

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 31348

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,

v.

KIM RENEE MCCLAIN,
Defendant and Appellant.

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

THE HONORABLE JOSHUA HENDRICKSON

APPELLANT'S BRIEF

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I. PRELIMINARY STATEMENT

The following references and citations will be used in this brief:

Defendant and Appellant, Kim Renee McClain, will be referred to as “Ms. McClain,” or “McClain;” Plaintiff and Appellee, the State of South Dakota, will be referred to as “the State;” the change of plea hearing transcript will be cited as “COP;” and, the sentencing hearing transcript will be cited as “ST.” Documents in the settled record will be referred to as “SR;” and the sealed pre-sentence investigation report and its attachments will be cited as “PSR.” Documents within the Appendix will be referred to as “App.”

II. JURISDICTIONAL STATEMENT

McClain was indicted in Pennington County, South Dakota, for alternative counts of driving under the influence. SR 32. This offense was

alleged, in a Part II Information, to be her sixth or subsequent offense. SR. 34.

On November 3, 2025, McClain pled guilty to Count II of the Indictment, and admitted the allegations contained in the Part II Information. On January 12, 2026, McClain was sentenced to four years in the South Dakota Women's Prison. A written Judgment was issued by the Court on January 14, 2026. SR 516; Add. 1. McClain filed a Notice of Appeal on January 14, 2026. SR 517.

McClain's Judgment is a final judgment in a criminal case from a circuit court within South Dakota. SDCL 23A-32-2. And, McClain's Notice of Appeal was filed in a timely manner. SDCL 23A-32-15. Therefore, this Court has jurisdiction to consider this appeal.

III. STATEMENT OF THE LEGAL ISSUE

Whether the trial court mis-interpreted SDCL 32-23-4.9 when it concluded that McClain was subject to a four year mandatory minimum sentence under the statute?

The trial court concluded that SDCL 32-23-4.9, in conjunction with SDCL 32-23-4.7, required it to impose, at minimum, a four year penitentiary sentence under the statute.

Busic v. United States, 446 U.S. 398 (1980)
State v. Biteler, 2025 S.D. 73, 29 N.W.3d 894
State v. Simons, 313 N.W.2d 465 (S.D. 1981)
SDCL 32-23-4.9

IV. STATEMENT OF THE CASE AND FACTS

A. Procedural History

On March 27, 2024, McClain was indicted for alternate counts of driving under the influence. SR 32. In Count I she was charged with driving or being in physical control of a motor vehicle while under the influence of alcohol, in violation of SDCL 32-23-1(2). SR 32. In Count II she was charged with driving or being in physical control of a motor vehicle while having .08 percent or more by weight of alcohol in her blood, a violation of SDCL 32-23-1(1).

The allegations in the Indictment were subject to a Part II Information. SR 34. That Part II Information alleged that, pursuant to SDCL 32-23-4.9, McClain's present charges constituted her sixth or subsequent offense.

The Part II Information raised McClain's DUI charges from class one misdemeanors to class four felonies, and subjected her to the sentencing provisions set forth in SDCL 32-23-4.9. SR 34. McClain was never charged with a violation of SDCL 32-23-4.7, she was never arraigned or advised of anything related to SDCL 32-23-4.7, and none of her charging documents reference that statute. SR 32, 65, 89.

The Honorable Joshua Hendrickson, Circuit Court Judge, presided over the case. The State was represented by the Pennington County State's

Attorney's Office, and McClain was represented by present counsel throughout most of the proceedings.

The case was delayed for many months when McClain was determined to be mentally incompetent to proceed, and then underwent competency restoration treatment. Upon her restoration to competency, and pursuant to a written plea agreement, SR 134, McClain entered a plea to Count II of the Indictment and admitted to the Part II Information. COP 2-7.

A pre-sentence investigation was ordered, and a pre-sentence report containing hundreds of pages of attachments was prepared. SR 136. On January 12, 2026, McClain was sentenced to four years of imprisonment in the South Dakota Women's Prison. ST 9. That sentence was memorialized in a Judgment issued on January 14, 2026. SR 516; ADD 1.

B. Facts

The facts relating to Ms. McClain's DUI charges are not at issue in this appeal. She freely and voluntarily admitted to having driven a motor vehicle with more than .08% alcohol by weight in her blood on March 15, 2024. COP 4-5. When accepting her guilty plea, the trial court relied upon McClain's admissions as well as McClain's blood test results, which showed that she had a blood-alcohol concentration of .138% at the time of her arrest. COP 5.

After McClain's plea to the Indictment was accepted, the circuit court accepted McClain's admission to the Part II Information, which alleged the present offense to be her sixth or subsequent conviction for DUI. COP 6. Those prior DUI convictions were from 2009, 2010, 2013, 2014, and 2018. COP 5-6; SR 34.

At the change of plea hearing, the trial court noted that the impact of McClain's admission to the Part II Information was to increase her offense to a class four felony. COP 6. And, the circuit court stated that this offense was subject to a four year mandatory minimum sentence. COP 6.

At that time, McClain objected to the circuit court's assertion that the offense contained a four year mandatory minimum:

Your Honor, one correction or notation is, though this is charged as the mandatory minimum offense, the State and I have both looked into it and it does not appear that there is a mandatory minimum based on the aggravated structure and the failure of any of these convictions to establish that.

COP 6. In response, the circuit court stated:

I understand. And I think I've – I've looked at that issue before and I think given the ages there might be an argument around it. It's listed as a mandatory four and it might not be. You can sure argue that at the time of sentencing.

COP 6.

A pre-sentence investigation (PSI) was ordered and a special block of time was reserved for the sentencing hearing based on the unique

circumstances of the case. COP 7-8. Due to McClain's age, her medical and mental health conditions, and the voluminous medical record that had been compiled during the litigation (over 3,500 pages of medical records), the Court provided the parties with extra time for the PSI and for a summary of the medical records to be prepared. COP 7-8.

The Court Services Office prepared a pre-sentence report (PSR) that included more than 500 of pages of information about Ms. McClain.¹ Psychological and neuro-psychological evaluations, medical records, and letters from mental health providers and case managers noted that Ms. McClain, who was 68 years old at that time, suffered from dementia and over a dozen other medical and mental health disorders, and that her IQ was in the very low range. PSR 455-457 (summary); 136-377 (psychological and neuro-psychological evaluations); 378-454 (medical records); 458-462 (letters). Further, the records and letters showed that Ms. McClain was involved in regular mental health counseling, was receiving regular medical care for her various conditions, received in-home services through the Signal

¹ To assist the Court in navigating the PSR: psychological, neuro-psychological, and competency evaluations are from page 136 to 377; medical records are from page 378 to 454; the summary of the records (diagnoses and medications) requested by the circuit court is from page 455 to 457; and, letters of support including those from McClain's psychologist and case manager and from page 458 to 462.

program, and had not had a single 24/7 violation (she was on the SCRAM bracelet) in the 20 months since her arrest.² PSR 458-462.

At the sentencing hearing, the substantial mitigation evidence in the record was addressed by both the State and the defense. The State noted that McClain performed well on bond, accepted responsibility for her actions, had gone through “a lot of medical things while this case has been pending and still generally showed up for court and complied with conditions of bond,” and was willing to participate in the DUI Court though she was not accepted as a participant. ST 3.

The defense pointed out that in Ms. McClain’s 22 months on the SCRAM alcohol monitoring bracelet, Ms. McClain hadn’t had a single violation, that she had made every court appearance, and that she had made all of the medical and psychological appointments that were required during the pendency of the case. ST 4-5. This included the dozens of appointments that McClain was required to participate in as part of competency restoration. ST 5.

The defense also noted that during the course of the case, McClain had created a network of medical and mental health providers that were

² At the time the PSR was prepared, McClain had gone 20 months without a violation. By sentencing, she had gone 22 months without any violation of her sobriety monitoring requirement.

attending to her multiple, chronic and degenerative conditions, and that she had accessed services and support programs that had given her life stability. ST 5. McClain had obtained subsidized housing, was enrolled in Medicare, was receiving social security benefits, and was benefiting from in-home and out-of-home case management services through Signal. ST 6-7. The defense noted that all of these programs and services would be disrupted if McClain was sentenced to prison, and that it might take years after her release to get them re-established. ST 7-8.

The circuit court stated it did not like mandatory minimum statutes, acknowledged that a prison sentence was not in McClain's "best interest" and that her case was "one of those cases" where the court should have sentencing discretion. ST 9. The circuit court agreed with the State and the defense that the six year mandatory minimum sentence referenced in SDCL 32-23-4.9 did not apply to Ms. McClain because she did not have five prior DUIs within the 15 years preceding the charged offense. ST 3, 9.

But, the circuit court repeatedly stated that it did not have a choice other than to send McClain to prison. ST 9. The circuit court did not base this position on the provisions of SDCL 32-23-4.9, the statute that McClain had been convicted of. Instead, the circuit court stated that, pursuant to

SDCL 32-23-4.7, it did not have a choice other than to impose the four year mandatory minimum contained in that statute. ST 9.

However, looking at 32-23-4.7., that regards a DUI fifth or subsequent, meaning further offense, and there's no time limit on that. And that requires a four-year mandatory minimum that I don't have a choice but to apply.

I don't think it's in your best interest, but I don't have a choice in regards to it.

