

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

KIRA RAE WALN,

Defendant/Appellant.

No. 31259

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

HONORABLE CHRISTINA KLINGER
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on October 23, 2025

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

No. 31259

KIRA RAE WALN,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as “SR.” The Transcript of the Initial Appearance held on June 5, 2025 is referred to as “IA.” The Transcript of the Arraignment held on July 22, 2025 is referred to as “AH.” The Transcript of the Change of Plea held on August 26, 2025 is referred to as “COP.” The Transcript of Sentencing held on September 23, 2025 is referred to as “ST.” The Judgment of Conviction and Sentence filed on September 25, 2025 is referred to as “JCS.” All references to documents will be followed by the appropriate page number. Defendant and Appellant, Kira Waln, will be referred to as “Waln.”

JURISDICTIONAL STATEMENT

Waln appeals the Judgment of Conviction filed on September 25, 2025. SR 200. Waln's Notice of Appeal was filed October 23, 2025. SR 206. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

1. WHETHER THE CIRCUIT COURT ERRED IN ITS APPLICATION AND INTERPRETATION OF SDCL 22-6-11?

The circuit court erred in departing from a presumptively suspended sentence because the court failed to draw a correlation between aggravating circumstances and public safety, did not consider prognostic indicators, and focused on punishment.

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

State v. Beckwith, 2015 S.D. 76, 871 N.W.2d 57

SDCL 22-6-11

STATEMENT OF CASE AND FACTS

On June 5, 2025 the Hughes County State's Attorney filed a complaint charging Waln with the following crimes: Count 1 – Possession with Intent to Distribute Methamphetamine in violation of SDCL 22-42-2, Count 2 – Possession of a Controlled Substance (Methamphetamine) in violation of SDCL 22-14-15, Count 3 – Possession of a Firearm by a Prohibited Person in violation of SDCL 22-14-15, and Count 4 – Possession of Drug Paraphernalia in violation of SDCL 22-42A-3. SR 1-4. That same day, Waln made her initial appearance. The circuit court explained her constitutional and statutory rights, her charges, and the

maximum punishments allowed; the court made a finding of indigency, appointed counsel, and set bond. 1A 1-13. The circuit court scheduled a preliminary hearing for June 16, 2025, and an arraignment was scheduled for June 24, 2025. 1A 8-9. On June 13, 2025, the State filed a motion to continue the preliminary hearing, and the court continued the preliminary hearing until June 23, 2025. SR 20.

On June 17, 2025, the Grand Jury returned an indictment charging the same offenses as listed above. SR 21. The State filed a Part II Information for a Habitual Offender, alleging that Waln had one prior felony conviction. SR 23. On July 22, 2025, Waln was arraigned on all charges, advised of her trial rights, and the maximum sentences allowed by law; She entered not guilty pleas to all counts. AH 1-6. The court set a date for jury trial and deadlines for the submission of pretrial motions. SR 32. Both Waln and the State filed pretrial motions. SR 27-54.

On August 26, 2025, a Change of Plea Hearing was held. COP 1. Waln's attorney informed the court of the terms and conditions of the plea agreement which called for a guilty plea to Count 2 (Possession of a Controlled Substance) and Count 4 (Possession of Drug Paraphernalia). In exchange for her pleas, the State agreed to dismiss the remaining counts and the Part II information. COP 2. The State further agreed to recommend that she serve this sentence concurrent to the sentence she was serving on another case. COP 2. The circuit court canvassed Waln about her understanding of the plea agreement, and Waln confirmed she

understood the terms of the agreement. COP 5. The circuit court advised her of each of the trial rights she was giving up by pleading guilty; she confirmed she understood. 5-7 COP. The court advised her of the maximum sentence for each count. COP 6. Waln entered pleas of guilty. COP 7. The court confirmed that no one forced her to plead nor promised anything to enter her pleas. COP 7.

The State provided a factual basis to support the pleas. COP 8-10. On June 2, 2025, law enforcement received information from a source who said they saw Waln at her storage unit, and there was methamphetamine inside the unit. COP 8. Law enforcement contacted the manager of the storage units and confirmed that Waln rented unit 114. COP 8. Waln was on parole, and law enforcement contacted her parole officer to authorize a search of the storage unit. COP 8. Inside Waln's unit, they found a white crystalline substance that tested presumptively positive for methamphetamine, digital scales, Ziplock baggies, and various smoking apparatuses. COP 8-9. Two firearms were allegedly found in the storage unit. COP 8. Although recited as part of the factual basis, the court did not require Waln to admit to possessing any weapons because the State dismissed the weapons charge consistent with the plea agreement. COP 9. A search of Waln's residence was also conducted on June 3, 2025, and drug paraphernalia with residue was found. COP 9. Waln confirmed and agreed with the State's rendition of the facts. COP 9-10. She admitted that she possessed methamphetamine and drug paraphernalia. COP 9-10. The circuit court ordered

a presentence investigation and set the case for sentencing on September 23, 2025. COP 10.

