDCL 32-23-4. A fourth-offense requires revocation for “not less than two years.” SDCL 32-23-4.6. A fifth-offense or sixth-offense requires revocation for “not less than three years.” SDCL 32-23-4.7; SDCL 32-23-4.9.

¹⁵ The circuit court stated, “I’m lifetime taking your license. I believe there’s a case authority for that. I’ve researched it. It’s just been a while since I looked at it and I think I had an appeal on this.” SENT 73. In *State v. Myers*, 411 N.W.2d 402 (S.D. 1987), this Court upheld a lifetime revocation of driving privileges for a third-offense DUI. However, *Myers* interpreted a prior version of SDCL 32-23-4 (revocation for third-offense DUI) which authorized the court to “unconditionally revoke the defendant’s driving privileges for such period of

CONCLUSION

For the foregoing reasons, Johnson respectfully requests that this Court vacate the Judgment and Sentence against him for violation of SDCL 22-42-5.1. If this Court does not deem Johnson's conviction under SDCL 22-42-5.1 to be wholly void due to the jurisdictional defect, Johnson also requests that this Court reverse the circuit court's finding of aggravating circumstances which pose a significant risk to the public and remand his case for resentencing with instructions to enter a suspended sentence. Finally, Johnson requests this Court vacate the portion of the Judgment which revoked his driving privileges for life and remand his case for resentencing with instructions to the circuit court that the revocation of Johnson's driving privileges must not exceed a period of one year pursuant to SDCL 32-23-2.

time as may be determined by the court." Conversely, SDCL 32-23-2 affirmatively caps revocation for first-offense DUI at one year.

REQUEST FOR ORAL ARGUMENT

The Appellant, Patrick Johnson, respectfully requests thirty (30) minutes for oral argument.

CERTIFICATE OF COMPLIANCE

- I. 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 6,282 words.
- II. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 17th day of April, 2026.

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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 the following individuals:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31357

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

PATRICK KEITH JOHNSON,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
JACKSON COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

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Notice of Appeal filed January 22, 2026

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31357

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

PATRICK KEITH JOHNSON,
Defendant and Appellant.

PRELIMINARY STATEMENT

Patrick Keith Johnson drove his motorcycle while high on methamphetamine. His passenger suffered life-threatening injuries and now permanently resides in a nursing home. Johnson pleaded guilty to the unauthorized possession and ingestion of methamphetamine, in addition to driving under the influence.

On appeal, Johnson complains that the circuit court lacked subject-matter jurisdiction to sentence him on the ingestion charge, that the court erred in deviating from presumptive probation, and that the court had no authority to revoke his driving privileges for life. But the court acquired jurisdiction over Johnson's case when the August 29, 2024 indictment was filed. He waived his right to indictment by grand jury on the ingestion charge by pleading guilty, and he forfeited his right

to challenge his conviction or sentence on this charge by not objecting below. He also forfeited his complaint about any misapplication of SDCL 22-6-11, and even if he hadn't, he cannot show any error there. Lastly, the State concedes he should be resentenced on his DUI charge.

JURISDICTIONAL STATEMENT

Johnson appeals the Judgment and Sentence filed by the Honorable M. Bridget Mayer on January 16, 2026. SR: 209.¹ Johnson's Notice of Appeal was filed six days later. SR: 212. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT HAD SUBJECT-MATTER JURISDICTION TO SENTENCE JOHNSON FOR INGESTION?

The circuit court did not address this issue. It sentenced Johnson after he pleaded guilty.

State v. Schrempp, 2016 S.D. 79, 887 N.W.2d 744

United States v. Cotton, 535 U.S. 625 (2002)

Honomichl v. State, 333 N.W.2d 797 (S.D. 1983)

State v. Bryant, 2020 S.D. 49, 948 N.W.2d 333

II. WHETHER THE CIRCUIT COURT PROPERLY APPLIED SDCL 22-6-11?

The circuit court found several aggravating circumstances and that Johnson posed a significant risk to the public

¹ In this brief, references to the Settled Record will be indicated by "SR" followed by a page number, and references to the Appellant's Brief will be indicated by "AB" followed by a page number.

before it sentenced Johnson to penitentiary time. Johnson did not object.

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. Scott, 2024 S.D. 27, 7 N.W.3d 320

SDCL 22-6-11

III. WHETHER THE CIRCUIT COURT ERRED IN REVOKING JOHNSON’S DRIVER’S LICENSE FOR LIFE?

The circuit court revoked Johnson’s driver’s license for life.

State v. Groethe, 439 N.W.2d 554 (S.D. 1989)

State v. Myers, 411 N.W.2d 402 (S.D. 1987)

SDCL 32-23-1(2)

SDCL 32-23-2

STATEMENT OF THE CASE AND FACTS²

Johnson and his friend, Tina Friesner, both from Iowa, were on a motorcycle trip to South Dakota—a bucket list trip of Tina’s. SR: 135 (sealed). Johnson was the operator of his own motorcycle, and Tina was his passenger. SR: 3. Midday on August 4, 2024, they were traveling eastbound on I-90 in Jackson County, at eighty-two miles per hour, when Johnson tried to pass a tractor-trailer. SR: 27 (confidential), 135 (sealed). The homemade trailer Johnson was pulling began to shake

² The Statement of the Case and the Statement of Facts are combined for brevity and clarity.

after the rear tire of his motorcycle went flat. SR: 3, 28 (confidential).

Johnson veered out of his lane, causing another motorist to take the

shoulder and the tractor-trailer to veer into the median. SR: 3, 26

(confidential). Johnson lost control of his motorcycle, which triggered a high-speed crash.³ SR: 3.

Johnson and Tina were lying in the center of the interstate, between the driving and passing lanes. SR: 27 (confidential). Tina was not moving and was bleeding profusely. SR: 27 (confidential). Passing motorists said the trailer had landed on Tina, so they took a picture of its location before moving the trailer off of Tina and onto the shoulder of the road. SR: 27 (confidential). A nurse and an off-duty firefly were already on the scene rendering aid when six law-enforcement officers arrived. SR: 26 (confidential).

Highway Patrol Trooper Kyle Knievel was the first officer to arrive. SR: 3. Trooper Knievel found a wallet on Johnson. SR: 27 (confidential). Trooper Knievel discovered that Johnson's Iowa driver's license was revoked. SR: 27 (confidential). Johnson was unable to perform field-sobriety tests because of his injuries. SR: 3. Because he had been wearing a helmet, his injuries were not life threatening, so he was sent to the hospital in nearby Philip. SR: 3. He suffered fractured ribs, a

³ The crash was caught on the tractor-trailer's dash camera. SR: 27 (confidential). The video was attached to the law-enforcement report, but it does not appear in the settled record. SR: 27 (confidential).

fractured right shoulder, and a severe concussion. SR: 7. While he was being treated, Dr. Dianne Webber located a small, clear bag on Johnson. SR: 3. The bag contained twenty-two grams of methamphetamine. SR: 3, 28 (confidential). A blood sample was drawn, and it was positive for the presence of methamphetamine. SR: 358 (sealed).

Tina was in far worse shape. SR: 3. She was not wearing a helmet and was life-flighted to Monument Health in Rapid City with life-threatening injuries. SR: 3. EMS took her purse and gave it to Highway Patrol Trooper Emily Metzger. SR: 3. In the purse, Trooper Metzger found two methamphetamine pipes and two small bags of a white crystalline substance that tested positive for methamphetamine. SR: 3.

When Johnson spoke with Trooper Knievel, Johnson said both he and Tina smoked methamphetamine the morning of the crash. SR: 3. He admitted the methamphetamine was his and said he smoked methamphetamine every day for more than thirty years. SR: 3, 135 (sealed). Several butane torches were found in the motorcycle and the trailer. SR: 27 (confidential).

The next day, Johnson was discharged from the Philip hospital. SR: 7. He was taken into custody at about 11:00 a.m. and spoke with Trooper Knievel after waiving his Miranda rights. SR: 3. Again, Johnson admitted he used his own methamphetamine the previous morning. SR: 3. He did not remain in custody for long. SR: 7. By late afternoon the day after the crash, Johnson was released from the Winner Jail

because the jail was unable to tend to his medical needs. SR: 7.

Johnson was released to the care of his son, Jeffrey, who did not have to post bond. SR: 13, 17.