ST 9.

McClain immediately objected to the circuit court's application of SDCL 23-23-4.7's mandatory minimum to McClain's case, which was prosecuted pursuant to SDCL 23-32-4.9. ST 10. The circuit court noted the objection and stated that it wished that it interpreted the statute the same way as McClain did. ST 10.

I, conversely, don't see it the same way, obviously . . . Kinda wish I did to be honest with you[.]

ST 10.

McClain was then sentenced to four years in prison, with credit for three days for time served. ST 10-11; SR 516; ADD 1.

V. AUTHORITY AND ARGUMENT

A. The circuit court misinterpreted SDCL 32-23-4.9 when it concluded that persons sentenced pursuant to it were either subject to the mandatory minimum contained therein, or were subject to the mandatory minimum in SDCL 32-23-4.7

1. Preservation of Issue and Standard of Review

At the change of plea hearing McClain objected to the circuit court's determination that a statutory mandatory minimum sentence was applicable to her case. COP 6. At the sentencing hearing, McClain reiterated her objection to the circuit court's interpretation of the statute and its belief that a mandatory minimum sentence was required by law. ST 10. The circuit court acknowledged the objection, and issued a final ruling that over-ruled it. ST 10. When asked if there was any legal reason why judgment should not be imposed, McClain re-asserted her previously made objection. ST 10. The circuit court then imposed the sentence. ST 10. McClain preserved the alleged error for appellate review through her timely objection prior to imposition of sentence. *See State v. Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d 561, 569 (allegations of procedural errors during sentencing must be preserved through a timely objection).

Issues relating to statutory interpretation are reviewed de novo, and no deference is given to the circuit court's interpretation of a statute. *E.g. State v. Biteler*, 2025 S.D. 73, ¶ 12, 29 N.W.3d 894, 897.

2. The Circuit Court Erroneously Interpreted SDCL 32-23-4.9

The purpose of statutory interpretation is to discover legislative intent. The starting point when interpreting a statute must always be the language itself. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Ambiguity exists when a statute 'is reasonably capable of being understood in more than one sense. All penal statutes shall be construed according to the fair import of their terms, with a view to effect their objects and promote justice.

State v. Biteler, 2025 S.D. 73, ¶13, 29 N.W.3d 894, 897 (internal citations and quotations omitted).

The circuit court in McClain's case believed that persons convicted under SDCL 32-23-4.9 are either subject to the six year mandatory minimum sentence under that statute, or are subject to the four year mandatory minimum sentence in SDCL 32-23-4.7, regardless of whether the person was charged under that statute. ST 9-10. The circuit court interpreted SDCL 32-23-4.9 as to give the court "no choice" but to impose at least a four year penitentiary sentence, and believed that the statute(s) divested the court of discretion to impose a probationary sentence. ST 9-10. Under the circuit court's statutory interpretation, probation was not a sentencing option for a person convicted under SDCL 32-23-4.7.

The circuit court's statutory interpretation was erroneous, and the sentencing procedure utilized was improper. First, the circuit court was

without any statutory or other authority to borrow or to apply the sentencing scheme described in SDCL 32-23-4.7 in a case prosecuted under SDCL 32-23-4.9. Second, the circuit court's interpretation of SDCL 32-23-4.9 conflicted with the plain, clear, and unambiguous language of the statute. Last, to the extent that there is any ambiguity in the statute, the circuit court's interpretation of the statute is inconsistent with the rule of lenity. The circuit court's error substantially prejudiced McClain because it led to imposition of a more severe sentence than otherwise would have been imposed.

B. The circuit court's incorporation of SDCL 32-23-4.7 into SDCL 32-23-4.9 was improper and inconsistent with the plain language of the statutes

At sentencing, it was not clear as to what authority or doctrine the circuit court was relying upon as a basis for applying the sentencing scheme described in SDCL 32-23-4.7 to McClain's case, which was prosecuted under SDCL 32-23-4.9. ST 9-11. The circuit court operated under an improper assumption that if a defendant, such as McClain³, did not meet the criteria for a six year mandatory minimum sentence under SDCL 32-23-4.9,

³ The parties and the circuit court agreed that McClain did not meet the criteria for a six year mandatory minimum sentence under SDCL 32-23-4.9 because she did not have five prior convictions within the preceding 15 years. ST 3, 9.

by default the defendant was to be sentenced pursuant to SDCL 32-23-4.7.

This led the circuit court to its prejudicial determination that it had no choice but to sentence McClain to a minimum of four years in prison.

There is nothing in the plain language of either statute, or elsewhere in the South Dakota Code, that supports the circuit court's position in this case. Nor is there any case law or statute which describes a scenario where a court can apply the sentence described for one crime to defendant convicted of a different offense. McClain was never charged with a violation of SDCL 32-23-4.7. None of her charging documents ever reference that statute. At all times, from the felony arrest warrant, to the complaint, to the indictment, to the Part II Information, the only offense McClain was ever charged with was DUI Sixth Offense, as described in SDCL 32-23-1 and 32-23-4.9. During her advisement and arraignment, SDCL 32-23-4.7 was never mentioned.

The two statutes contain substantially different structures. SDCL 32-23-4.9 describes multiple categories of offenders that fall within its purview, specifically aggravated offenders and non-aggravated offenders. SDCL 32-23-4.7 does not contain any discussion or description of these categories. Then, even within the category of aggravated offenders, SDCL 32-23-4.9 describes the class of individuals that are subject to a mandatory minimum

sentence, and those which are not. SDCL 32-23-4.7 makes no such distinction.

SDCL 32-23-4.9 discusses the imposition of a probationary sentence within the context of a specialty court sentence, and as part of a stand-alone discussion of the kinds of sentences which may be imposed and the conditions thereof.

For any person convicted under this section and placed on probation, parole, or released from prison due to a suspended sentence, the person's supervision must include at least one of the following . . .

SDCL 32-23-4.9. When SDCL 32-23-4.7 references probation, it is only in the context of a specialty court.

When SDCL 32-23-4.9 references conditions of release such as the ignition interlock device, it does so in regard to persons placed on probation or parole.

For any person convicted under this section and placed on probation, parole, or released from prison due to a suspended sentence, the person's supervision must include at least one of the following . . .

SDCL 32-23-4.9. When SDCL 32-23-4.7 describes the same list of required conditions of release, it does so only in the context of persons released on parole. SDCL 32-23-4.7.

These are two distinct and separate statutes that describe two distinct and separate sentencing schemes. There is nothing in the plain language of either statute, or elsewhere, that makes the provisions of one applicable to the other. The circuit court's interpretation of the statutes, and the statutory scheme, was improper and incorrect. As a result, even though the circuit court expressed a desire for judicial discretion and the ability to impose a probationary sentence, Mc. Clain was prejudiced by the court's wrongful statutory construction and sentenced to four years in prison.

Due to the circuit court's statutory misinterpretation and misapplication, McClain's case should be remanded for resentencing.

C. The circuit court's interpretation of SDCL 32-23-4.9 was erroneous

The circuit court misinterpreted SDCL 32-23-4.9 when it concluded that the statute required a mandatory minimum sentence for all offenders, other than those sentenced to a specialty court. Although the circuit court did not clearly articulate its reasoning on the issue, the statements made at the sentencing hearing suggest that the circuit court believed that the statute required all defendants charged with having been convicted of a sixth or subsequent offense to face some mandatory minimum prison sentence, whether that be the six year mandatory minimum in SDCL 32-23-4.9, or the four year mandatory minimum it borrowed from SDCL 32-23-4.7. ST 9-10.

The circuit court's understanding of the statute is inconsistent with SDCL 32-23-4.9's plain language.

The circuit court's statutory interpretation contradicts the express language found in SDCL 32-23-4.9's fourth paragraph, which states: "For any person convicted under this section and placed on *probation*, parole, or released from prison due to a suspended sentence, the person's supervision must include . . ." SDCL 32-23-4.9 (emphasis added). It is a well-established rule of law in South Dakota that a defendant cannot be on probation and placed in the custody of a state correctional facility at the same time. *State v. Orr*, 2015 S.D. 89, ¶ 17, 871 N.W.2d 834, 836 (determining concurrent sentences to prison and to probation violated the Separation of Powers Doctrine). Thus, this statute, by its plain language, anticipates that one of the options available to a circuit court when sentencing a defendant convicted of SDCL 32-23-4.9 is a non-penitentiary, probationary sentence. Importantly, this reference to probation in the statute is distinct from its discussion in the first paragraph of the statute, which pertains to specialty court sentences.

SDCL 32-23-4.9 defines a multi-faceted sentencing scheme. It breaks down DUI Sixth (or subsequent) offenses into two categories: aggravated and non-aggravated offenses. To be an aggravated offense, two conditions

must be met: (1) the defendant has had at least five DUI convictions within 25 years of the offense being charged; and, (2) at least two of those prior convictions occurred within the preceding ten years. SDCL 32-23-4.9.

If a defendant is an aggravated offender under the statute, he or she is subject to a mandatory minimum sentence, but only if one additional condition is met. If the defendant is an aggravated offender (meets the two conditions listed in the preceding paragraph) AND has had six convictions for DUI within 15 years of the charged violation, the court must sentence the defendant to at least six years in a state correctional facility (along with other requirements pertaining to parole, etc.). SDCL 32-23-4.9.