On September 23, 2025, Waln appeared with her attorney for sentencing. ST 2. All parties and the court received and reviewed the presentence investigation report. ST 2. In addition, Waln's attorney submitted materials on Waln's behalf that the court reviewed. ST 3. Both attorneys made their respective arguments to the court, and Waln also spoke on her own behalf. ST 2-8. The State's Attorney recommended concurrent time per the plea agreement. ST 6. Despite Waln's criminal history, the State's Attorney felt concurrent time was appropriate because Waln was taking the right steps necessary to clean herself up and was moving forward with the best possible attitude. ST 6. After the State's Attorney spoke, the court inquired, and both sides stated there was no legal reason why sentence should not be imposed. ST 8.

Before pronouncing the sentence, the court noted the following: Waln has a lengthy criminal history, she committed the offenses shortly after being released, she was still on parole at the time of the offense, she had been out of custody with all resources available to her for twenty months and chose not to use them, and the offense was serious. ST 9. When listing these factors, the court made no mention of aggravating factors and never explained how the factors listed would create a significant risk to the public. The court only made a vague reference to how "the nature of the crime [was] a serious concern for this [c]ourt" and how it was a "quite serious offense." ST 7-8. In fact, the court was primarily

focused on the issue of punishment, citing Waln’s failure to learn her lesson after her recent incarceration. ST 7-8.

For possession of paraphernalia, Waln was sentenced to pay fees. ST 7-8. Regarding possession of methamphetamine, Waln was sentenced to five years in the State Penitentiary with three of those years suspended. ST 8-9. Contrary to the State’s recommendation and her attorney’s arguments, the circuit court ran the sentence consecutive to the sentence she was serving on another case. ST 8-9.

On September 25, 2025, the court released a judgement of conviction and sentence. JCS A-2. The judgement begins by establishing a proper guilty plea was found. JCS A-1. It then lists the sentences. JCS A-1-2. Within the sentences is a list of aggravated factors. JCS A-2. Prefacing this list of factors is a line that the factors require a departure from probation because they pose a significant risk to the public. JCS A-2. These factors include the defendant committing crimes while on parole, not using resources available to her for her drug and alcohol abuse, the defendant not learning anything from her time in prison, and her lengthy criminal history. JCS A-2. The court does not describe how these factors correlate to a significant risk to the public. JCS A-2.

STANDARD OF REVIEW

The circuit court’s failure to “state the aggravating circumstances on the record at the time of the sentencing” is an alleged procedural error. *State v. Feucht*, 2024 S.D. 16, ¶ 22, 5 N.W.3d 561, 569. Because Waln did not object, the

plain error standard of review is applicable to the circuit court's procedural error. *Id.* ¶ 25, 5 N.W.3d at 569. In order to prove plain error one "must establish that there was: '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.'" *State v. Guziak*, 2021 S.D. ¶ 6, 968 N.W.2d 196, 200 (citing *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d at 206 (quoting *State v. Beck*, 2010 S.D. 52, ¶ 11, 785 N.W.2d 288, 293)). On this point, Waln concedes that the circuit court's failure to state aggravating circumstances on the record at sentencing does not meet the strict standard of plain error review, as the court only invokes "discretion under the plain error rule cautiously and only in 'exceptional circumstances.'" *Id.* (citations omitted).

Waln, however, is not limited to plain error review. This Court, in reviewing non-procedural issues related to SDCL 22-6-11, has employed both the abuse of discretion and de novo standards of review in past cases. *Beckwith* demonstrates how the abuse of discretion standard of review would apply under SDCL 22-6-11. Because the aggravating circumstances¹ used in *Beckwith* were appropriate and applied correctly; the question in the case was whether the

¹ Whether or not certain circumstances were aggravating is something the Court determined in *Underwood*. *State v. Underwood*, 2017 S.D. 3, ¶ 7, 890 N.W.2d 240, 242. Under that determination a de novo standard of review was applied. *Id.* ¶ 5, 890 N.W.2d at 241.

circuit court applied them in a way that fell within the range of permissible choices. *See State v. Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d 57, 60-61.