On August 6, 2024, Johnson was charged by complaint with the following crimes:

- Count 1: Vehicular Battery, a Class 4 felony, in violation of SDCL 22-18-36;
- Count 2: Possession of Methamphetamine, a Class 5 felony, in violation of SDCL 22-42-5;
- Count 3: Driving Under the Influence, a Class 1 misdemeanor, in violation of SDCL 32-23-1(2);
- Count 4: Driving Under Revocation, a Class 1 misdemeanor, in violation of SDCL 32-12-65(1);
- Count 5: Possession of Drug Paraphernalia, a Class 2 misdemeanor, in violation of SDCL 22-42A-3; and
- Count 6: Improper Lane Change, a Class 2 misdemeanor, in violation of SDCL 32-26-6.

SR: 9. A Jackson County grand jury indictment followed on August 29, 2024, charging the same six counts. SR: 32. An amended complaint followed in October of 2025, charging Johnson with only two crimes:

- Count 1: Possession of Methamphetamine, a Class 5 felony, in violation of SDCL 22-42-5; and
- Count 2: Ingestion of Methamphetamine, a Class 5 felony, in violation of SDCL 22-42-5.1.

SR: 42.

Johnson asked for a pre-plea presentence investigation (PSI).

SR: 40. It revealed that he had several prior felonies, that he was arrested in Iowa for distributing methamphetamine while out on bond for

this case, and that he scored “high” on the level of service inventory.⁴

SR: 125, 140 (sealed). The PSI also revealed Johnson was deeply remorseful that he hurt his friend. SR: 139 (sealed).

Tina’s family was offered the opportunity to provide victim-impact statements. SR: 66 (sealed). Tina’s sister described how she first saw Tina in the hospital and the agony they endured. SR: 66 (sealed). She described the staples from Tina’s frontal lobe to the back of her neck, her fractured eye sockets, broken ribs, neck fractures, sepsis, pneumonia, surgeries, and rehab. SR: 67 (sealed). Tina’s daughter wrote about Tina’s inability to care for herself, clean herself, cook for herself, or dress herself. SR: 75 (sealed). Tina’s recovery lasted several months, and she now permanently resides in a nursing home at age fifty-three. SR: 75 (sealed).

Johnson agreed to plead guilty to count one, Possession of Methamphetamine; count two, Ingestion of Methamphetamine, and count three, Driving Under the Influence. SR: 354-55; 360-61 (sealed).⁵

⁴ A few days before his plea and sentencing hearing, the State filed a motion to revoke Johnson’s conditional release because he was arrested in Iowa for possession with intent to distribute methamphetamine and possession of drug paraphernalia. SR: 44. The court granted the State’s motion. SR: 47.

⁵ The plea agreement was reduced to writing. SR: 60 (sealed). However, it was later revoked by the State when Johnson violated bond. SR: 360-61 (sealed). Johnson still agreed that he would plead to count one, Possession of Methamphetamine; count two, Ingestion of Methamphetamine, and count three, Driving Under the Influence, but

At sentencing, the circuit court specified it did not see an amended information filed, but the State informed the court that an amended information should have mimicked the amended complaint. SR: 352-53 (sealed). Noting the information's absence in the record, the court asked Johnson if he waived his right to a preliminary hearing on the amended charges, and he did. SR: 353 (sealed). Defense counsel stated there was a finding during the indictment stage on all charges, including ingestion. SR: 353 (sealed). He agreed there was probable cause established by the grand jury on all three counts. SR: 353 (sealed). The court instructed the State to file an amended information within forty-eight hours after sentencing, and defense counsel consented to the same. SR: 353-54 (sealed).

The court heard a factual basis from the State, and Johnson admitted he knew what he had done. SR: 357-61 (sealed). The court found that Johnson freely, intelligently, and voluntarily waived his rights and pleaded guilty to the three charges in the amended complaint. SR: 361-62 (sealed). It found a factual basis for all three charges and accepted his pleas. SR: 362 (sealed). Johnson expressed deep remorse for hurting his friend Tina. SR: 372-73 (sealed). And he admitted that he was one-hundred-percent guilty. SR: 373 (sealed).

that the State would no longer make any stipulated sentencing recommendations. SR: 360-61 (sealed).

Before imposing sentence, the circuit court found aggravating circumstances that make Johnson a significant risk to the public:

- The severity of Tina's injuries and the effects on her and her family;
- Johnson's danger to the motoring public;
- Johnson's extensive criminal history;
- That drugs were on Johnson's person;
- That drugs were in Johnson's system;
- That Johnson was operating a vehicle while using meth; and
- Johnson's inability to follow court orders.

SR: 412-14 (sealed). The court concluded that these factors sufficiently established that Johnson was a danger to the community. SR: 414 (sealed). In mitigation, the court referenced Johnson's remorse. SR: 414 (sealed).

On count one, Possession of Methamphetamine, the circuit court sentenced Johnson to five years in prison. SR: 210. On count two, Ingestion of Methamphetamine, the court sentenced Johnson to four years in prison. SR: 211. And on count three, Driving Under the Influence, the court suspended Johnson's driver's license for his lifetime. SR: 211. The court ordered counts one and two to be served consecutively. SR: 210-11. The court reiterated its aggravating factors in the final judgment justifying departure from presumptive probation on counts one and two:

- The severity of Tina's injury and the effects on her and her family;

- The danger Johnson poses to the public;
- Johnson’s extensive criminal history;
- That drugs were found on Johnson and in his system;
- Johnson’s failure to follow court orders;
- Johnson’s arrest in Iowa for distribution of meth while on bond for this case;
- The presence of meth in Johnson’s system while out on bond for this case; and
- Johnson’s use of substances for the past thirty-five years.

SR: 210. The judgment was filed January 16, 2026, and Johnson filed a notice of appeal six days later. SR: 209-12.

ARGUMENT

I. THE CIRCUIT COURT HAD JURISDICTION TO SENTENCE JOHNSON.

Johnson first argues that the circuit court lacked subject-matter jurisdiction to sentence him for the unauthorized ingestion of a controlled substance in violation of SDCL 22-42-5.1. AB: 12-15. He correctly points out that South Dakota law generally requires an indictment or information to prosecute a defendant and that when neither has been filed, a circuit court lacks the power to adjudicate the case. AB: 12-13. He reasons that because the State did not file an amended indictment charging him with unauthorized ingestion, the circuit court lacked subject-matter jurisdiction to sentence him on that count. AB: 13-15. Framing the issue as a jurisdictional defect, he asks this Court to conduct a de novo review and void the sentence. AB: 15.

This Court should reject Johnson's view of the law. The circuit court's sentencing Johnson for an offense in addition to the offenses charged in the indictment was a constructive amendment of the indictment. This Court, the Supreme Court of the United States, and myriad other courts treat the constructive amendment of an indictment as a potential procedural error rather than a jurisdictional defect. As such, waiver and forfeiture may apply. In this case, the constructive amendment is not error because Johnson waived his right to indictment by grand jury when he pleaded guilty to the additional offense. And even if it were error, he forfeited his right to appeal the issue by not objecting below. Consequently, the constructive amendment could be reviewed only for plain error, and under that standard, the error is not reversible.

A. The circuit court had subject-matter jurisdiction.

Johnson argues that the circuit court lacked subject-matter jurisdiction to sentence him for unauthorized ingestion. South Dakota law generally requires an indictment or information to prosecute a

defendant. S.D. Const. art. VI, § 10;⁶ SDCL 23A-6-1.⁷ And this Court's decisions have recognized that "[w]ithout a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction and thus an accused may not be punished for a crime." *Honomichl v. State*, 333 N.W.2d 797, 798 (S.D. 1983) (citing *Albrecht v. United States*, 273 U.S. 1 (1927)). Relying on *Honomichl* and similar decisions, Johnson concludes that "[t]he circuit court never obtained subject matter jurisdiction over the Ingestion count, which was not

⁶ Article VI, Section 10, of the South Dakota Constitution states:

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

⁷ South Dakota Codified Laws 23A-6-1 states:

Every public offense must be prosecuted by an indictment or by an information signed by a prosecuting attorney except:

- (1) A proceeding for the removal of a civil officer of this state;
- (2) An offense arising under the laws, rules, and regulations relating to the National Guard;
- (3) An offense arising under the laws of this state which is a Class 2 misdemeanor or petty offense or which is punishable by a fine not exceeding two hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment;
- (4) An offense arising from the violation of an ordinance or bylaw of a unit of local government of this state.

contained in the Indictment. Therefore, it could not impose sentence on that charge.” AB: 14 (citation omitted).