This statute describes a number of categories of offenders. First, there are those for which the present conviction is a sixth or subsequent offense, but whose offense is not aggravated. These could be persons who have six convictions, but five of them occurred within 25 years of the date of the present offense, but only one of which occurred within the preceding 10 years. For these persons, the statute – by its plain and unambiguous language -- does not impose any mandatory minimum sentence. And, because the statute lists probation as one of the potential outcomes, and because there is no language prohibiting probation for such offenders, the

sentencing court would be free to impose any sentence otherwise permitted for class four felonies.

The second category of offenders are those who fit the definition for aggravated offenses, and who have had at least six DUI convictions within the 15 years preceding the present offense. For those persons, the statute – by its plain and unambiguous language – imposes either a minimum of a six year penitentiary sentence, or a sentence to one of the listed specialty courts. The sentencing court has no discretion outside of those parameters.

The third category of offenders are those who fit the definition for aggravated offenses, but who do not have at least six DUI convictions within the 15 years preceding the present offense. For this category of offender, the statute does not – by its plain and unambiguous language – impose any mandatory minimum sentence. Rather, the statute gives the sentencing court the discretion to sentence the defendant to any sentence permissible for class four felonies, including probation. However, the statute does mandate various conditions for a probationary or suspended penitentiary sentence.

McClain falls within this third category of offenders. Her offense was considered aggravated because she had five prior DUI convictions, and at least two of those occurred within the preceding 10 years. SR 34. But, McClain did not, as the State acknowledged, have six convictions within 15

years of the charged offense. ST 3. As a result, the six year mandatory minimum was inapplicable pursuant to SDCL 32-23-4.9's plain language. She was eligible for probation or any other sentence applicable to class four felonies, as long as the other conditions in the statute pertaining to driver license revocation, sobriety monitoring, etc., were ordered.

Nowhere else within this statute, either by express wording or through incorporation or cross-reference to another statute, are persons like McClain who fall in the third category of offenders subject to any mandatory minimum sentence. Due to the circuit court's erroneous statutory interpretation, McClain's case should be remanded for re-sentencing.

D. The circuit court's statutory interpretation is inconsistent with the rule of lenity, and any apparent unreasonableness in the statute's application should be addressed by the legislature, not the courts

Ambiguity in sentencing statutes "should be resolved in favor of lenity." *State v. Simons*, 313 N.W.2d 465, 467 (S.D. 1981) (quoting *Simpson v. United States*, 435 U.S. 6, 15 (1978). *See United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

If sentencing statutes, as applied in a particular case, appear to lead to unreasonable results, it is not for the courts to disregard the plain language of the statute to create an allegedly more reasonable result: "If corrective action is needed, it is the Congress that must provide it." *Busic v. United*

States, 446 U.S. 398, 404 (1980). In a case involving the application of seemingly inconsistent sentencing enhancement statutes, the United States Supreme Court rejected the government's request to have the Court interpret the statutes in a way consistent with what the government asserted was the likely intent of the drafters of the legislation:

More broadly, it is simply not for this Court to substitute its accommodation between old and new enhancement provisions for the one apparently chosen by Congress. On the contrary, in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with commonsense and the public weal.

Busic v. United States, 446 U.S. 398, 409 (1980) (internal quotations omitted).

McClain maintains that SDCL 32-23-4.9 is not ambiguous. Its language is clear and plain, and that language allows sentencing courts to impose probationary sentences and/or sentences that do not carry a mandatory minimum penitentiary sentence for certain defendants. However, to the extent that the Court finds that there is some language ambiguity, the rule of lenity resolves that ambiguity in McClain's favor.

The State is likely to argue that this Court should reject SDCL 32-23-4.9's plain language and affirm the circuit court's statutory construction when it concluded that a mandatory minimum penitentiary sentence was

mandated – even if it required the incorporation of an uncharged offense.

The State is likely to reason that this statutory re-construction is necessary because, otherwise, some defendants convicted of Sixth Offense DUI may be eligible for a less severe sentence than those convicted of a Fifth Offense DUI.

This Court should not reconstruct the statute merely because, in some cases, Sixth Offense offenders may face less time than Fifth Offense offenders. The legislature set forth a detailed sentencing scheme in SDCL 32-23-4.9 that distinguishes between aggravated and non-aggravated offenses, and offenders who have repeatedly been convicted of DUIs in recent years versus those who have been convicted over greater expanses of time. The legislature did not create as detailed of a structure for those convicted of Fifth Offense DUI. That could be because it was anticipated that a greater portion of those offenders would be eligible for specialty courts, or it could be for a number of other reasons that we can't determine.

Regardless of the reason for the structural differences in the two statutes, it is not for this Court, the circuit court, or any other judicial body to “fix” the legislation to create an outcome that it, or the State, believes is more reasonable. The statute is clear. It permits probationary sentences for

defendant's like McClain. It does not permit the incorporation of SDCL 32-23-4.7's sentencing scheme into its parameters.

The circuit court's interpretation of the statute was erroneous.

McClain's case should be remanded for resentencing.

E. McClain was prejudiced by the circuit court's statutory mis-interpretation

McClain has been unable to find any case on point that directly addresses whether she is required to establish prejudice from the circuit court's mis-interpretation of the statute in a case where the issue was properly preserved for de novo review. However, in other cases involving the de novo review of a circuit court's application of legal principles, a showing of prejudice has been required. *See In Re Est. of O'Neil*, 2026 S.D. 1, ¶ 23, 30 N.W.3d 713, 728 (requiring showing of prejudice in case involving de novo review of circuit court's application of the collateral estoppel rule); *State v. Thoman*, 2021 S.D. 10, ¶ 32, 955 N.W.2d 759, 770 (showing of prejudice required in case involving de novo review of the propriety of circuit court's jury instructions). Prejudice, in the context of alleged sentencing errors, may be established if the defendant shows that the sentence received was likely harsher than he or she would have received but for the error. *See State v. Guziak*, 2021 S.D. 68, ¶ 26, 968 N.W.2d 196, 204

(no prejudice where the defendant failed to show she would have received a less severe sentence absent the State's improper sentencing argument).

The circuit court's statements during the sentencing hearing establish prejudice to Ms. McClain:

Ms. McClain, you come before the Court on – the laws have changed in this matter recently and it kind of takes the discretion out of my hands to a degree.

I think your argument and the State has acknowledged that that 32-23-4.9 requiring a mandatory six-year sentence probably doesn't apply due to the age of your DUIs. I agree with that.

However, looking at 32-234.7, that regards a DUI fifth or subsequent, meaning further offense, and there's no time limit on that. And that requires a four-year mandatory minimum that I don't have a choice but to apply.

I'm not in favor of mandatory – or, you know, sentences like these really as it takes the matter of the Court's discretion to a degree. And this being one of those cases where I think it would be completely in the Court's discretion to sentence that. I just don't think I can given the way the statutes read. It's a mandatory sentence. I would – I don't think it's been official. I'll say that. I don't think it's in your best interest, but I don't have a choice in regards to it.

ST 9. A few minutes later, after McClain renewed her objection to the circuit court's interpretation of the statute as requiring a prison sentence, the circuit court went on to state:

I appreciate the objection. I'll note that as well . . . I, conversely, don't see it the same way, obviously . . . Kinda wish I did to be honest with you[.]

These statements evince the circuit court's desire to sentence McClain to a less severe sentence. The circuit court repeatedly stated that it didn't have a choice but to impose what it believed was a statutorily required mandatory minimum sentence. McClain had argued for probation and against the circuit court's statutory interpretation. The court responded that it honestly wished that it interpreted the statute the same way as the defense.

But for the circuit court's erroneous statutory interpretation, the circuit court's own statements establish that McClain would have received a less severe sentence. Consistent with South Dakota law, McClain established prejudicial error. Ms. McClain's case should be remanded for resentencing.

CONCLUSION

Based on the facts, authority and argument presented above, McClain asks that her sentence be vacated and her case be remanded for resentencing.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant McClain asks the Court for oral argument so that she can answer questions and address concerns that the Court may have.

Dated this 9th day of March, 2026.

_____/s/_____
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for Appellant Kim McClain, submits the following:

The forgoing brief is 27 pages in length. It is typed in proportionally spaced 14 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 6247 words and 30,204 characters.

Dated March 9, 2026.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served upon the persons herein next designated, on the date shown below, by electronic filing at the e-mail addresses below, to wit:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31348

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KIM RENEE MCCLAIN,

Defendant and Appellant.

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

THE HONORABLE JOSHUA K. HENDRICKSON
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Notice of Appeal filed January 14, 2026

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31348

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KIM RENEE MCCLAIN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Kim Renee McClain, is referred to as “Defendant” or “McClain” and Appellee, State of South Dakota, is referred to as “State.” References to documents are designated as follows:

Settled Record SR

Defendant’s Brief..... DB

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

JURISDICTIONAL STATEMENT

On November 3, 2025, McClain entered a guilty plea on Count 2 of the Indictment, Driving or Control of Vehicle While Having .08 Percent Or More By Weight Of Alcohol In Blood. SR:32, 530. McClain also admitted to a Part II Information which alleged that her conviction would be a sixth or subsequent offense. SR:34, 531-32. Sentencing took place on January 12, 2026. SR:540. The Honorable Joshua K. Hendrickson

stated that the conviction was McClain’s “fifth or subsequent” driving under the influence offense per SDCL 32-23-4.7 and required a mandatory four-year sentence. SR:548. The Judgement was filed on January 14, 2026. SR:516. McClain filed her notice of appeal on that same day. SR:517.