However, in this case, “[w]hether the circuit court misinterpreted or misapplied SDCL 22-6-11 involves a question of statutory interpretation, which [this Court] review[s] de novo, with no deference given to the circuit court’s legal conclusions.” *State v. Kurtz*, 2024 S.D. 13, ¶ 12, 4 N.W.3d 1, 4. 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.* ¶ 13, 4 N.W.3d at 5. Here, the aggravating circumstances – which were not stated on the record at the time of sentencing but listed in the circuit court’s judgment of conviction – did not “focus on the relationship of those circumstances to public safety.” *Id.* ¶ 15, 4 N.W.3d at 5. Because the circuit court did not connect the aggravating circumstances to a significant risk to the public, it misapplied SDCL 22-6-11, and the de novo standard of review is applicable to the circuit court’s misapplication of the statute. *Id.* ¶ 13, 4 N.W.3d at 5.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT MISINTERPRETED AND MISAPPLIED SDCL 22-6-11.

- A. The circuit court erred when it failed to draw a connection between possible aggravating circumstances that would pose a significant risk to the public under SDCL 22-6-11.

Under SDCL 22-6-11 “[t]he sentencing court may impose a sentence other than probation or a fully suspended state incarceration sentence if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section...” *Id.* During the sentencing hearing in this case, the circuit court made references to the seriousness of the crimes Waln committed, talked about how these crimes were committed while on parole, how the defendant did not use substance abuse resources available to her, how the defendant did not learn anything from her time in prison, and her lengthy criminal history. ST 7-8. Aside from the circuit court’s comment about the serious nature of these crimes, in the circuit court’s judgement of conviction and sentence, these same factors were listed as aggravating factors that would pose a significant risk to the public.

In neither the sentencing nor the judgment of conviction and sentence, was there an oral or written connection between these factors, and how they related to a significant risk to the public. In this case, there is an implicit finding that Waln did not pose a significant risk to the public through the circuit court’s lack of connection between possible aggravating circumstances and significant public safety concerns, as well as an explicit admission by the State’s Attorney that Waln was taking necessary steps to get clean and had the right attitude. ST 6-8 and JCS A-2.

While it is true a lengthy criminal history may be an aggravating circumstance that would indicate a significant risk to the public, “the sentencing

court's required finding under SDCL 22-6-11 must focus on the relationship of those circumstances to public safety.” *State v. Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d 1, 5. In this case, no relationship was established between a lengthy criminal history and public safety.

B. The circuit court erred when it did not consider recent prognostic indicators when evaluating whether Waln would pose a significant risk to the public under SDCL 22-6-11.

It is important that a sentencing court does not “ignore recent prognostic indicators suggesting the defendant does not presently pose a significant risk to the public.” *Id.* This would include ““the rehabilitative prospects of the defendant.”” *Id.* (quoting *State v. Seidel*, 2020 S.D. 73, ¶ 47, 953 N.W.2d 301, 316-17.” The State’s Attorney in this case felt concurrent time was appropriate because Waln was taking the right steps necessary to clean herself up and was moving forward with the best possible attitude. ST 6. The State’s Attorney would have had the most up to date information on Waln when they made their recommendation. They also did not feel Waln posed a significant risk to the public as seen through their recommendation. Finally, the State’s Attorney noted Waln had a good attitude, and that she was taking the right steps to get back on her feet.

C. The circuit court erred when it used punishment as a justification for running Waln’s sentences consecutively under SDCL 22-6-11.

In *Kurtz* the sentencing “court’s further statement that departure is warranted because ‘at some point, we don't deal any longer with whether you're

a threat to society, but it's simply punishment' is flatly contrary to the mandate in SDCL 22-6-11." *Id.* ¶ 13, 4 N.W.3d 1, 5. While Waln recognizes that the Court's primary concern in *Kurtz* was the sentencing court's finding that the defendant was not a threat to society, the Court also seems to take issue with the sentencing court's primary motivation for departure being a need for punishment. During sentencing in this case, the court makes multiple references to how Waln did not learn her lesson and needed to be punished. ST 7-8. These multiple references to Waln needing to be punished could lead to the reasonable inference that the judge's allusions to the seriousness of Waln's crimes did not have to do with public safety but rather had to do with Waln needing to be taught a lesson for breaking the law multiple times.

CONCLUSION

The circuit court's misinterpretation and misapplication of SDCL 22-6-11 shown through the aforementioned arguments, establish that Waln was not a threat to public safety. Without such a finding, Waln's penitentiary sentence must be suspended under SDCL 22-6-11.