Johnson’s argument overlooks that subject-matter jurisdiction applies to the *case* and not to an individual *count*. As the Supreme Court of the United States has explained: “Subject-matter jurisdiction defines the court’s authority to hear a given *type of case*’; it represents ‘the extent to which a court can rule on the conduct of persons or the status of things.’” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (emphasis added) (first quoting *United States v. Morton*, 467 U.S. 822, 828 (1984); and then quoting Black’s Law Dictionary 870 (8th ed. 2004)). Likewise, this Court defines subject-matter jurisdiction as the “authority of courts to adjudicate the *type of controversy* involved in the action.” *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 S.D. 49, ¶ 21, 834 N.W.2d 324, 331 (emphasis added) (quoting Restatement (Second) of Judgments § 11 (1982)). The type of controversy in this action was a criminal prosecution on an indictment charging two felonies and four misdemeanors. SR: 32-33. The circuit court had authority to adjudicate this controversy because it had “original jurisdiction to try and determine all cases of felony, and . . . all cases of misdemeanor[.]” SDCL 16-6-12.

Therefore, the court had subject-matter jurisdiction. *See State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107-08.⁸

The addition of the ingestion charge without formal amendment of the indictment was a constructive amendment, which does not affect a court's jurisdiction. A constructive amendment occurs when

the terms of the indictment are altered in effect by either the admission of evidence or the use of jury instructions which modify the essential elements of the offense charged so that a substantial likelihood exists that the defendant was convicted of an offense other than that charged in the indictment.

State v. Mesa, 2004 S.D. 68, ¶ 13, 681 N.W.2d 84, 87 (quoting *United States v. Johnson*, 934 F.3d 936, 941 (8th Cir. 1991)). This includes convicting the defendant of an additional offense not included in the indictment. *United States v. Lasley*, 917 F.3d 661, 664 (8th Cir. 2019).

⁸ The subject-matter jurisdiction analysis in *Sanders* is the same as that presented here:

Subject matter jurisdiction is the courts' statutory or constitutional power to adjudicate the case, and whether a court has subject matter jurisdiction is determined by the indictment. In this case, the indictment alleged, in relevant part, that Sanders committed forgery on or about the 26th day of March, 2012, in Hughes County, South Dakota. Forgery is a felony under South Dakota law, and the circuit court of the Sixth Judicial Circuit has original jurisdiction to adjudicate felonies alleged to have occurred in Hughes County, South Dakota. Thus, the circuit court had subject matter jurisdiction to adjudicate this case.

2016 S.D. 32, ¶ 5, 878 N.W.2d at 107-08 (citation modified).

Both this Court and the United States Supreme Court have rejected “the view that indictment defects are ‘jurisdictional.’” *State v. Schrempp*, 2016 S.D. 79, ¶ 12, 887 N.W.2d 744, 748 (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). Consequently, this Court considers constructive-amendment arguments not raised before the circuit court waived, limiting review to plain error. *Id.* ¶ 13, 887 N.W.2d at 748; *Mesa*, 2004 S.D. 68, ¶ 15, 681 N.W.2d at 87-88. The United States Supreme Court does the same. *Cotton*, 535 U.S. at 630-31 (holding that “the grand jury right can be waived” and “proceed[ing] to apply the plain-error test” to waived indictment defect). Waiver and plain-error review could not apply if indictment defects were jurisdictional. *See LaCroix v. Fluke*, 2022 S.D. 29, ¶ 20, 975 N.W.2d 150, 159 (holding that a lack of subject-matter jurisdiction cannot be waived, and a judgment rendered in the absence of jurisdiction is void).

The United States Courts of Appeals, which routinely handle constructive-amendment arguments, take the same approach. Many Courts of Appeals have explicitly held that constructive-amendment arguments are not jurisdictional. *See United States v. Gelin*, No. 25-10867, 2026 WL 92877, at *2 (11th Cir. Jan. 13, 2026); *United States v. Brika*, 487 F.3d 450, 464-65 & n.8 (6th Cir. 2007); *Romero v. Samuels*, 205 F. App’x 967, 968 (3d Cir. 2006); *United States v. Bieganowski*, 313 F.3d 264, 286-87 (5th Cir. 2002); *United States v. Avery*, 295 F.3d 1158, 1173 (10th Cir. 2002). Most other Courts of Appeals imply it by

applying waiver and plain-error review. See *United States v. Banks*, 29 F.4th 168, 176-77 (4th Cir. 2022); *United States v. Kilmartin*, 944 F.3d 315, 326 (1st Cir. 2019); *United States v. Heon Seok Lee*, 937 F.3d 797, 806 n.4 (7th Cir. 2019); *United States v. Bastian*, 770 F.3d 212, 219-20 (2d Cir. 2014); *United States v. Mann*, 701 F.3d 274, 307 (8th Cir. 2012); *United States v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012).

The authorities Johnson cites do not conflict with the above. Johnson relies primarily on this Court's decisions in *Honomichl v. State*, 333 N.W.2d 797 (S.D. 1983), and *State v. Eidahl*, 486 N.W.2d 257 (S.D. 1992). Both cases hold that “[w]ithout a formal and sufficient indictment or information, a court does not acquire subject matter jurisdiction[.]” *Honomichl*, 333 N.W.2d at 798; *Eidahl*, 486 N.W.2d at 259. The problem for Johnson is that there were no indictments filed in *Honomichl* or *Eidahl*; therefore, the courts in those cases never acquired subject-matter jurisdiction. In contrast, and as explained above, the circuit court in the present case acquired subject-matter jurisdiction upon the filing of the August 29, 2024 indictment. See *Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d at 107-08. Consequently, *Honomichl* and *Eidahl* do not apply to this appeal.

Finally, Johnson argues that in *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 44, 835 N.W.2d 886, 902, this Court “appl[ied] jurisdictional requirement to Part II habitual offender proceedings.” AB: 14. In that case, the defendant appealed an enhanced sentence, arguing that the

Part II information was defective and therefore deprived the circuit court of subject-matter jurisdiction. *Medicine Eagle*, 2013 S.D. 60, ¶ 36, 835 N.W.2d at 899. Chief Justice Gilbertson and Justice Severson agreed. *Id.* ¶ 44, 835 N.W.2d at 902. But a majority of the Court—then-Judge Salter and Justices Konenkamp and Zinter—held that the defective information did not affect the court’s jurisdiction. *Id.* ¶ 51, 835 N.W.2d at 903 (Salter, J., concurring in part); *id.* ¶ 66, 835 N.W.2d at 907 (Zinter, J., concurring in part and dissenting in part). This three-vote majority also agreed that the defendant’s argument was subject to waiver. *See id.* ¶¶ 59-64, 835 N.W.2d at 905-06 (Salter, J., concurring in part) (concluding defendant preserved error by objecting, applying harmless-error review, and concluding error was reversible); *id.* ¶¶ 79-82, 835 N.W.2d at 911-12 (Zinter, J., concurring in part and dissenting in part) (concluding defendant did not effectively object before trial, applying plain-error review, and concluding error was not reversible).

Applying these authorities, the circuit court acquired subject-matter jurisdiction when the State filed the August 29, 2024 indictment. And the subsequent constructive amendment of that indictment—even if erroneous—did not deprive the court of jurisdiction.

B. Johnson waived his right to indictment by grand jury.

Because it is not jurisdictional, “the grand jury right can be waived.” *Cotton*, 535 U.S. at 630. “[W]aiver is the intentional relinquishment or abandonment of a known right.” *State v. Bryant*,

2020 S.D. 49, ¶ 18 n.2, 948 N.W.2d 333, 338 n.2 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). This Court has “long held that ‘a voluntary and intelligent plea of guilty waives a defendant’s right to appeal all nonjurisdictional defects in the prior proceedings.’” *State v. Longchase*, 2025 S.D. 61, ¶ 17, 27 N.W.3d 735, 740 (quoting *State v. Cepelcha*, 2020 S.D. 11, ¶ 29, 940 N.W.2d 682, 692). So a defendant’s voluntary and intelligent guilty plea waives his right to be charged by indictment or information.