This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY SENTENCED MCCLAIN TO A FOUR-YEAR SENTENCE FOR A CLASS FOUR FELONY UNDER SDCL 32-23-4.7?

The trial court sentenced McClain to four years.

State v. Williamson, 342 N.W.2d 15 (S.D. 1983)

State v. Bettelyoun, 2022 S.D. 14, 972 N.W.2d 124

SDCL 32-23-4.1

SDCL 32-23-4.7

SDCL 32-23-4.9

STATEMENT OF THE CASE AND FACTS

On March 27, 2024, an indictment was filed in Pennington County, charging McClain with two counts of Driving or Control of Vehicle While Under the Influence of Alcohol. SR:32-33. The State also filed a Part II Information for Driving or Control of Vehicle While Under the Influence (Sixth Or Subsequent Offense) “contrary to SDCL 32-23-4.9.” SR:34. McClain was arraigned on April 29, 2024. During the arraignment Judge Hendrickson informed McClain of potential impact of Part II Information,

including enhancement to a “Class 4 felony, meaning potentially up to 10 years in prison” and a “mandatory minimum of four years on that as well.” SR:106. McClain entered a not guilty plea to the indictment and denied the Part II Information. SR:107.

On March 20, 2024, the Forensic Chemist submitted an affidavit stating that McClain’s blood sample was determined to be .138% by weight in ethyl alcohol near the time she was arrested. SR:135. McClain was later denied her application to the 7th Circuit DUI Court. SR:133.

On November 3, 2025, the State provided a written plea offer to McClain. That same day, a change of plea hearing was held. Defense counsel stated that McClain would be “pleading guilty to Count 2 and *admitting the Part II Information alleging this to be a sixth offense.*” SR:528 (emphasis added).

After finding a factual basis for driving under the influence, the court addressed the Part II Information. SR:530-31. The court listed the dates and locations for each of the five prior convictions with McClain and her counsel. SR:531-32. The court informed McClain that the sixth offense would result in a class 4 felony and a mandatory minimum sentence of four years. SR:531. McClain admitted that this would be her sixth offense, as outlined in the Part II information. SR:531-32.

Sentencing occurred on January 12, 2026. SR:540. The court reiterated that McClain entered a “plea to a DUI sixth offense... Is it your

intention to let your plea stand and proceed to sentencing today?”

McClain answered, “[y]es sir.” SR:541. Both the State and Defense counsel acknowledged having reviewed the presentence investigation and had neither corrections nor additions. *Id.*

The State began its sentencing argument by explaining the scenario that resulted in McClain’s arrest. McClain had struck another car and then, while she attempted to drive away, she hit a pole in the Walmart parking lot. SR: 542-43. Law enforcement responded to the vehicle accident. SR:542. McClain admitted to law enforcement she had been drinking and “had her granddaughter in the vehicle” during the accidents. SR:543. It was later determined that McClain had a “blood-alcohol content of 0.138.” *Id.* The State concluded its statement by recommending a six-year prison sentence and a mandatory three-year driver’s license revocation as set forth in SDCL 32-23-4.9. SR:543. The State also commented that the mandatory minimum set out in SDCL 32-23-4.9 may not apply but McClain could still receive up to ten years because it is a class 4 felony. SR:542-43.

Defense counsel acknowledged that McClain “...does have six DUIs.” SR:543. He mentioned that she made her court appearances and “went through competency restoration which required dozens of meetings at West River Mental Health and finally an evaluation from the Human Services Center.” SR:543-44. Counsel summarized his argument by

acknowledging that “...it’s an extraordinary ask, but asking the Court to place her on long-term probation.” SR:546.

The court then asked McClain if there was anything she would like to say. McClain told the court of her desire to continue supervised probation “because this is the first time I’ve had this much sobriety my whole life.” SR:547.

The court asked both the State and Defense counsel if there was “[a]ny legal reason why judgement should not be imposed at this time?” SR:547. Both answered “No.” *Id.* The court agreed with both counsel that SDCL “32-23-4.9...mandatory six-year sentence probably doesn’t apply due to the age of your DUIs.” SR:548. The court also held that SDCL 32-23-4.7 addressed a defendant with five or more convictions, prior to their current conviction, and it did not have the time limit requirement that SDCL 32-23-4.9 did. *Id.* Although both SDCL 32-23-4.7 and 4.9 are class 4 felonies, SDCL 32-23-4.7 had an applicable mandatory minimum of four years. The court shared its unfavorable opinion of mandatory sentences, stating that they “take the matter out of the [c]ourt’s discretion....” SR:548.

Defense counsel argued that he “believe[d] the mandatory minimum for a DUI fifth requires a plea and /or adjudication of guilt for that statute, where in this case she pled to a different statute, and so I don’t believe the mandatory minimum does apply.” SR:549. The court disagreed with counsel and noted the objection. *Id.*

The court again asked if there was any legal reason “why judgement should not be entered.” SR:549. Defense counsel had none, other than the previous objection. *Id.* The court then sentenced McClain under SDCL 32-23-4.7 to the mandatory four years in the penitentiary and three years of lost driving privileges. SR:549-50.

ARGUMENT

THE CIRCUIT COURT PROPERLY SENTENCED MCCLAIN WITHIN THE CONFINDS OF A CLASS FOUR FELONY.

A. *Introduction.*

McClain’s brief states: “[t]he circuit court misinterpreted SDCL 32-23-4.9 when it concluded that persons sentenced pursuant to it were either subject to mandatory minimum contained therein or were subject to the mandatory minimum in SDCL 32-23-4.7.” DB:13. McClain does not believe she is subject to the mandatory sentence set out in SDCL 32-23-4.7 because the Part II Information cited SDCL 32-23-4.9 and not SDCL 32-23-4.7. McClain preferred being sentenced under SDCL 32-23-4.9, where she hoped the court might “impose probationary sentences and/or sentences that do not carry a mandatory minimum penitentiary sentence for certain defendants.” DB:23. McClain also argues there is not “any case law or statute which describes a scenario where a court can apply the sentence described for one crime to defendant convicted of a different offense.... [She] was never charged with a violation of SDCL 32-23-4.7.” DB:16. But McClain is mistaken.

This Court permits sentencing under a different enhancement statute than the one cited, if the Part II Information provides adequate notice of the prior convictions. *State v. Williamson*, 342 N.W.2d 15, 17 (S.D. 1983). Simply put, a fully informed defendant does not have the right to be sentenced under their preferred statute, especially when they are well aware of the underlying crimes used to enhance the sentence.

B. *Standard of Review.*

McClain claims the court erred in her sentence enhancement resulting in “prejudicial error.” McClain now seeks remand for resentencing. DB:15-22, 25-27. When assessing non-constitutional challenges to a sentence, this Court reviews a circuit court’s sentencing decisions under an abuse of discretion standard. *State v. Black Cloud*, 2023 S.D. 53, ¶ 65, 996 N.W.2d 670, 686; *State v. Chipps*, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486. An abuse of discretion is described as “a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109; *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83. Circuit courts exercise broad discretion when deciding the extent and kind of punishment to impose. A sentence within the statutory maximum generally will not be disturbed on appeal. *State v. Yeager*, 2019 S.D. 12, ¶ 11, 925 N.W.2d 105, 110; *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83; *State v. Talla*, 2017 S.D. 34, ¶ 10, 897 N.W.2d 351, 354;

State v. Milk, 2000 S.D. 28, ¶ 10, 607 N.W.2d 14, 17. This Court has held that it will not substitute its judgment for that of the circuit court when determining the appropriateness of a particular sentence. *State v. Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d 354, 358.

Although McClain’s main complaint is the court’s decision that she is “subject to the mandatory minimum in SDCL 32-23-4.7[,]” DB:13, this Court “will not overturn the circuit court’s abuse of discretion unless that error is demonstrated and shown to be prejudicial error.” *State v. Mitchell*, 2021 S.D. 46, ¶ 27, 963 N.W.2d 326, 332 (further citation omitted). That means, when an error does not affect a defendant’s substantial rights, it is disregarded. *State v. Medicine Eagle*, 2013 S.D. 60, ¶¶ 59-61, 835 N.W.2d 886, 905.

If applicable, questions of statutory interpretation and application are reviewed de novo, with no deference to the circuit court’s decision. *State v. Hirning*, 2023 S.D. 28, ¶ 10, 992 N.W.2d 794, 798.

C. *The Part II Information provided adequate notice of prior convictions and potential sentencing consequences; therefore, strict adherence to a specific statute citation is not required and did not prejudice McClain.*

McClain argues that the circuit court lacks the authority to use a statute for sentence enhancement that was not cited in the Part II Information:

There is nothing in the plain language of either statute, or elsewhere in the South Dakota Code that supports the circuit court’s position in this case. Nor is there any case law or statute which describes a scenario where a court can

apply the sentence described for one crime to defendant convicted of a different offense. McClain was never charged with a violation of SDCL 32-23-4.7.

DB:16.