REQUEST FOR ORAL ARGUMENT

The attorneys for the Appellant, Kira Waln, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted on this 27th day of February, 2026.

/s/ Joshua Gurnick

Legal Extern

/s/ Justine Avtjoglou

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 3,266 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 27th day of February, 2026.

/s/ Justine Avtjoglou
Justine Avtjoglou
Attorney for Appellant

CERTIFICATE OF SERVICE

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

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Dated this 27th day of February, 2026.

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APPENDIX

Judgment of Conviction.....	A-1
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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
 Plaintiff,)
)
vs.)
)
KIRA RAE WALN,)
DOB: 08/10/1997)
)
 Defendant.)

JUDGMENT OF CONVICTION

32Cri25-230

An Indictment was filed with this Court on the 17th day of June, 2025, charging Defendant with Possession of a Controlled Substance – Schedule I or II (SDCL 22-42-5), a Class 5 Felony and Possession of Drug Paraphernalia (SDCL 22-42A-3), a Class 2 Misdemeanor.

Defendant was arraigned on said Indictment and received a copy thereof on 26th day of August, 2025. Defendant, Defendant's attorney, Dave Siebrasse, and Daniel VanGorp, prosecuting attorney, appeared at Defendant's arraignment. The Court advised Defendant of all of the constitutional and statutory rights pertaining to the charges that had been filed against Defendant, including but not limited to the right against self-incrimination, the right of confrontation, and the right to a jury trial. Defendant pled guilty to Possession of a Controlled Substance – Schedule I or II (SDCL 22-42-5), a Class 5 Felony and Possession of Drug Paraphernalia (SDCL 22-42A-3), a Class 2 Misdemeanor, said offenses having been committed on or about the 2nd day of June, 2025.

It is the determination of this Court that Defendant has been regularly held to answer for said offenses; that said pleas were voluntary, knowing, and intelligent; that Defendant was represented by competent counsel; that Defendant understood the nature and consequences of the pleas at the time said pleas were entered; and that a factual basis existed for the pleas.

It is therefore the JUDGMENT of this Court that Defendant is guilty of Possession of a Controlled Substance – Schedule I or II (SDCL 22-42-5), a Class 5 Felony and Possession of Drug Paraphernalia (SDCL 22-42A-3), a Class 2 Misdemeanor.

SENTENCES

On the 23rd day of September, 2025, the Court asked Defendant, if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentences:

POSSESSION OF A CONTROLLED SUBSTANCE – SCHEDULE I OR II

ORDERED that the Defendant shall be committed to the custody of the South Dakota Department of Corrections for placement at an appropriate facility for five (5) years, with three (3) years suspended, on the charge of Possession of a Controlled Substance – Schedule I or II (SDCL 22-42-5), a Class 5 Felony.

AGGRAVATING FACTORS:

The aggravating factors that exist which pose a significant risk to the public and require departure from probation are:

- The Defendant committed these crimes while out on parole.
- The Defendant chose not to use resources that she knew were available to her for drug and alcohol abuse.
- The Defendant doesn't seem to have learned anything while in prison.
- The Defendant has a lengthy criminal history.

It is further

ORDERED that the Defendant shall pay court costs of \$116.50; transcript fees of \$44.10 (payable to Hughes County, 104 E. Capital Ave., Pierre, SD 57501); and court appointed attorney fees submitted by Dave Siebrasse (payable to Hughes County Auditor, Second Floor, 104 E. Capitol Ave., Pierre, SD 57501), while on parole and on a schedule prescribed by Defendant's Parole Officer.

POSSESSION OF DRUG PARAPHERNALIA

ORDERED that the Defendant shall pay court costs of \$78.50; and court appointed attorney fees as submitted by Dave Siebrasse (payable to Hughes County Auditor, Second Floor, 104 E. Capital Ave., Pierre, SD 57501), while on parole and on a schedule prescribed by Defendant's Parole Officer. It is further

ORDERED that this sentence shall run consecutively to the Defendant's current South Dakota Department of Corrections sentence. It is further

ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

DATED this **9/25/2025 8:29:12 AM**

BY THE COURT:



Christina Klinger
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy



NOTICE OF RIGHT TO APPEAL

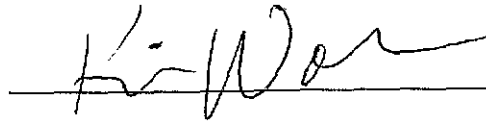
You, KIRA RAE WALN, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of South Dakota and the State's Attorney of Hughes County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this Judgment is filed with said Clerk.