In this case, Johnson’s plea was voluntary and intelligent. The circuit court advised Johnson that he had a right to be charged by indictment or information. SR: 341 (sealed). The court asked if Johnson had any questions about his rights, and he replied that he did not. SR: 351 (sealed). The court specifically questioned him about his knowledge of the potential sentences and his right to a preliminary hearing, and he said he understood. SR: 352-53 (sealed). The court reviewed the State’s burden of proof and the elements of the offenses. SR: 354-55 (sealed). The court asked him whether he had been threatened to plead, whether his plea was voluntary, or whether anybody promised him special treatment if he pleaded guilty, and he affirmed his plea was voluntary. SR: 356 (sealed). The court advised him of his rights to a jury trial, to call and confront witnesses, and to remain silent, which he acknowledged. SR: 356 (sealed). And notably, Johnson “does not contend that his guilty plea was improvident because it was

involuntary or that he waived his rights without knowing what they were.” *Longchase*, 2025 S.D. 61, ¶ 17, 27 N.W.3d at 740. Therefore, Johnson waived his right to indictment by grand jury, and no error occurred. *See Olano*, 507 U.S. at 732-33 (“Deviation from a legal rule is ‘error’ unless the rule has been waived.”).

C. *Alternatively, Johnson forfeited his right to appeal the conviction and sentence, and there is not plain error.*

Assuming there was error, Johnson forfeited his right to challenge it. “[F]orfeiture is the failure to make the timely assertion of a right[.]” *Bryant*, 2020 S.D. 49, ¶ 18 n.2, 948 N.W.2d at 338 n.2 (quoting *Olano*, 507 U.S. at 733). Johnson acknowledges that he pleaded guilty to ingestion pursuant to an agreement with the State, AB: 5-6, and that he did not object to being convicted of or sentenced for that offense before the circuit court, AB: 15. Because Johnson did not object, this Court “can only review for plain error.” *Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d at 748.

Plain error review must be applied cautiously and only in exceptional circumstances. To establish plain error, an appellant must show (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 affects the fairness, integrity, or public reputation of judicial proceedings.

Id. (citation modified). And under plain-error review, it is Johnson who “bears the burden of showing the error was prejudicial.” *Id.*

Johnson's appeal is premised entirely on the erroneous view that the constructive amendment to the indictment is a jurisdictional issue. Therefore, he has not provided any plain-error analysis.

If it is assumed that Johnson did not waive his right to indictment by grand jury, then constructively amending the indictment to convict and sentence Johnson for an offense not included in the indictment plainly deviates from the requirements of S.D. Constitution article VI, § 10, and SDCL 23A-6-1. So the first two prongs of plain-error review would be met.

However, Johnson cannot meet his burden under the third or fourth prongs of plain-error review. Under the third prong, “[t]o establish that an error has affected substantial rights, ‘the error must have been prejudicial: It must have affected the outcome of the circuit court proceedings.’” *Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d at 748 (quoting *Olano*, 507 U.S. at 734). A “defendant who seeks reversal of his conviction after a guilty plea, on the ground that the . . . court committed plain error . . . , must show a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). This is an impossible task for Johnson. He cannot claim that his plea would have been different had the State filed the information because at the time he pleaded guilty, he anticipated that the State would do just that. SR: 352-54 (sealed).

Johnson’s plea also heavily influences the analysis of the fourth prong, which requires him to show that the alleged error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d at 748. The Amended Complaint notified Johnson of the State’s intent to charge him with unauthorized ingestion. SR: 42. Johnson negotiated a favorable plea agreement with the State.⁹ SR: 350 (sealed). He agreed to the content of the State’s amended information and to its filing after sentencing. SR: 353-54 (sealed). He waived his right to a preliminary hearing, and his attorney admitted that the grand jury had already determined there was probable cause to charge unauthorized ingestion. SR: 353 (sealed). His plea was knowing, intelligent, and voluntary. SR: 354-57, 361-62 (sealed). And he was sentenced only for the charges to which he pleaded guilty. SR: 411-12, 414-15 (sealed). To paraphrase the United States Supreme Court: “The real threat then to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if

⁹ As originally charged in the indictment, Johnson faced one Class 4 felony, one Class 5 felony, two Class 1 misdemeanors, and two Class 2 misdemeanors, which carry a combined maximum sentence of fifteen years in prison, two years and sixty days in jail, and up to \$35,000 in fines. SDCL 22-6-1, -2. Under the plea agreement, he faced two Class 5 felonies and one Class 1 misdemeanor, which carry a combined maximum sentence of ten years in prison, one year in jail, and up to \$22,000 in fines. *Id.* And because the State agreed to dismiss the Class 4 felony, there was the possibility that Johnson could have been sentenced to up to one year in jail for each of the Class 5 felonies instead of a longer term in prison. SDCL 22-6-1.1.

[Johnson] . . . were to receive a sentence prescribed for those committing [fewer] drug offenses because of an error that was never objected to at trial.” *Cf. Cotton*, 535 U.S. at 634 (referring to the unfairness of a defendant avoiding sentence enhancement when an indictment omitted a necessary fact, and the defendant did not object at trial).

The circuit court acquired subject-matter jurisdiction because the grand jury’s August 29, 2024 indictment charged Johnson with felonies and misdemeanors in violation of South Dakota law. The court’s constructive amendment of that indictment did not affect the court’s jurisdiction. Waiver and forfeiture apply to the right to indictment by grand jury. Johnson waived this right by pleading guilty, and so the constructive amendment is not error. But even if this Court concludes the amendment was erroneous, Johnson forfeited his right to appeal the issue by not objecting below. Consequently, plain-error review would apply, and under that standard, the alleged error is not reversible.

II. THE CIRCUIT COURT PROPERLY APPLIED SDCL 22-6-11.

Johnson claims the circuit court misapplied SDCL 22-6-11 by considering a dismissed charge and retribution. AB: 15. He also argues the court failed to connect the aggravating factors to his risk to the public’s safety. AB: 15. But Johnson forfeited this issue, too, by not objecting at sentencing, so this Court need not review it. Even if it does, Johnson cannot meet the plain-error standard because the record does

not support his claims. At sentencing, the court named several proper aggravating factors supporting deviation from presumptive probation and concluded Johnson poses a serious risk to the public. SR: 412 (sealed). In Johnson’s judgment of conviction, the court reiterated several aggravating factors and that Johnson poses a danger to the public, supporting its deviation from presumptive probation. SR: 210. There was no error.

A. Johnson forfeited his challenge.

SDCL 22-6-11 affords offenders convicted of certain Class 5 and 6 felonies the opportunity to be sentenced to probation. Yet a sentencing court can depart from presumptive probation “if the court finds aggravating circumstances exist that pose a significant risk to the public.” SDCL 22-6-11. Then “the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” *Id.* This statutory requirement is mandatory.

But this Court has “recently held that a defendant must object to a circuit court’s failure to comply with the presumptive sentencing provisions of [SDCL 22-6-11].” *State v. Scott*, 2024 S.D. 27, ¶ 31, 7 N.W.3d 320, 330 (citing *State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d 561, 569). This Court made the explicit prospective requirement that “parties must first raise the issue to the circuit court to preserve the error for appeal and avoid plain error review.” *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569. “In the absence of such an objection, we held

that the error was forfeited and subject to review under the plain error doctrine.” *Scott*, 2024 S.D. 27, ¶ 31, 7 N.W.3d at 330.

Johnson did not object to the circuit court’s departure from presumptive probation or the manner in which it applied aggravating circumstances. Thus, this issue is forfeited.

B. If this Court reviews Johnson’s complaint, it will find no error.

Johnson suggests his claims should be reviewed de novo. AB: 15-16. But this is not a matter of statutory interpretation. Because he failed to preserve his issue for appellate review, this Court has the discretion to review his case for plain error. *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569. Indeed, “when ‘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.’” *Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d at 338 (emphasis added) (quoting *State v. Buchhold*, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821). This Court invokes its discretion to review a case for plain error “cautiously and only in ‘exceptional circumstances.’” *State v. Clemensen*, 2025 S.D. 68, ¶ 48, 28 N.W.3d 902, 918, *reh’g denied* (Jan. 15, 2026) (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729).