In *State v. Williamson*, 342 N.W.2d 15 (1983) this Court held that adequate notice of prior convictions and what the potential sentence could be is more important than the citing of a specific statute in the Part II information. *Id.* at 17. Williamson's Part II Information specifically cited his offense as violating SDCL 22-7-7 (one or two prior felony convictions) and never mentions SDCL 22-7-8 (three or more prior felony convictions). *Id.* at 16. Yet the trial court sentenced Williams under SDCL 22-7-8 and this Court affirmed. *Id.* at 17.

The requirements of a Part II habitual information are set out in SDCL 22-7-11. It "must state the *times, places* and *specific crimes* alleged to be prior convictions and must be signed by the prosecutor." *Williamson*, 342 N.W.2d at 17. This Court has stated a defendant must be aware of the "maximum possible punishment." *Id.* Unlike principal charging documents, there is no statutory requirement in a habitual offender information to cite a specific habitual offender statute the defendant is alleged to have violated. *Id.*, SDCL 23A-6-4, *see also*: SDCL 22-7-11.

McClain had adequate notice of her prior convictions and potential sentence. During the arraignment, Judge Hendrickson informed

McClain of the potential impact of the Part II Information in the following colloquy:

The state has outlined five prior convictions they allege you have, and if they prove beyond a reasonable doubt you are one and the same Kim Renae McClain that has those five priors, then the *penalty for the charge could be raised to that of a Class 4 felony, meaning potentially up to 10 years in prison, a \$20,000 fine or both, and there's a mandatory minimum of four years on that as well.* Do you understand the allegations in the Part 2 Information?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand what the maximum penalty could be as a result?

THE DEFENDANT: Yes, Your Honor.

SR:106. McClain entered a not guilty plea to the indictment and denied the Part II Information. SR:107.

Later the State provided a written plea offer to McClain on November 3, 2025, which stated in part:

[McClain] would plead guilty to Count 2: DUI and admit the *Part II Information enhancing the charge to a DUI 6th or Subsequent Offense (F4).* She would be responsible for all costs of prosecution and any restitution, as ordered by the Court. In exchange, the State would dismiss any remaining count(s) of the Indictment. At sentencing, both sides would be free to comment.

SR:134 (emphasis added.)

The same day, a change of plea hearing was held. SR:527.

McClain's attorney, who is also counsel on this appeal, told the court that there was a plea agreement. SR:528. Counsel explained McClain would be "pleading guilty to Count 2 and *admitting the Part II Information*

alleging this to be a sixth offense.” SR:528 (emphasis added). McClain was asked by the court if she understood the plea agreement as “outlined in the plea letter?” SR:530. She replied “[y]es sir.” *Id.*

After finding a factual basis for DUI count, the court addressed the Part II Information. The court listed the dates for each of the five prior convictions and explicitly stated a four-year mandatory sentence applied:

THE COURT: . . . One on July 30th, 2018 in Walworth County. One on July 28th, 2014 in Pennington County. One October 10, 2013 in Pennington County. One November 5th, 2010 in Pennington County. One January 6th, 2009 in Pennington County. *That would make this a sixth offense, bumping it up to a class 4 felony with a mandatory minimum of four years.*

To that allegation then, ma’am that this is a sixth offense as outlined in the Part II, do you admit or deny.

THE DEFENDANT: Admit.

THE COURT: And are you one and the same Kim McClain that has those five prior convictions?

The Defendant: Yes, sir.

MR. MURPHY: Your Honor, one correction or notation is, though this is charged as the mandatory minimum offense, the State and I have both looked into it and it does not appear that there is a mandatory minimum based on the aggravated structure and the failure of any of these convictions to establish that.

THE COURT: I understand. And I think I've -- I've looked at that issue before and I think given the ages there might be an argument around it. It's listed as a mandatory four and it might not be. You can sure argue that at the time of sentencing.

MR. MURPHY: Sure.

THE COURT: And you understand that, ma'am, that it's still possible that the Court could consider -- I just tell people

that's a guideline essentially. Even if it's not applicable to this, the Court certainly looks at that as a potential guideline. That's not one I have to follow, but I have in the past. I just want you to be aware of that. It's not -- it's a possibility. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, it looks like each of those prior convictions is referenced -- or has been filed. Mr. Murphy, any reason to believe any of those priors is not valid for enhancement purposes?

MR. MURPHY: No, Your Honor.

SR:531-33 (emphasis added).

At sentencing, the State also commented that the mandatory minimum set out in SDCL 32-23-4.9 may not apply. Although this was McClain's sixth DUI, the oldest conviction fell outside the "15-year window" by "a few months . . ." SR:542. The State further noted that the court still has the discretion to sentence "anywhere from zero to 10 years" for a class four felony. *Id.*

The court implied that SDCL 32-23-4.7 addressed a defendant with five or more convictions before their current conviction. Although both SDCL 32-23-4.7 and SDCL 32-23-4.9 are class four felonies, SDCL 32-23-4.7 had a mandatory minimum of four years.

Defense counsel stated that he "believed the mandatory minimum for a DUI fifth requires a plea and/or adjudication of guilt for that statute, where in this case she pled to a different statute, and so I don't believe the mandatory minimum does apply." SR:549. The court noted the objection and disagreed with counsel. The court again asked if there

was any legal reason “why judgement should not be entered.” SR:549. Defense counsel said just the previous objection but did not move to withdraw McClain’s plea. The court sentenced McClain to four years in the penitentiary and the loss of driving privileges for three years. SR:549-50.

Even though the Part II Information cited SDCL 32-23-4.9 and not SDCL 32-23-4.7, the record provided McClain adequate notice of her prior convictions and potential sentencing consequences such that strict adherence to a specific statute citation is not required. McClain’s counsel’s objection was rightfully denied. This Court has held that “there is no requirement under SDCL 22-7-11 that [a] habitual offender information must cite the exact statute which the accused is alleged to have violated.” *State v. Conaty*, 380 N.W.2d 656, 659 (S.D. 1986); *State v. Ganrude*, 499 N.W.2d 608, 612 (S.D. 1993). What’s more, McClain cannot show she was prejudiced by the circuit court sentencing under SDCL 32-23-4.7, given that statute carried a lesser mandatory minimum than the one she was advised of under SDCL 32-23-4.9. Thus, the court correctly sentenced McClain under SDCL 32-23-4.7.

D. *The statutes are not ambiguous and this Court need not engage in statutory interpretation.*

The objective this Court has in statutory interpretation is to start with the “language itself.” *State v. Bryant*, 2020 S.D. 49, ¶ 20, 948 N.W.2d 333, 338. In doing so, this Court “give[s] words their plain

meaning and effect, and read[s] statutes as a whole.” *Id.*; *State v. Thoman*, 2021 S.D. 10, ¶ 17, 955 N.W.2d 759, 767. Penal statute interpretation must result in “the fair import of their terms, with a view to effect their objects and promote justice.” SDCL 22-1-1. If after a review of SDCL 32-23-4.7 and SDCL 32-23-4.9, this Court finds the language “clear, certain and unambiguous . . . the Court’s only function is to declare the meaning of the statute as clearly expressed.” *State v. Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d 9, 13; *see also State v. Long Soldier*, 2023 S.D. 37, ¶ 11, 994 N.W.2d 212, 217. The language of the statutes is clear because “fifth or subsequent” encompasses McClain’s guilty plea for her sixth DUI.

Through the enactment of SDCL Ch. 32-23, the Legislature provided the punishments courts must prescribe for multiple driving under the influence convictions. It included mandatory minimum punishments for specific levels of driving under the influence convictions.

The Legislative punishment scheme for sixth or subsequent convictions of driving under the influence are set out in two statutes, SDCL 32-23-4.7 and SDCL 32-23-4.9. Under SDCL 32-23-4.7, a fifth “*or subsequent*” driving under the influence conviction results in a mandatory four-year sentence in a state correctional facility. Whereas SDCL 32-23-4.9 states sixth or subsequent driving under the influence convictions, if committed during specific timetables, result in a mandatory six-year sentence.

The Part II Information stated that the Indictment against McClain constituted her “Sixth or Subsequent Offense.” SR:34. It listed the dates, counties, and court file numbers for the five previous driving under the influence convictions:

- January 6, 2009, in Pennington County.
- November 5, 2010, in Pennington County.
- October 10, 2013, in Pennington County.
- July 28, 2014, in Pennington County
- July 30, 2018, in Walworth County.

Id.

The Part II information claims that the offenses occurred within “twenty-five years [from the current charge of] March 15, 2024, contrary to SDCL 32-23-4.9, and contrary to the statute . . .” The statutory language of SDCL 32-23-4.9 in March 2024 stated, in part:

If a conviction for a violation of § 32-23-1 is for a sixth offense or subsequent offense, and the person had at least five convictions of § 32-23-1 occurring within twenty-five years of the violation being charged and at least two of those prior convictions having occurred within ten years, the violation is an aggravated offense and the person is guilty of a Class 4 felony. If a person is convicted of an aggravated violation of § 32-23-1 and the person has at least six convictions of § 32-23-1 occurring within fifteen years of the violation being charged, the court must sentence the person to at least six years in a state correctional facility, one of which must be served on parole, unless refused pursuant to § 24-15A-15. Any term of parole must include at least one of the following: enrollment in an alcohol or drug accountability program, an ignition interlock, a breath alcohol interlock, an alcohol monitoring bracelet, or another enhanced monitoring tool. The court may suspend this sentence only if the court orders the person to participate in and complete a drug court program, DUI court program,

veterans treatment court program, or mental health court program, as a condition of probation . . .¹

Id. (emphasis added).