SOUTH DAKOTA
OFFICE OF INDIGENT LEGAL SERVICES

P O Box 88237
Sioux Falls, SD 57109

I, Kira Waln, do hereby authorize and consent to the appearance of Joshua Gurnick, a student practice certified legal extern of the South Dakota Office of Indigent Legal Services, to appear on my behalf and prepare the appellant brief, and appellant reply brief, in South Dakota Supreme Court Case No. 31259.

Dated this 21 day of February, 2026.

A handwritten signature in cursive script, appearing to read "Kira Waln", is written over a horizontal line.

Kira Waln

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31259

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KIRA RAE WALN,

Defendant and Appellant.

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

THE HONORABLE CHRISTINA L. KLINGER
Presiding Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed October 23, 2025

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<i>State v. Orr</i> , 2015 S.D. 89, 871 N.W.2d 834	7
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PRELIMINARY STATEMENT

SDCL 22-6-11 prevents low-level criminals, including drug users, from being sent to prison unless “aggravating circumstances exist that pose a significant risk to the public. . . .” Kira Rae Waln falls into SDCL 22-6-11’s sweep; she pled guilty to possessing methamphetamine and drug paraphernalia after a search of her storage shed and home revealed those items. The circuit court sentenced Waln to five years in prison, with three years suspended, after finding aggravating circumstances. Waln now appeals, claiming this Court should apply a de novo standard of review and that the circuit court misapplied SDCL 22-6-11.

But Waln’s claim is reviewed for plain error—a rule applied in only exceptional circumstances not warranted here. And despite Waln’s assertion to the contrary, her judgment specifically says her aggravating factors reveal she “pose[s] a significant risk to the public,” so her judgment and sentence should be affirmed.

In this brief, the State of South Dakota is called “the State.” All other individuals are referenced by name. Relevant documents are referenced as follows:

Settled Record (Hughes County Criminal File 25-230)..... SR

Change of Plea Hearing Transcript (August 26, 2025) CPH

Sentencing Hearing Transcript (September 23, 2025)ST

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The appropriate page numbers follow all document references.

JURISDICTIONAL STATEMENT

On September 25, 2025, the Honorable Christina L. Klinger, Hughes County Circuit Court Judge, filed a Judgment of Conviction that sentenced Kira Rae Waln to prison. SR: 200-01. Under SDCL 23A-32-15, Waln timely filed and served her Notice of Appeal on October 23, 2025. SR: 206-07. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT COMMITTED
PLAIN ERROR IN SENTENCING WALN TO
PRISON?

This issue is being raised for the first time on appeal.

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

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

SDCL 22-6-11

STATEMENT OF THE CASE AND FACTS

In the Summer of 2025, Kira Waln was on parole for attempted aggravated assault. SR: 2; CPH: 8. The South Dakota Division of Criminal Investigation learned that Waln rented a storage shed in Pierre, and she was seen in the shed with methamphetamine and an AR-15 rifle. SR: 2; CPH: 8. DCI agents confirmed with the property manager that

Waln rented the storage shed and got permission to search it from Waln's parole officer. SR: 2; CPH: 8.

Inside the storage shed, agents found several prohibited items. SR: 2; CPH: 8-9. They found an AR-15 rifle, rifle ammunition, a 9mm handgun, a cannister with a white substance that tested presumptive positive for methamphetamine, Ziploc bags, digital scales, and smoking devices. SR: 2; CPH: 8-9.

After the search of the storage shed, agents got a search warrant for Waln's home. SR: 2. They found more Ziploc bags with a white substance that tested presumptive positive for methamphetamine and .22 caliber rifle ammunition. SR: 2-3; CPH: 8-9.

The Hughes County Grand Jury indicted Waln on four counts:

- Count 1: Possession with Intent to Distribute methamphetamine in violation of SDCL 22-4-2, a Class 4 felony;
- Count 2: Possession of methamphetamine in violation of SDCL 22-42-5, a Class 5 felony;
- Count 3: Possession of a Firearm by a Prohibited Person in violation of SDCL 22-14-15, a Class 6 felony; and
- Count 4: Possession of Drug Paraphernalia in violation of SDCL 22-42A-3, a Class 2 misdemeanor.

SR: 21-22. The State also filed a Part II Information alleging Waln's prior felony conviction for attempted aggravated assault in 2022. SR: 23.