This is not a case that needs plain-error review. It is obvious on the face of the record that the circuit court complied with SDCL 22-6-11. Even if this were an exceptional circumstance, Johnson cannot 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. Richter*, 2025 S.D. 58, ¶ 18, 27 N.W.3d 777, 785 (quoting *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206). Johnson 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 *Olano*, 507 U.S. at 741). “‘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. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283 (quoting *United States v. Rush–Richardson*, 574 F.3d 906, 911 (8th Cir. 2009)).

Even if this Court finds the decision to deviate from presumptive probation under SDCL 22-6-11—without objection—is reviewed for an abuse of discretion, Johnson cannot meet this burden. *State v. Underwood*, 2017 S.D. 3, ¶ 13, 890 N.W.2d 240, 243. “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.” *Interest of J.A.D.*, 2026 S.D. 11, ¶ 28, 32 N.W.3d 673, 682 (citations omitted).

If that standard applies, “a sentence within the statutory maximum generally will not be disturbed on appeal.” *State v. Miles*,

2021 S.D. 13, ¶ 17, 956 N.W.2d 61, 67 (citation modified) (quoting *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406).

Before imposing a sentence, however, the court must become thoroughly acquainted with the character and history of the defendant by considering the “general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record[,] as well as the rehabilitative prospects of the defendant.”

Id. (quoting *State v. Yeager*, 2019 S.D. 12, ¶ 12, 925 N.W.2d 105, 110).

SDCL 22-6-11 permits the sentencing court to impose a sentence other than probation “if the court finds aggravating circumstances exist that pose a significant risk to the public[,]” and “[i]f a departure is made, the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” SDCL 22-6-11.

The circuit court adhered to the statutory requirements prescribed by SDCL 22-6-11. The court found aggravating circumstances that make Johnson a significant risk to the public. SR: 412-13 (sealed). It viewed the factors as numerous:

- The severity of Tina’s injuries and the effects on her and her family;
- Johnson’s danger to the motoring public;
- Johnson’s extensive criminal history;
- That drugs were on Johnson’s person;
- That drugs were in Johnson’s system;
- That Johnson was operating a vehicle while using meth;
- Johnson’s inability to follow court orders.

SR: 413-14 (sealed). The court considered these factors sufficient to establish that Johnson is a danger to the community. SR: 414 (sealed).

Then the court wrote the same in its final judgment of conviction:

- The severity of Tina’s injury and the effects on her and her family;
- The danger Johnson poses to the public;
- Johnson’s extensive criminal history;
- That drugs were found on Johnson and in his system;
- Johnson’s failure to follow court orders;
- Johnson’s arrest in Iowa for distribution of meth while on bond for this case;
- The presence of meth in Johnson’s system while out on bond for this case; and
- Johnson’s use of substances for the past thirty-five years.

SR: 210. The court specified the danger Johnson poses to the public.

SR: 210.

While Johnson complains the circuit court’s “primary aggravating circumstance was [Tina’s] injuries,” AB: 17, there is no indication the court leaned on that factor as the one with the most weight. In fact, the circuit court addressed this exact concern when making its sentencing decision. During sentencing, the court acknowledged that the vehicular-battery charge was pleaded down and that other charges had been dismissed under the plea agreement. SR: 410 (sealed). Tina’s injuries and the effects on her family was only one of the eight factors the court listed, the rest of which all centered on Johnson, including his criminal history, the drugs in his system, his criminal activity while out on bond,

including an arrest for possession of methamphetamine with the intent to distribute it, and his use of methamphetamine while on bond.

SR: 210. None of these other factors relate to Tina.

What's more, courts *are* permitted to consider “conduct that was uncharged or served as the basis for charges that later resulted in a dismissal or acquittal[.]” *State v. Mitchell*, 2021 S.D. 46, ¶ 31, 963 N.W.2d 326, 333. This Court has specified “a circuit court could rely upon an ‘extensive sentencing record’ to assess the nature of a defendant’s offense and was not limited to the information contained in a stipulated factual basis statement used to support a defendant’s guilty plea.” *Id.* (citing *State v. Klinetobe*, 2021 S.D. 24, ¶ 36 n.6, 958 N.W.2d 734, 742 n.6). The court did not err in considering the magnitude of Johnson’s decision to operate his motorcycle while high on methamphetamine.

Johnson further claims that the circuit court “did not sufficiently connect [Tina’s] injuries to a danger to the public” because it did not connect the cause of the accident to Tina’s injuries. AB: 18. This premise is flawed and unsupported by the record.

In analyzing the breadth of Johnson’s criminal history, decision making, and his extensive criminal and drug-use history, the circuit court also considered the duty Johnson had on the day of the accident and weighed how he had no right or privilege to drive a motorcycle because he did not have a license. SR: 407, 409 (sealed). Moreover, the

court noted that as the person in charge of the motorcycle, Johnson had a duty to ensure that his passenger had a helmet on but failed to do so. SR: 409-10 (sealed). These factors were within the reasonable aggravating factors connected to Johnson’s “general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record” that enabled the court to properly deviate from presumptive probation as prescribed by SDCL 22-6-11. *Miles*, 2021 S.D. 13, ¶ 17, 956 N.W.2d at 67 (quoting *Yeager*, 2019 S.D. 12, ¶ 12, 925 N.W.2d at 110). In the same vein, the circuit court also appropriately focused on Johnson’s recent behavior. He was arrested in Iowa while out on bond in this matter for additional methamphetamine charges, including intent to distribute, and he tested positive for methamphetamine while out on bond.

Johnson argues his case is similar to *State v. Flowers*, 2016 S.D. 63, 885 N.W.2d 783, when the State argued the defendant’s admission to a Part II Information enhanced the crime’s classification. But here, there is no Part II, no enhancement, and no argument to that effect. In *Flowers*, “the court did not state any aggravating circumstances on the record or in the written judgment.” *Id.* ¶ 9, 885 N.W.2d at 785. Here, the opposite is true on both fronts. SR: 210, 406-15 (sealed). The circuit court properly stated aggravating circumstances on the record and in the written judgment when it deviated from presumptive probation. *Id.*

The circuit court here did not sentence Johnson to prison solely to punish him for Tina's injuries. Johnson's interpretation of this Court's decision in *State v. Kurtz*, 2024 S.D. 13, 4 N.W.3d 1, overlooks this Court's instruction on how a circuit court should consider aggravating circumstances in its sentencing hearings and judgement orders when deviating from presumptive probation under SDCL 22-6-11. In *Kurtz*, the sentencing court specifically found the defendant was *not* "much of a threat to society." 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5. This Court opined how its precedent "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.* ¶ 14, 4 N.W.3d at 5. "[S]entencing 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." *Id.*

The circuit court considered the totality of the circumstances, and Johnson fails to demonstrate how the court erred in applying SDCL 22-6-11. The court correctly determined Johnson is a danger to the community. SR: 414 (sealed). Johnson's sentences for counts one and two fell within the range of permissible choices for Class 5 felonies with aggravating circumstances. SDCL 22-6-1(8).

III. THE CIRCUIT COURT LACKED AUTHORITY TO REVOKE JOHNSON’S DRIVING PRIVILEGES FOR LIFE.

The circuit court revoked Johnson’s driving privileges for life after he pleaded guilty to a violation of SDCL 32-23-1(2). The court believed that there are cases upholding the lifetime revocation of driving privileges for DUI convictions. SR: 412 (sealed).

State statutes limit a circuit court’s authority to revoke a person’s driving privilege for a first-offense DUI. While a court must revoke driving privileges for at least thirty days, the revocation is “not to exceed one year.” SDCL 32-23-2. Here, though Johnson had a significant criminal history, no prior DUI convictions enhanced this conviction under SDCL 32-23-1. Johnson’s PSI revealed he was arrested for operating a vehicle while intoxicated in Iowa in 1987 and 1990, SR: 117-18 (sealed), as well as enough arrests for “driving while barred” to be a “habitual offender” and have his license revoked, SR: 118, 120-22 (sealed). But “[f]or the State to enhance the charged offense, it must file ‘a separate supporting information’ alleging, ‘in addition to the principal offense charged, any former convictions.’” *State v. Rus*, 2021 S.D. 14, ¶ 5, 956 N.W.2d 455, 457 (quoting SDCL 32-23-4.2). No supporting information exists in Johnson’s record alleging prior convictions under SDCL 32-23-1. Even if it did, South Dakota law generally establishes a ten-year lookback period for DUI enhancement purposes, and Johnson’s priors are much older than that. SDCL 32-23-4.1.