A portion of SDCL 32-23-4.9 is applicable to McClain. The statute’s first requirement is that she had five driving under the influence convictions within twenty-five years of her current charge. That requirement is met in that McClain’s current charge occurred on March 15, 2024, and her earliest conviction was on January 6, 2009.

The second requirement is that “at least two of those prior convictions having occurred within ten years . . .” SDCL 32-23-4.9. That requirement is met by McClain’s two most recent convictions: July 28, 2014, in Pennington County, and July 30, 2018, in Walworth County. The statute states that if the two requirements above are met, McClain’s “violation is an *aggravated offense* and [she] is guilty of a Class 4 felony . . .” *Id.* (emphasis added).

SDCL 32-23-4.9 then makes a distinction among “aggravated” offenders. If a person “is convicted of an aggravated violation of § 32-23-1 and the person has at least six convictions of § 32-23-1 *occurring within fifteen years of the violation being charged*, the court must

¹ The remainder of SDCL 32-23-4.9 was not included in the quotation above as it is not the pertinent issue at hand.

In July 2026, the most recently amended version of SDCL 32-23-4.9 will state in part: “...If a person is convicted of an aggravated ~~violation of 32-23-1~~ [offense] and the person has at least ~~six~~ [five] convictions of § 32-23-1 occurring within fifteen years....”

sentence the person to at least six years in a state correctional facility, one year of which must be served on parole, unless refused pursuant to § 24-15A-15.” SDCL 32-23-4.9 (emphasis added).

McClain is an aggravated violator, but her sixth driving under the influence violation did not occur within fifteen years of the previous five convictions.² The calculated time between convictions is about fifteen years, two months and twenty-two days. Since McClain does not meet this distinction, the mandatory “six years in a state correctional facility” portion of the statute is not applicable.

McClain’s theory is that under SDCL 32-23-4.9, she remains a class four felony but is not subject to mandatory sentence. DB:17-21. At sentencing, the court countered and pointed out that McClain could be sentenced under SDCL 32-23-4.7 which applies to “a DUI fifth or subsequent. . . and there’s no time limit on it.” SR:548. Both SDCL 32-23-4.7 and SDCL 32-23-4.9 are class four felonies. The statutory language of SDCL 32-23-4.7 in March 2024 stated:

If a conviction for violation of § 32-23-1 *is for a fifth offense or subsequent offense thereafter, the person is guilty of a Class 4 felony* and the court in pronouncing sentencing must revoke the person's driver license for a period of not less than three years from the date sentence is imposed or three years from the date of initial release from

² The calculation begins with her first violation on January 6, 2009, DUI in Pennington County, and her current conviction from the arrest on March 15, 2024. This period is fifteen years, two months and twenty-two days.

imprisonment, whichever is later. In the event the person is returned to imprisonment prior to the completion of the period of driver's license revocation, time spent imprisoned does not count toward fulfilling the period of driver's license revocation. If the person is convicted of driving without a license during that period, the court must sentence the person to the county jail for not less than twenty days, which sentence may not be suspended. Notwithstanding § 23A-27-19, the court retains jurisdiction to modify the conditions of the license revocation for the term of the revocation. Upon the successful completion of a court-approved chemical dependency counseling program, and proof of financial responsibility pursuant to § 32-35-113, the court may permit the person to operate a vehicle for the purposes of employment, 24/7 sobriety testing, attendance at school, child care delivery or pickup, health appointments, attendance at court or probation appointments, or attendance at counseling programs.

If a person is convicted of a fifth or subsequent violation of 32-23-1, the court must sentence the person to at least four years in a state correctional facility, one of which must be served on parole, unless refused pursuant to § 24-15A-15. Any term of parole must include at least one of the following: enrollment in an alcohol or drug accountability program, an ignition interlock, a breath alcohol interlock, an alcohol monitoring bracelet, or another enhanced monitoring tool. The court may suspend this sentence only if the court orders the person to participate in and complete a drug court program, DUI court program, veterans treatment court program, or mental health court program, as a condition of probation.

SDCL 32-23-4.7. (emphasis added).

In summary, SDCL 32-23-4.9 has a *six-year* mandatory sentence and SDCL 32-23-4.7 has a *four-year* mandatory sentence. Both are class four felonies and neither is ambiguous on its face, so this Court need not engage in statutory interpretation.

E. *Because McClain did not meet the requirements for a six-year minimum sentence under SDCL 32-23-4.9, the court sentenced under SDCL 32-23-4.7.*

At McClain's Change of Plea, she admitted it was her sixth offense. SR:532. For six or more violations, SDCL 32-23-4.9 has an additional time periods requirement to determine which "aggravated" offenders are subject to the six-year mandatory minimum sentence.

That is not the case with SDCL 32-23-4.7. The statute has no time periods named explicitly within the statute to distinguish between fifth, sixth or subsequent offenders that are subject to its four-year mandatory sentence.

At McClain's sentencing, both parties and the court agreed that McClain was not subject to the six-year mandatory minimum sentence. Yet the court believed McClain could be sentenced under SDCL 32-23-4.7, stating that for a "DUI fifth or subsequent . . . there's no time limit on that." SR:548. McClain objected only to being sentenced under SDCL 32-23-4.7 because that statute was not identified in her indictment or Part II Information. Neither the State, nor McClain, nor the court found any specific time period was relevant to considering the number of prior violations under SDCL 32-23-4.7.

This Court has held that for issues to be preserved for appellate review, "litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons."

State v. Feucht, 2024 S.D. 16, ¶ 21, 5 N.W.3d 561, 568, (quoting *State v.*

Nelson, 1998 S.D. 124, 587 N.W.2d. 439, 443). The trial court must have the opportunity to correct the alleged error before this Court will review it on appeal. *Matter of Estate of Tank*, 2023 S.D. 59, ¶ 31, 998 N.W.2d 109, 120.

Although SDCL 32-23-4.1 is not mentioned at the trial level or in McClain’s appellate brief, it may have application to 32-23-4.7.³ SDCL 32-23-4.1 states:

Except as authorized under § 32-23-4.9, no previous conviction for, or plea of guilty to, a violation of § 32-23-1, 22-18-36, or 22-16-41 occurring more than ten years prior to the date of the violation being charged may be used to determine that the violation being charged is a second, third, or subsequent offense. Any period of time during which the defendant was incarcerated for a previous violation may not be included when calculating if the time period provided in this section has elapsed.

Id. (emphasis added), *see also: State v. Powers*, 2008 S.D. 119, ¶ 6, 758 N.W.2d 918, 920.

McClain waived any argument that SDCL 32-23-4.1 controls her sentence by not mentioning it at the trial court level or on appeal. Yet if this Court determines SDCL 32-23-4.1’s ten-year period controls SDCL 32-23-4.7, that would mean McClain, a statutorily defined “aggravated” offender,⁴ would not face a mandatory sentence for her sixth DUI

³ “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign . . .” *State v. Brandenburg*, 344 N.W.2d 702, 706 (S.D. 1984).

⁴ *See* SDCL 32-23-4.9.

conviction unless all five prior convictions occurred within ten years of her current charge. McClain has only two prior offenses within ten years of her current offense (July of 2018 and July of 2014)—not five.

F. *Because the statutes are not ambiguous, there is no need to apply the rule of lenity.*

Finally, McClain agrees that SDCL 32-23-4.9 is “not ambiguous” DB:23. Yet she argues that if this Court finds confusion, “the rule of lenity resolves that ambiguity in [her] favor.” *Id.* But as stated, no ambiguity exists here. The “rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.” *United States v. Castleman*, 572 U.S. 157, 172–73, 134 S. Ct. 1405, 1416, 188 L. Ed. 2d 426 (2014); *see also Reck v. S. Dakota Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 9, 932 N.W.2d 135, 139.

This Court does not need to guess what the Legislature intended because the plain reading of SDCL 32-23-4.7 and SDCL 32-23-4.9 are not grievously ambiguous. *Id.* This Court’s rule of statutory interpretation “is that the Legislature said what it meant and meant what it said from the text of the statute.” *Farm Bureau Life Ins. v. Dolly*, 2018 S.D. 28, ¶ 12, 910 N.W.2d 196, 201 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 72 n.15, 710 N.W.2d 131, 159 n.15. If McClain does not agree with

the plain language of the statutes, her remedy is with the Legislature and not this Court.

CONCLUSION

Under SDCL 32-23-4.9, McClain is an “aggravated” offender and subject to a maximum of ten years for a class four felon. Even so, a plain reading of SDCL 32-23-4.7 renders McClain a class four felon. McClain may have waived any argument that her mandatory sentence under SDCL 32-23-4.7 is restricted by SDCL 32-23-4.1. McClain was sentenced within the guidelines of a class four felony.

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 5,081 words.

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

Dated this 23rd day of April 2026.

/s/ John M. Strohman

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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 23, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kim Renee McClain*, was served electronically through Odyssey File and Serve upon John R. Murphy at john@murphylawoffice.org

/s/ John M. Strohman

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 31348

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,

v.