Waln and the State reached a plea agreement. CPH: 4. Waln agreed to plead guilty to possessing methamphetamine and drug paraphernalia. CPH: 4. The State agreed to dismiss the remaining charges, as well as the Part II Information, and recommend that Waln's

sentence run concurrent to her attempted aggravated assault that she is already in prison for.¹ CPH: 4. After reviewing the plea agreement with Waln and the factual basis provided by the State, the circuit court accepted her guilty pleas.² CPH: 5-10.

At sentencing, Waln's attorney, David Siebrasse, requested that she be given a suspended execution of sentence because she has taken "quite a few classes" in prison, she was on parole for twenty months before violating the terms of her release, and she is a young mother with two children. ST: 4-5; SR: 62-72 (sealed document). For its part, the State recommended that "whatever sentence this Court imposes that it run concurrently with the defendant's current pen sentence." ST: 6.

Ultimately, the circuit court sentenced Waln to five years in prison, with three years suspended, and ordered it to run consecutive to her current sentence. ST: 9; SR: 200-01. The court based that sentence on its review of Waln's Presentence Investigation Report that detailed her "lengthy criminal history" and her track record of being "unwilling to follow conditions."³ ST: 7. It also based that sentence on Waln committing her new crimes while on parole, her continued use of drugs,

¹ While not spelled out in the settled record, context shows that Waln's parole was revoked and she was returned to the custody of the Women's Prison. See CPH: 4.

² The Honorable Margo Northrup presided over Waln's change of plea hearing, even though Waln's case was assigned to the Honorable Christina L. Klinger.

³ The parties and the circuit court relied on Waln's 2022 PSI because Mr. Siebrasse was "comfortable with the 2022" report. CPH: 10.

and her refusal to participate in rehabilitative programming while out in the community. ST: 7-8. The circuit court listed four aggravating factors, under SDCL 22-6-11, in its Judgment to support Waln's prison sentence:

- The Defendant committed these crimes while out on parole[;]
- The defendant chose not to use resources that she knew were available to her for drug and alcohol abuse[;]
- The defendant doesn't seem to have learned anything while in prison[; and]
- The defendant has a lengthy criminal history.

SR: 201. The judgment says these aggravating factors exist "which pose a significant risk to the public and require departure from probation[.]"

SR: 201.

Waln made no objection and found no legal reason why the court could not impose its sentence. ST: 8. Nor did she move to correct her sentence in any way after the Judgment was filed. *See generally*

SR: 1-266. But now she claims the circuit court failed to follow SDCL 22-6-11's requirements before ordering her to serve actual prison time.

AB: 9-11.

STANDARD OF REVIEW

This Court recently clarified that it is judicially inefficient for a defendant to sit and "remain silent when fully aware that the circuit court has [allegedly] failed to comply with SDCL 22-6-11. . . ." *State v. Feucht*, 2024 S.D. 16, ¶ 23, 5 N.W.3d 561, 568. When no objection is

made at sentencing, the alleged error is unpreserved and plain error review applies. *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569.

Under plain error review, Waln “must establish 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 affects the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Janes*, 2026 S.D. 9, ¶ 14, ---N.W.3d--- (quoting *State v. Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d 196, 200)(cleaned up).

Waln concedes that her challenges to the circuit court’s sentencing decision “do[] not meet the strict standard of plain error review.” AB: 7. Waln tries to get around this by pointing to the other standards of review this Court has applied in SDCL 22-6-11 appeals. AB: 7-8 (citing *State v. Beckwith*, 2015 S.D. 76, ¶ 15, 871 N.W.2d 57, 60-61; *State v. Kurtz*, 2024 S.D. 13, ¶¶ 12-15, 4 N.W.3d 1, 4-5; *State v. Underwood*, 2017 S.D. 3, ¶¶ 5 and 7, 890 N.W.2d 240, 241-42). But those decisions predate, and Waln’s charges postdate, *Feucht*’s prospective application of the error preservation rule and plain error review when that rule is violated. Thus, her concession that she cannot satisfy the plain error standard disposes of this appeal.

But even if that concession were not controlling, the arguments that follow explain why Waln cannot show a plain error occurred that calls into doubt the fairness or reputation of the judicial system or the fairness of her case specifically.

ARGUMENT

THE CIRCUIT COURT MADE THE NECESSARY FINDINGS OF AGGRAVATING CIRCUMSTANCES THAT RISK PUBLIC SAFETY, UNDER SDCL 22-6-11, TO SENTENCE WALN TO PRISON.