The circuit court is correct that there are cases upholding the lifetime revocation of driving privileges for DUI convictions, but they differ from Johnson’s case. In *State v. Groethe*, 439 N.W.2d 554 (S.D. 1989), the defendant had “at least eight DWI convictions” and was sentenced under a third-or-subsequent-offense DUI statute. *Id.* at 557. In *State v. Myers*, 411 N.W.2d 402 (S.D. 1987), the defendant had “eleven DUI convictions” and again was sentenced under a third-or-subsequent-offense DUI statute. *Id.* at 403.

Accordingly, although the State shares the circuit court’s concern for the danger to the public posed by Johnson holding a driver’s license, the State nevertheless must agree that the court lacked authority to revoke his driving privileges for life. This Court should remand only for the purpose of resentencing Johnson on count three.

CONCLUSION

The circuit court acquired jurisdiction over Johnson’s case when the August 29, 2024 indictment was filed. Jurisdiction is, after all, attained over the case, not each specific charge. Johnson waived his right to indictment by grand jury on the ingestion charge by pleading guilty, and he forfeited his right to challenge his conviction or sentence on this charge by not objecting below. Johnson also forfeited his complaint about any misapplication of SDCL 22-6-11, and even if he hadn’t, he cannot show any error there. The court gave appropriate weight to several factors and concluded Johnson poses a significant risk

to the public. Lastly, the circuit court lacked authority to revoke Johnson's driving privileges for life. This Court should remand only for the purpose of resentencing Johnson on count three.

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 7,336 words and 45,645 characters.

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

Dated this 1st day of June, 2026.

/s/ Christopher A. Dabney
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of June, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Patrick Keith Johnson* was served via Odyssey File and Serve upon Derek Friese at derek.friese@state.sd.us.

/s/ Christopher A. Dabney
Christopher A. Dabney
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

PATRICK KEITH JOHNSON,

Defendant/Appellant.

No. 31357

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
JACKSON COUNTY, SOUTH DAKOTA

HONORABLE M. BRIDGET MAYER
Circuit Court Judge

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

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PATRICK KEITH JOHNSON,

Defendant/Appellant.

No. 31357

PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Patrick Johnson, will limit discussion to the issues that need further development or argument. Any matter raised in Johnson's initial brief, but not specifically mentioned herein, is not intended to be waived. Johnson 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. Johnson relies upon the Jurisdictional Statement, Statement of the Case and Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on April 17, 2026.

ARGUMENT

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO SENTENCE JOHNSON FOR VIOLATION OF FELONY UNAUTHORIZED INGESTION UNDER SDCL 22-42-5.1.

A. The Circuit Court Was Without Jurisdiction in Imposing Sentence Under SDCL 22-42-5.1.

The State argues that “subject matter jurisdiction applies to the *case* and not to the individual *count*,” and that “this action was a criminal prosecution on an indictment charging two felonies and four misdemeanors.” SB 13. But authority from this Court establishes that subject matter jurisdiction in criminal cases *is* offense specific. *See State v. Pentecost*, 2016 S.D. 84, ¶ 12, 887 N.W.2d 877, 881 (stating “[t]o properly hear a case, a circuit court must have personal jurisdiction over the defendant appearing before them *and subject matter jurisdiction over the charges filed by the State*”) (emphasis added). In *Pentecost*, to establish subject matter jurisdiction, the Court examined the charging documents and specific offense. *See Pentecost*, 2016 S.D. 84, ¶ 13, 887 N.W.2d at 881 (stating “the State’s charging documents show that the court had jurisdiction over the subject matter (second-degree burglary)”). Moreover, the State’s argument that subject matter jurisdiction is not determined on an offense-specific basis is contrary to the plain language of SDCL 23A-6-1, which requires that “[e]very *public offense* must be prosecuted by an indictment or by an information signed

by a prosecuting attorney.” (emphasis added).¹ See also S.D. Const. art. VI, § 10 (stating “[n]o person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor”).

The State cites to SDCL 16-6-12 and *State v. Sanders*, 2016 S.D. 32, 878 N.W.2d 105. In doing so, the State conflates the circuit court’s original jurisdiction over criminal charges generally with its subject matter jurisdiction. SDCL 16-6-12 establishes a court’s original jurisdiction over crimes generally, and *Sanders* determined subject matter jurisdiction existed by examining the indictment and its specific charge. See *Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d at 107 (stating “jurisdiction over the subject-matter of the offense charged *depends upon the allegations of said indictment or affidavit and information* and not upon the actual facts” and referencing the charges contained in the indictment) (quoting *State v. Osborn*, 155 Ind. 385, 58 N.E. 491, 493 (1900)) (emphasis added).²

¹ Additionally, the circuit court’s clarification of Johnson’s plea itself demonstrates that even the plea was offense-specific, as it related to the charging documents, because it took Johnson’s plea from both the Indictment and the Amended Complaint. The circuit court asked the State, “are you pulling the Indictment charge of the DUI as well?” SENT 13. See also SR 209.

² *Sanders* involved an appellant asserting for the first time on appeal that the factual basis for his guilty plea to forgery was inadequate. 2016 S.D. 32, ¶ 2, 878 N.W.2d at 106-07. Sanders argued the adequacy of a factual basis for a plea is a jurisdictional issue. *Id.* at ¶ 3, 107. But this Court held that “[t]he factual basis requirement in SDCL 23A-7-14 (Rule 11(f)) is not jurisdictional.” *Id.* at ¶ 4, 107. The indictment charged Sanders with forgery, “and whether a court has subject matter jurisdiction is determined by the indictment.” *Id.* at ¶ 5, 107 (citing *State v. Janssen*, 371 N.W.2d 353, 356 (S.D. 1985)). Here, the Ingestion charge was not instituted in the indictment. *Sanders* does not apply.

Next, the State argues that “[t]he addition of the ingestion charge without formal amendment of the indictment was a constructive amendment, which does not affect a court’s jurisdiction.” SB 14. In support, the State cites *State v. Mesa*, 2004 S.D. 68, 681 N.W.2d 84, and *United States v. Lasley*, 917 F.3d 661 (8th Cir. 2019). Neither case supports the State’s argument. First, both cases involved a jury’s question and the trial court’s response. *Mesa*, 2004 S.D. 68, ¶ 8, 681 N.W.2d at 86; *Lasley*, 917 F.3d at 664-65. Second, neither case even considered subject-matter jurisdiction. Nor did either case involve a trial court instituting a completely new charge altogether.³ Rather, these cases considered whether the trial courts’ responses to jury questions altered the essential elements of the charges already contained in the indictment under the jury’s consideration. *Mesa*, 2004 S.D. 68, ¶ 13, 681 N.W.2d at 87; *Lasley*, 917 F.3d at 664. The doctrine of constructive amendment to an indictment is not applicable here.

This case is more simple. The State failed to file a valid charging instrument to commence the prosecution and sustain Johnson’s conviction for Ingestion.⁴ The circuit court addressed the jurisdictional infirmity at the Change

³ Here, the circuit court indicated in its Judgment that an information was filed *nunc pro tunc*. SR 209. No information was filed.

⁴ The State’s view that this case demonstrates a defect in the indictment is incorrect. The State discusses dissenting opinions in *State v. Medicine Eagle*, 2013 S.D. 60, 835 N.W.2d 886. SB 17. But those dissents focused on the distinction between a court’s sentencing authority and its jurisdiction. See *Medicine Eagle*, 2013 S.D. 60, ¶ 66, 835 N.W.2d at 907 (Zinter, J., dissenting) (stating “I agree with Judge Salter and Justice Konenkamp that the error alleged in the part II

of Plea/Sentencing Hearing. SENT 13-15.⁵ Now, the State asks this Court to supplant this jurisdictional requirement with oral statements made during a plea hearing. But an oral representation that an information *will be* filed does not establish jurisdiction. Furthermore, Johnson's conviction for Ingestion still rests on an unfiled charging document, because the circuit court erroneously found in its Judgment that an information was filed *nunc pro tunc*. SR 209.⁶ Because of the

information proceedings involved the question of statutory authority rather than the circuit court's subject matter jurisdiction) (emphasis added); *Id.* at ¶ 56, 904 (Salter, J., dissenting) (stating "this Court's previous decisions point decidedly, if implicitly, toward treating *irregularities in the habitual offender procedures as non-jurisdictional errors*) (emphasis added). Neither *Cotton* nor *Medicine Eagle* considered the government's failure to institute a criminal charge, rather, they considered sentencing enhancement authority as related to charging documents. Both the dissenting views in *Medicine Eagle* discusses "the courts' statutory or constitutional power to adjudicate the case." 2013 S.D. 60, ¶ 57, 835 N.W.2d at 905 (Salter, J., dissenting) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). Here, the circuit court's power to adjudicate Johnson's convictions is derived from SDCL 23A-6-1 and S.D. Const. art. VI, § 10, and each require an indictment or information for every "offense."