KIM RENEE MCCLAIN,
Defendant and Appellant.

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

THE HONORABLE JOSHUA HENDRICKSON

APPELLANT'S REPLY BRIEF

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McClain's initial brief will be cited herein as DB. In reply to the State's Brief [herein cited as SB], Appellant/Defendant McClain states the following:

1. *Williamson* is not dispositive of the issue presented:

The State relies primarily on *State v. Williamson*, 342 N.W.2d 15 (S.D. 1983), for the proposition that McClain did not have the right to be sentenced under SDCL 32-23-4.9. SB 7-9. SDCL 32-23-4.9 was the statute cited in McClain's Part II Information and was referenced by the State as being the operative statute for sentencing purposes. ST 3 (State referencing the 15 year look back period in SDCL 32-23-4.9 in its preliminary comments to the circuit court). The State cites *Williamson* for the proposition that a defendant can have his or her sentence enhanced by a different statute than that which was cited in the Part II Information as long as the defendant was adequately informed as to the underlying crimes being alleged for enhancement purposes. SB 7-9. In regard to McClain, the State argues that because McClain knew the prior convictions being alleged for enhancement purposes, the circuit court was allowed to impose the mandatory minimum sentence from SDCL 32-23-4.7, even if that statute was not alleged in the Part II Information and she was not advised that the circuit court intended to rely on that statute prior to the sentencing hearing.

Williamson is factually and legally distinguishable from the facts and issues presented in McClain's case, and should not be read as expansively as the State urges. In *Williamson* the defendant had nine prior felonies listed in his Part II Information, and the Part II Information cited to SDCL 22-7-7 as the basis for the State seeking an enhanced sentence based upon past convictions. *Williamson*, 342 N.W.2d at 17. At sentencing, however, the circuit court relied upon SDCL 22-7-8 as the basis for enhancing the defendant's maximum possible sentence up to life. *Id.*

On review, this Court found no error in the manner in which the circuit court enhanced the defendant's sentence. *Id.* at 19. However, there are substantial differences between the facts and statutes at issues in *Williamson* and those presented in McClain's case.

In *Williamson*, the two enhancement statutes in effect in 1983 were very simple. *Williamson, supra*, at n. 1 & 2. SDCL 22-22-7 defined what constituted a prior felony for enhancement purposes, and then instructed that defendants who had one or two prior felonies faced enhancement of their felony category to the next highest level. SDCL 22-22-8 was a one sentence statute that stated that defendants with three or more felony convictions faced an increase in their felony classification to that of a Class 1 felony.

The application of these two statutes was also simple and straightforward. At the time these statutes were drafted, the circuit court was not required to do any fact-finding other than to count the number of eligible prior felonies.¹

In its analysis, the *Williamson* Court noted that “the reference [in the Part II Information] to SDCL 22–7–7 refers only to the definition of a habitual offender, which is contained in that section, and not reiterated in SDCL 22–7–8.” *Id.* at 17. The Court noted that under these statutes all that the circuit court was required to do was count the number of eligible prior convictions to determine how much to enhance the maximum possible sentence under either SDCL 22-7-7 or 22-7-8, as the statutes were essentially the same but for the distinction contained therein based on the number of prior convictions. *Id.* And, the Court noted that the defendant had ample notice of the possibility of facing enhancement under SDCL 22-22-8 because he was advised twice, beginning at his arraignment, that he faced up to life in prison (which could only happen if he was sentenced under SDCL 22-22-8), and he was fully advised that he was alleged to have nine prior felonies. *Id.*

¹ The present version of SDCL 22-7-8 requires that a defendant have previously been convicted of three or more felonies, and one of those felonies had to have been for a crime of violence.

The situation in McClain's case was substantially different than those presented in *Williamson*.

This analysis is not applicable to McClain's case. Unlike SDCL 22-7-7 and 22-7-8, the statutes at issue in McClain's case, SDCL 32-23-4.7 and 32-23-4.9, are extremely complicated statutes that are substantively different. As detailed her initial brief, DB 16-18, SDCL 32-23-4.7 and 32-23-4.9 create different sentencing structures and categories of offenders, implicate different mandatory minimums, and contain differing references to probation, parole, specialty courts, sobriety monitoring, and other matters. As set forth in McClain's initial brief, DB 16-18, SDCL 32-23-4.9 permits the imposition of a probationary sentence for non-aggravated offenders, whereas SDCL 32-23-4.7 doesn't incorporate the aggravated/non-aggravated structure and doesn't permit the imposition of a probationary sentence outside the context of a specialty court.

Another significant distinction between the two statutes is the "look-back" period for prior convictions. SDCL 32-23-4.9, by its plain language, limits the application of its mandatory minimum sentence to defendants who has six DUI convictions, at least five of which occurred within the 15 years preceding the commission of the present offense. Conversely, SDCL 32-23-

4.7, does not include an express look-back period in it, but it is expressly subject to the 10 year look-back provisions in SDCL 32-23-4.1.

These distinctions in the statutes also relates to the notice issue presented in *Williamson*. As described above, the only fact-finding necessary by the Court per the statutes in effect at that time was to count eligible convictions. Thus, the listing of defendant's nine prior convictions in the Part II Information, in conjunction with him being repeatedly told he faced life in prison, was sufficient to put him on notice that the circuit court was proceeding under SDCL 22-22-8. *Williamson, supra*, at 17.

In McClain's case, the only references to the legal pre-requisites for application of a sentencing enhancement statute were related to SDCL 32-23-4.9. The State began its sentencing comments by referencing a six-year mandatory minimum, which only exists in SDCL 32-23-4.9, and then expressly cited to SDCL 32-23-4.9 when conceding that McClain's prior convictions did not fall within the 15 year look-back period in that statute. ST 2-3. Neither the State nor the circuit court, at any prior proceeding or in any filed document, ever referenced SDCL 32-23-4.7 or the 10 year look-back period it is subject to. Indeed, the only time SDCL 32-23-4.7 was referenced in McClain's case was after the circuit court asked the parties if there was any legal reason why judgment could not be imposed, and the

parties agreed there was not. ST 8-9. Neither the State nor McClain ever had notice that the circuit court would be switching from one statute to another when it imposed sentencing.

Another differentiation between the *Williamson* analysis and the situation in McClain's case has to do with judicial fact-finding. In *Williamson*, the jury convicted the defendant of having eight prior felonies. *Williamson*, 342 N.W. 2d at 16. Under the statutes, the only fact-finding necessary for application of the two statutes was to count the number of prior convictions and determine whether the defendant had more or less than three. The jury found beyond a reasonable doubt that he had eight. Thus, the circuit court did not err in its application of SDCL 22-22-8 to the defendant's case, as the defendant unquestionably and indisputably had three or more prior felonies.

The statutes at issue in McClain's case require more extensive fact-finding for their application. SDCL 32-23-4.9 requires an inquiry into the total number of prior felonies, the number of felonies that have occurred within the past 15 years, and whether the defendant is considered an aggravated or non-aggravated offender. SDCL 32-23-4.7 requires an inquiry into the total number of prior felonies, and whether five or more of them occurred within the preceding ten years.

The circuit court did not need to do the fact-finding required by SDCL 32-23-4.9 in McClain's case because the State conceded that McClain did not have five prior felonies within the preceding 15 years, and thus she was a non-aggravated offender and not subject to the mandatory minimum. ST 9. The circuit court adopted that position and agreed that the pre-requisites for the mandatory minimum contained in SDCL 32-23-4.9 did not apply to McClain's case. ST 9.

Problematically, when the circuit court *sua sponte* elected to apply SDCL 32-23-4.7 to McClain's case, it did not do any fact-finding to determine whether her prior convictions fell within the ten year look-back period applicable to that statute. ST 9. The circuit court erroneously determined that this statute had no look-back period, a position the State now tacitly conceded was incorrect. SB 20. It is impossible to say what the *Williamson* Court would have done had the circuit court in that case had made a counting error when it applied SDCL 22-22-8 instead of 22-22-7.

For these reasons, the holding in *Williamson* should not be considered dispositive in McClain's case. The statutory structure at issue in *Williamson* was substantially different than in McClain's case; the defendant in *Williamson* had been repeatedly advised that the circuit court would proceed under SDCL 22-22-8, whereas the circuit court in McClain's case raised the

issue *sua sponte* at the conclusion of the sentencing hearing; and, in *Williamson* the circuit court was factually correct in its application of the enhancement in SDCL 22-22-8, whereas McClain's prior convictions do not subject her to the mandatory minimum sentence set forth in SDCL 32-23-4.7.

2. McClain properly preserved her challenge to the circuit court's utilization of SDCL 32-23-4.7 for appellate review:

The State alleges that McClain did not properly preserve for appellate review the circuit court's misapplication of SDCL 32-23-4.7 to her case. SB 20. The State argues that McClain waived review of the circuit court's error of applying the four year mandatory minimum sentence in SDCL 32-23-4.7 because she did not specifically reference SDCL 32-24-4.1 at sentencing or in her initial brief. SB 20. The State acknowledges that McClain only had two prior convictions within the preceding ten years of her charged offense and that the four year mandatory minimum described in SDCL 32-23-4.7 might not apply to her case. SB 21.

The State's waiver argument is based on an artificially narrow reading of McClain's stated objections to the circuit court's sentencing analysis. And, it disregards the context within which the circuit court *sua sponte* switched between statutes when imposing sentence.