With few exceptions, defendants convicted of Class 5 and Class 6 felonies cannot be sentenced to actual prison time unless the sentencing court “finds aggravating circumstances exist that pose a significant risk to the public. . . .” SDCL 22-6-11.⁴ There is no question that Waln, a drug offender, is subject to SDCL 22-6-11’s sentencing rubric. She claims the circuit court did not say the right words at sentencing, even though the aggravating circumstances it noted, warranting an active prison sentence, track this Court’s case law and are explicit in its written disposition. *See* AB: 8-9. She also claims that the circumstances the circuit court noted, in the context of Waln’s case, do not meet SDCL 22-6-11’s requirements to depart from the presumptive fully suspended sentence. *See* AB: 10-11.

But Waln’s claims fail on both fronts. First, while the court did not say the words “significant risk to the public safety” at sentencing, the circuit court’s sentencing comments, which translate into “aggravating

⁴ If a defendant is not under any postconviction supervision or they are on probation, which is supervised by the Unified Judicial System, they must receive probation if departure is not warranted. SDCL 22-6-11. If a defendant is in prison or on parole, they must receive a fully suspended prison sentence when departure is not warranted. SDCL 22-6-11; *State v. Orr*, 2015 S.D. 89, ¶ 10, 871 N.W.2d 834, 838 (“[P]robation is not available for those defendants that are incarcerated in the penitentiary or on parole.”).

circumstances that pose a significant risk to public safety,” track this Court’s precedent on what is and is not a valid aggravator under SDCL 22-6-11. The final judgment of conviction also made the public safety connection explicit. Second, the comments Waln focuses on to claim she is not a risk to the public came from the prosecutor, not the court, and it’s the court’s comments that matter. Thus, this Court should affirm Waln’s prison sentence.

A. No reversible error occurred because the sentencing transcript does not say the words “significant risk to the public,” but the final disposition does.

This Court has interpreted SDCL 22-6-11’s language to mean that what qualifies as an aggravating circumstance cannot be “precisely defined.” *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d at 5. But if those circumstances do not pose a significant risk to public safety itself, then a sentencing court cannot depart from the statute’s sentencing presumption. *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. “[I]t is true that prior felonies and prior probation violations *can* constitute aggravating circumstances that pose such a risk, [but] it is not a foregone conclusion” they do. *Id.* (emphasis added). A sentencing court is required to find aggravating circumstances that reveal the defendant poses a significant risk to the public to depart from presumptive probation to comply with SDCL 22-6-11. *Kurtz*, 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5.

Waln asserts “[i]n neither the sentencing nor the judgment of conviction and sentence, was there an oral or written connection between these factors, and how they related to a significant risk to the public.”

AB: 9. But a quick review of the judgment of conviction negates her claim. The judgment says Waln’s four aggravating factors exist “which pose a *significant risk to the public* and require departure from probation[.]” SR: 201 (emphasis added). Thus, she is correct that her argument “does not meet the strict standard of plain error review.”

AB: 7.

Similarly, at Waln’s sentencing hearing, the comments from her attorney and the prosecutor show everyone operated with the understanding that SDCL 22-6-11 applied. Mr. Siebrasse’s request for a suspended execution of sentence tracks SDCL 22-6-11’s presumptive suspended sentence given that Waln was already in prison.⁵ ST: 4. The State’s comments echo this, recommending “that *whatever sentence* this Court imposes that it run concurrently with the defendant’s current pen sentence.” ST: 6 (emphasis added). That “whatever sentence” language gives a nod to SDCL 22-6-11’s application, recognizing the court could

⁵ A suspended execution of sentence, under SDCL 23A-27-18, and a presumptive fully suspended sentence, under SDCL 22-6-11, are technically different procedures. But context shows Mr. Siebrasse wasn’t using “suspended execution” in the technical sense. He used it in a colloquial way, asking the court to comply with SDCL 22-6-11, especially given that its application to most Class 5 and Class 6 felonies, like Waln’s methamphetamine charge, is “well known.” *Feucht*, 2024 S.D. 16, ¶ 18, 5 N.W.3d at 567.

order a fully suspended sentence or deviate if the statute's parameters were met.

The circuit court's own comments also show it operated under SDCL 22-6-11 and that it made the necessary findings to deviate from the presumed suspended sentence:

In reviewing the PSI and the file, it's clear that Ms. Waln has a lengthy criminal history.

She committed the offense possession of a controlled substance and possession of drug paraphernalia shortly after being released. While she may have made it 20 months, she was still on parole.

This is a completely different situation from ones that had come before because this was committed after she had been released. She had been out. She had all the resources available to her. She had parole available to her and chose not to use those. And historically, she's been unwilling to follow conditions.