⁵ In its brief, the State does not argue that the Amended Complaint in this case was a sufficient charging document. *See generally* SB. Moreover, the State did not claim as much below. *See generally* SENT. It is clear the circuit court also viewed the information as a jurisdictional requirement and the Amended Complaint as insufficient. Further, it acknowledged at least one component distinguishing the Amended Complaint and the requirements of a valid information. *See* SENT 15 (stating the information will "say the same thing except it's going to say Information and list witnesses"). *See* SDCL 23A-6-10 (stating "[t]he prosecuting attorney shall endorse upon each information the names of the witnesses known to him at the time of its filing").

⁶ The circuit court's reference to an information being filed *nunc pro tunc* is also legally untenable because it relates to a substantive act (i.e. filing the information) that did not occur, rather than a clerical error. *See Wolff v. Weber*,

State's failure, and the circuit court's error in imposing sentence on a non-existent charging document, this Court should hold that Johnson's ingestion conviction is wholly void. *See LaCroix v. Fluke*, 2022 S.D. 29, ¶ 20, 975 N.W.2d 150, 159 (stating "a judgment rendered by a court without jurisdiction to pronounce it is wholly void and without any force or effect whatever") (quoting *State v. Haase*, 446 N.W.2d 62, 64 (S.D. 1989)).

B. Johnson Did Not Waive the Filing of the Information.

As the State points out, a waiver "is the intentional relinquishment of a known right." SB 17 (citing *State v. Bryant*, 2020 S.D. 49, ¶ 18 n. 2, 948 N.W.2d 333, 338 n.2). The State's argument that Johnson waived his right to indictment by grand jury misses the mark for several reasons. First, Johnson's consent or 'waiver' was to the filing of an information; he did not consent to proceeding without one. And his agreement was conditioned on the State actually filing the information. Johnson, the State, and the circuit court acknowledged the State's obligation to file an information. The plea agreement expressly stated, regarding Johnson's representations, "Defendant recognizes the State will need to file an amended charging document to add this charge and waives his right to a

1997 S.D. 52, ¶ 13, 563 N.W.2d 136, 139 (stating "[t]he authority of a court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken"). Furthermore, the circuit court's passive language (i.e. "Information was filed") is problematic in that it does not indicate whether it imposed judgment on a *sua sponte* filing of its own, or the State's filing. But neither exist in the record.

preliminary hearing to this new charge.” SR 62 (sealed PSI). The State reaffirmed its obligation in the plea agreement, regarding its own representations, stating “the State will dismiss Counts: 1, 4, 5 and 6 of the Complaint and Indictment and file an amended charging document containing the charges the Defendant has agreed to enter a plea of guilty to as listed above under the defendant’s representations.” SR 63 (sealed PSI). After recognizing only the Amended Complaint was filed, the circuit court asked Johnson “[d]o you have any issue with her filing that [information] within the next 48 hours?” and explained, “[i]t’s going to say the same thing except it’s going to say Information and list witnesses.” SENT 14-15. Under these circumstances, Johnson’s failure to object at sentencing was not an *intentional* relinquishment of his right to be prosecuted by a valid information. Rather, he was led to believe the information would be filed as required.

Likewise, the State’s claim that Johnson waived his right to indictment by grand jury, and therefore “no error occurred,” is misplaced. SB 19. What never occurred is the State fulfilling its obligation that induced any waiver it now seeks to attribute to Johnson. The State cites to *United States v. Cotton*, 535 U.S. 625 (2002) for support. But *Cotton* concerns the Fifth Amendment grand jury clause, and the right to indictment by grand jury, which can be waived. *Id.* at 630-34. Further, *Cotton* addressed defects in an existing indictment for the charged offense (i.e. failure to allege a drug quantity element for sentencing enhancement) and did not address a non-existent indictment or information. 535

U.S. at 632. This case concerns the State's obligation to properly bring a criminal charge before the circuit court under SD Const. art. VI, § 10 and SDCL 23A-6-1, and the court's jurisdiction to impose sentence on charged offense(s).

Furthermore, Johnson cannot confer subject matter jurisdiction by agreement, waiver, or consent. *Honomichl v. State*, 333 N.W.2d 797, 799 (S.D. 1983).

In addition to protecting a defendant's rights, the requirement of indictment or information under S.D. Const. art. VI, § 10 also protects the public interest in the integrity of criminal prosecutions. It ensures prosecutorial accountability by requiring either grand jury review or formal prosecutorial information. Here, the State's failure and the circuit court's declaration that an information was filed undermine that integrity. The State and the circuit court acknowledged the jurisdictional necessity of a valid charging document. The State promised to file it but did not. Any waiver the State now seeks to invoke, in order to excuse its own failure, is an improper characterization of the facts. Johnson cannot waive a right when the act he consented to in order to induce the waiver never occurred. The State's argument, if accepted, would allow new charges to be instituted by oral statement at a plea hearing and a sentence to rest on the circuit court's erroneous statement that a document was filed when it was not. A defendant cannot waive the filing of a jurisdictional charging document and this Court should not condone the State's failure and the circuit court's error.

C. *Johnson Did Not Forfeit his Right to Appeal the Conviction and Sentence.*

Waiver is the intentional relinquishment of a known right, but forfeiture is the failure to timely assert a right. *Bryant*, 2020 S.D. 49 at ¶ 18 n. 2, 948 N.W.2d at 338 n.2. The State argues, in the alternative, that Johnson forfeited his right “to appeal the conviction and sentence,” and that “there is not plain error.” SB 19. Johnson disagrees. First, Johnson did not *forfeit* his right to appeal the conviction and sentence. Johnson timely asserted his right to appeal. SR 212-13.

The State faults Johnson for entering his guilty plea pursuant to the plea agreement, and not objecting to the imposition of sentence. SB 19. The State asks the Court to review the issue for plain error. *Id.* Johnson asserts that the issue of the State’s failure to file a valid charging document is a jurisdictional issue that cannot be forfeited. *See State v. Eidahl*, 486 N.W.2d 257, 259 (S.D. 1992) (holding “jurisdiction may not be conferred by agreement, consent or waiver,” even when “the omission of the filing of the information was completely overlooked”). Johnson does not waive that argument. However, he will respond to the State’s claim that he cannot establish plain error.

Of plain error review, this Court has stated:

We invoke our discretion under the plain error rule cautiously and only in exceptional circumstances. To establish plain error, an appellant must show (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 affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Townsend, 2021 S.D. 29, ¶ 24, 959 N.W.2d 605, 612 (citation modified). In its analysis, the State concedes that “the first two prongs of plain-error review

would be met,” if the Court “assume[s] that Johnson did not waive his right to indictment by grand jury.” SB 20. The State here concedes that, “constructively amending the indictment to convict and sentence Johnson for an offense not included in the indictment plainly deviates from the requirements of S.D. Constitution article VI, § 10, and SDCL 23A-6-1.” SB 20. Johnson agrees that the Ingestion charge was never instituted by indictment or information and the Amended Complaint was not a constitutionally or statutorily sufficient charging instrument for a felony prosecution. This was plain error and the first two prongs would be met.