At the change of plea hearing, the circuit court listed the names and dates of McClain's alleged prior convictions. COP 5-6. It listed the five prior convictions that were enumerated in the Part II Information. COP 5-6. And, it received McClain's admission to having these prior convictions. COP 6.

At the time of that hearing, the only statute ever referenced as a basis for enhancing McClain's sentence was SDCL 32-23-4.9. Immediately after McClain's admission to the Part II Information was received, McClain made a record as to the impact of that statute on her sentence. ST 6. McClain stated that both the defense and State were in agreement that her prior convictions failed to establish the pre-requisites for the mandatory minimum sentence under SDCL 32-23-4.9. COP 6. In her comments, McClain mentioned the "aggravated structure," which was a reference to the aggravated and non-aggravated status of offenses described in SDCL 32-23-4.9, and which is not a facet of SDCL 32-23-4.7.

The circuit court acknowledged her concerns and stated that "given the age" of the priors, McClain might not be subject to a mandatory minimum. ST 6. The circuit court went on to advise McClain that even if she isn't subject to a mandatory minimum, the court might use that as a "potential guideline." ST 7. At this time, the circuit court never stated

anything to the effect that whereas McClain might not be subject to the mandatory minimum under SDCL 32-23-4.9, she might be under SDCL 32-23-4.7. Instead, the circuit court conceded that based on the dates of McClain's priors, she might not face any mandatory minimum, period. ST 6-7.

Though the discussion at this juncture was in one regard about the application of SDCL 32-23-4.9, in the broader context it was a discussion about the applicability of any mandatory minimum applying to McClain based on the dates of her prior convictions. McClain argued that no mandatory minimum applied, and the circuit court conceded that McClain's case might be one where that was true. ST 6-7. Since SDCL 32-23-4.7 imposes a mandatory minimum sentence for all defendants similarly situated to McClain (those who haven't been accepted by a specialty court), the discussion necessarily includes the application of SDCL 32-23-4.7 and 32-23-4.9 to McClain.

At sentencing, the issue as to whether McClain was exposed to a mandatory minimum sentence was raised immediately by the State. ST 3. The State conceded that McClain did not face a mandatory minimum sentence, but urged the circuit court to sentence McClain to six years as if the mandatory minimum provision within SDCL 32-23-4.9 did apply to her

case. ST 3. The State never referenced SDCL 32-23-4.7 or suggested in any fashion that its provisions were applicable to her, or that McClain faced an alternative mandatory minimum under a different statute from that charged in the Part II Information.

In McClain's counsel's comments to the circuit court, he asked it to impose a probationary sentence. ST 7. Since this sentence is not a possibility under SDCL 32-23-4.7, his request was, in essence, an objection to McClain being sentenced under that statute.

It was only after asking the parties whether there was any legal reason why judgment could not be imposed and receiving no objection thereto, ST 8, that the circuit court ever referenced its inclination to sentence McClain pursuant to SDCL 32-23-4.7. ST 8-9. In a case that had been litigated for over two years, this was the first express reference to that statute. McClain immediately objected. ST 9-10.

McClain's objection did not specifically raise the issue as to whether she had the requisite number of convictions within the preceding ten years for the statute to apply, nor did she cite to SDCL 32-23-4.1. ST 9-10. But, in fairness to McClain, since the circuit court made no findings that her convictions fell within the requisite time period, so McClain had no factual record to contest at that juncture.

More importantly, McClain did state as part of her objection that “I don’t believe the mandatory minimum does apply.” ST 10. Admittedly, McClain’s objection was convoluted and referenced matters that also implicated SDCL 32-23-4.9. However, at the time this objection was made, the circuit court had already stated that the mandatory minimum in SDCL 32-23-4.9 was not applicable to McClain’s case. That statute was no longer part of the debate. The only statute at issue at this juncture was SDCL 32-23-4.7, and McClain did make an objection to its application and stated that she didn’t believe a mandatory minimum sentence applied to her. Her objection to the application of a mandatory minimum is an objection to the foundation for the imposition for the mandatory minimum, because only if there is a determination that a defendant had five or more prior convictions within the preceding ten years can the mandatory minimum apply. This should be sufficient to preserve the issue for appellate review. *See State v. Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d 196, 200 (to preserve a sentencing issue for review, a timely objection must be made).

3. If the error was not preserved, McClain’s sentence should be vacated under the plain error standard:

If the Court determines that McClain did not preserve a challenge to the application of SDCL 32-23-4.7 because she did not specifically object to the circuit court’s failure to determine whether her prior convictions fell

within the look-back period in SDCL 32-23-4.1, McClain asks the Court to review the issue for plain error. To demonstrate plain error, McClain must establish that the circuit court erred, that the error was plain, that it affected her substantial rights, and that the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *State v. Janes*, 2026 S.D. 9, ¶ 14, 32 N.W.3d 377, 383.

The circuit court erred in two ways. First, it determined as a matter of statutory interpretation that the four year mandatory minimum sentence described in SDCL 32-23-4.7 was applicable to all defendants who had five or more DUI convictions, regardless of the date of those convictions. ST 9 (“However, looking at 32-23-4.7, that regards a DUI fifth or subsequent, meaning further offense, and there’s no time limit on that. And that requires a four-year mandatory minimum that I don’t have a choice but to apply.”). As pointed out by the State in its brief, SB 20, this is contrary to the plain language of SDCL 32-23-4.1. SDCL 32-23-4.1 states that for all enhanced DUI cases other than those prosecuted under SDCL 32-23-4.9, there is a ten year look-back period for utilization of a prior conviction to increase the penalty of a present DUI offense.

Second, the circuit court erred by not making any factual findings related to the eligibility of McClain’s prior DUI convictions for

enhancement purposes under SDCL 32-23-4.7. The circuit court made no findings, didn't reference the Part II Information, or ask counsel whether McClain's prior convictions were sufficient to enhance her sentence under SDCL 32-23-4.7. The undisputed fact is that McClain had only two prior convictions within the ten years preceding the charged offense. SB 21. The circuit court's failure to make factual findings as to the applicability of SDCL 32-23-4.7 to her case led it to overlook this glaring fact.

The error was plain. The language of SDCL 32-23-4.1 is clear and unambiguous. The only statute excluded from its application is SDCL 32-23-4.9, and the circuit court expressly stated that it was not proceeding under that provision. ST 9. Further, the facts at issue – the dates of McClain's prior DUI convictions and the fact that only two occurred within the ten years preceding her arrest – were uncontested. Had the circuit court conducted the required factual analysis under SDCL 32-23-4.1 and 32-23-4.7, it would have been obvious that that McClain was not subject to the four year mandatory minimum.

The error affected McClain's substantial rights. This error led the circuit court to impose a four year penitentiary sentence when it was not required to do so. The circuit court repeatedly noted its misgivings about having to sentence McClain to prison when it believed this was not in her

best interests. ST 9. The circuit court went on to state it “wished” it did not have to send McClain to prison, but its erroneous application of the statutes led it to the conclusion that it had no choice in the matter. ST 9-10.

McClain is incarcerated – deprived of her liberty – based on the circuit court’s mistaken belief that it had no alternative but to send her to prison. Her imprisonment is a deprivation of a substantial right.

The circuit court’s error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. As acknowledged by the State and noted by the circuit court, McClain had made radical improvements in her life since the commission of the offense. She had made all court appearances and had no bond or 24/7 violations over a two year period. She worked diligently to be restored to competency. And, she built a network of services and service providers that assisted her in her recovery from alcoholism, improved her daily functioning notwithstanding her degenerative cognitive disease and other medical issues, provided her with housing, and gave her financial stability. McClain did all of this despite having substantial medical and mental health conditions. In a phrase, McClain did what everyone in the criminal justice system hopes criminals do: rehabilitate themselves.

Yet, McClain sits in prison. And, her imprisonment is premised upon a mistaken reading of the law and based on a statute that she was never presented with until the final moments of her sentencing hearing. Public trust in the integrity and fairness of our judicial system is based on the belief that the system corrects its mistakes to prevent unjust imprisonment.

It is not hard to envision the disbelief, anger, and distrust that members of the public would feel if they learned that someone who had made the strides McClain had made was locked in prison for four years based on a mistake made by the court system, and that no one was willing or able to correct the mistake merely because her counsel did not precisely articulate an objection to the mistake at the time of sentencing. This would be particularly true in a case such as this where the underlying facts – the dates of the prior convictions – was not in dispute, and where the sentencing court made no effort to determine whether the dates of these convictions fell within the statutory time frame for consideration.

For these reasons, if the Court finds that counsel did not properly preserve this issue for appellate review, McClain asks that the Court find that plain error was committed and remand the matter for re-sentencing.

CONCLUSION

Based on the facts, authority and argument presented above, McClain asks that her sentence be vacated and her case be remanded for resentencing.

Dated May 14, 2026.

_____/s/_____
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for Appellant Kim McClain, submits the following:

The forgoing brief is 17 pages in length. It is typed in proportionally spaced 14 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 3,950 words and 20, 513 characters. It complies with the requirements set forth in SDCL 15-26A-66.

Dated May 14, 2026.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served upon the persons herein next designated, on the date shown below, by electronic filing at the e-mail addresses below, to wit:

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