The State argues that it is “an impossible task for Johnson” to establish the third prong. SB 20. For support in this assertion, the State relies on *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). Johnson disagrees with the State’s characterization of that authority. In *Dominguez Benitez*, the Supreme Court framed the issue as “whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.” 542 U.S. at 80.⁷ But Johnson does not allege a Rule 11 violation. Therefore, the State is misguided in arguing Johnson “cannot claim that his plea would have been different had the State filed the information because at the time

⁷ The error under consideration was the district court’s failure to advise the defendant he was ineligible for “safety valve” protection from a mandatory minimum sentence prior to entering his plea. 542 U.S. at 78.

he pleaded guilty, he anticipated the State would do just that.” SB 20. To the extent that Johnson must respond to whether the plea agreement itself affected his substantial rights, he asserts that it did so because the State did not fulfill its obligation to file a “charging document.” This error directly affects Johnson’s constitutional and statutory right to be charged, in every offense, pursuant to indictment or information. S.D. Constitution article VI, § 10; SDCL 23A-6-1. And the State’s argument acknowledges its own failure. Had Johnson known the State would not validly establish his charge, conviction, and sentence, he may have chosen not to enter the plea.

However, the error in violating the requirements of S.D. Const. art. VI, § 10, and SDCL 23A-6-1 affected Johnson’s substantial rights most prominently in sentencing. He was convicted and sentenced on a charge that was never properly instituted. The Ingestion sentence was imposed consecutive to the possession sentence, meaning the jurisdictionally defective Ingestion sentence directly increased the total term of imprisonment Johnson must serve. 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. *Townsend*, 2021 S.D. 29, ¶ 31, 959 N.W.2d at 614. Here, but for the error, Johnson would not have been convicted of or sentenced for the Ingestion charge at all, because the court lacked jurisdiction to accept a plea and impose sentence on a charge that was never properly instituted. The consecutive sentence structure makes the prejudice material and quantifiable.

Finally, the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. The State again relies on *Cotton*, arguing that authority establishes “the *unfairness* of a defendant avoiding a sentencing enhancement when an indictment omitted a necessary fact, and the defendant did not object at trial.” SB 22 (emphasis added). Notably, the State does not address how its own error affects the integrity and public reputation of judicial proceedings. Allowing a conviction and consecutive sentence to stand on a charge that was never properly instituted – and where the State concedes the error on appeal – would seriously undermine public confidence in the integrity of criminal proceedings. Furthermore, the integrity of the proceedings here is seriously undermined by the State’s failure to file an adequate charging document and the circuit court stating in its Judgment that it was filed, especially when the State and court acknowledged this issue.

II. THE CIRCUIT COURT MISAPPLIED SDCL 22-6-11 WHEN IT CONSIDERED ELEMENTS OF A DISMISSED CHARGE, EMPHASIZED RETRIBUTION, AND FAILED TO CONNECT THE AGGRAVATING CIRCUMSTANCES TO PUBLIC SAFETY RISK.

A. Standard of Review

The State suggests Johnson forfeited the issue of the circuit court’s application of SDCL 22-6-11 and argues plain error review must be applied. SB 22-24. But the State fails to acknowledge the distinction between procedural issues and substance issues. *Compare 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 factors 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."), *with State v. Kurtz*, 2024 S.D. 13, ¶ 12, 4 N.W.3d 1, 4 (this Court applying the de novo standard to determine whether the circuit court misinterpreted or misapplied SDCL 22-6-11). In addressing Johnson's assertion that the Court should apply de novo review, the State does not address *Kurtz*. SB 24. The State also incorrectly states "Johnson did not object to the circuit court's departure from presumptive probation or the manner in which it applied aggravating circumstances." SB 24. Johnson disagrees. First, Johnson's counsel had argued initially that presumptive probation applied. SENT 10. Then, after the State's sentencing remarks and victim impact statements, Johnson's counsel asked to be heard and "respond to a couple of the factors that have been mentioned." SENT 61-62. Counsel argued the circuit court should limit its consideration of sentencing factors to those related to the charges to which Johnson pleaded guilty, and that unproven allegations of negligence associated with the dismissed charge of Vehicular Battery were not proper considerations under SDCL 22-6-11. SENT 65-67. Central to counsel's rebuttal argument was the issue of causation. SENT 66-67. Therefore, Johnson did preserve this issue for de novo review in that he argued below that consideration of disputed elements of negligence and

causation and the nexus between Friesner's injuries and Johnson's risk to public safety.

The State acknowledges that the abuse of discretion standard may be applied. SB 25 (citing *State v. Underwood*, 2017 S.D. 3, ¶ 13, 890 N.W.2d 240, 243). 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 *State v. Beckwith*, "apply the abuse of discretion standard in reviewing a sentencing court's decision to depart from presumptive probation." 2015 S.D. 76, ¶ 7, 871 N.W.2d 57, 59.

B. *The Circuit Court Misapplied SDCL 22-6-11 When it Considered the Disputed Elements of Negligence and Causation from the Dismissed Vehicular Battery Charge.*

The State argues that courts are permitted to consider uncharged or dismissed conduct to justify departure from presumptive probation. SB 28. The State cites *State v. Mitchell*, 2021 S.D. 46, 963 N.W.2d 326, for support. But in *Mitchell*, the Court vacated the defendant's manslaughter sentence and remanded for resentencing because "[t]he circuit court's decision to treat Mitchell as solely responsible without regard for [victim]'s conduct was not harmless." 2021 S.D. 46, ¶ 40, 963 N.W.2d at 335. In *Mitchell*, the Court considered the concept of "imperfect self defense" in cases where murder charges are reduced by way of plea agreement to manslaughter, reducing criminal liability. *Id.* at ¶¶ 36-37, 335. Here, as the State acknowledges, "the court noted that as the person in charge of the motorcycle, Johnson had a duty to ensure that his passenger had a

helmet on but failed to do so.” SB 29. Even though it stated it was not considering the Vehicular Battery count that was dismissed, the circuit court’s statements demonstrate it was attributing causation solely to Johnson. SENT 70-71. The circuit court misapplied SDCL 22-6-11 because it conflated its sentencing considerations with Class 4 felony conduct.

C. The Circuit Court Misapplied SDCL 22-6-11 When it Used Punishment on Behalf of Friesner and Her Family to Justify Departure from Presumptive Probation.

The State argues that “there is no indication that the court leaned on [the] factor” of Friesner’s injuries “as the one with the most weight.” SB 27. This is an inaccurate account of the circuit court’s comments, because in addressing SDCL 22-6-11, it first emphasized Friesner’s injuries and the trauma inflicted on her family, then described this consideration as “mammoth.” SENT 73. Similar to the reasoning in *Mitchell*, “by regarding [Johnson]’s conduct as it did, the court’s concern with the *punitive* objective of sentencing was artificially heightened which affected the ultimate decision” to deviate from presumptive probation. *Mitchell*, 2021 S.D. 46, ¶ 40, 963 N.W.2d at 335 (emphasis added). In *Kurtz*, this Court reversed the circuit court because it considered “simply punishment,” overlooking the statute’s requirements. 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5. The circuit court misapplied SDCL 22-6-11 because it emphasized the punitive objective of sentencing in focusing on Friesner’s injuries as an aggravating factor without articulating it as an ongoing risk to public safety.

III. THE CIRCUIT COURT EXCEEDED ITS STATUTORY
AUTHORITY IN REVOKING JOHNSON'S DRIVER'S LICENSE
FOR LIFE UPON CONVICTION FOR DUI FIRST OFFENSE.

The State concedes “the court lacked authority to revoke [Johnson’s] driving privileges for life.” SB 32. The State argues “This Court should remand only for the purpose of resentencing Johnson on count three.” *Id.* Johnson agrees the Court should remand for resentencing on this count. But, based on the foregoing argument, Johnson argues the Court’s remand should not be limited to this issue.

CONCLUSION

Johnson respectfully requests that this Court vacate the Judgment and Sentence against him for violation of SDCL 22-42-5.1. If this Court does not deem Johnson’s conviction under SDCL 22-42-5.1 to be wholly void due to the jurisdictional defect, Johnson also requests that this Court reverse the circuit court’s finding of aggravating circumstances which pose a significant risk to the public and remand his case for resentencing with instructions to enter a suspended sentence. Finally, Johnson requests this Court vacate the portion of the Judgment which revoked his driving privileges for life and remand his case for resentencing with instructions to the circuit court that the revocation of Johnson’s driving privileges must not exceed a period of one year pursuant to SDCL 32-23-2.

CERTIFICATE OF COMPLIANCE

- I. 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 4,629 words.
- II. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 1st day of July, 2026.

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CERTIFICATE OF SERVICE

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

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