And this quite serious offense while out on parole is very concerning to the Court. She received a very good benefit of the bargain plea agreement, and the Court's aware of that.

In looking at the sentence, obviously punishment is an issue that clearly needs to be established. Ms. Waln did not learn her lesson last time when she was in prison because we're back here again within a short period of time.

There's general and specific deterrence, obviously, that needs to be addressed, not only for general but for Ms. Waln individually.

I'm not sure what it's going to take to get you to stop using, but there's some very serious allegations and concerns.

You had an opportunity to engage in rehabilitation but chose to use rather than do that.

The nature of the crime is a serious concern for this Court.

ST: 7-8.

The circuit court's comments are the flip side of the sentencing comments at issue in *Feucht*. There, the sentencing court's comments focused "on giving Feucht reasons why he is capable of redemption and why he should change his life's course and be the father, son, and friend that the letters of support indicated he had the potential to be." *Feucht*, 2024 S.D. 16, ¶ 30, 5 N.W.3d at 570. But here, the circuit court focused on what Waln did and how she did it, not how Waln could change her behavior and better herself going forward. ST: 7-8.

That the circuit court's judgment of conviction also included aggravating circumstances, as required by the statute, shows that it applied SDCL 22-6-11. SR: 200-01. Those written aggravating circumstances are preceded with the required finding: the factors mean Waln "pose[d] a significant risk to the public and require[d] departure from probation." SR: 201.

Simply put, the parties and the court knew SDCL 22-6-11 applied to Waln. The court did not say the words "significant risk to the public" at sentencing, but it did in the final judgment of conviction. Waln's failure to object at sentencing paired with the explicit finding in the final judgment disposes of her ability to show reversible plain error occurred.

B. No reversible error occurred when the circuit court properly identified the aggravating circumstances that it found as ones posing a significant risk to public safety, warranting actual prison time for Waln.

Waln's challenge to her prison sentence boils down to three complaints. First, Waln faults the court for relying on aggravating circumstances that she claims have no connection to public safety. AB: 9-10. Second, she faults the court for allegedly ignoring her rehabilitative prospects that were reflected in the prosecutor's comments about the positives he saw in Waln. AB: 9-10. Third, she faults the court for determining that a prison sentence was needed to punish Waln when she argues she could have been rehabilitated with probation instead. AB: 10-11.

But each of her arguments fail at fundamental levels. First, the circuit court's aggravating circumstances track this Court's case law about what are appropriate circumstances to deviate from SDCL 22-6-11's presumptive sentences. Second, the prosecutor's comments do not drive whether Waln poses a "significant risk to the public." What matters are the circuit court's findings on that score. Third, when the Legislature adopted SDCL 22-6-11, it did not limit a circuit court's ability to consider traditional sentencing factors when applying that statute, and deviating from its presumptive sentences.

- 1. The aggravating circumstances found by the circuit court track this Court's case law about what are aggravating circumstances that "pose a significant risk to the public."*

Waln recognizes that the circuit court found that she committed new crimes while on parole, refused to use the resources available to her, did not learn her lesson from her prior prison sentence, and her criminal

history were all aggravating circumstances.⁶ AB: 9. But Waln claims the court erred by sending her to prison because “there is an implicit finding that Waln did not pose a significant risk to the public through the circuit court’s lack of connection between possible aggravating circumstances and significant public safety concerns[.]” AB: 9. This claim fails, as stated above.

Prior to *Kurtz*, this Court would often review whether certain aggravating circumstances posed a significant risk to the public for an abuse of the sentencing court’s discretion. *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. But in that decision, this Court specified a clear connection between the factors and the risk to the public must be explicit. “[W]hile 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.* (emphasis added). Yet, as explained above, the court made this required connection explicit in its final judgment. SR: 201.

2. The prosecutor’s comments about Waln are not determinative of whether she posed a risk to public safety.

In her second attack on her prison sentence, Waln claims she is not a risk to the public because of the prosecutor’s comments that she

⁶ Waln also recognizes that the court included these aggravating circumstances in its judgment of conviction. AB: 9.

seemed to be taking steps to get off drugs and move forward. AB: 9 (citing ST: 6-8). This argument, too, is misplaced.

Importantly, the prosecutor’s comments—just as a defendant’s, an expert’s, and defense counsel’s—can influence a court’s sentencing decision. Indeed, “[w]hen faced with differing opinions, it is the circuit court’s job to weigh the options and evidence and come to a conclusion.” *People in Interest of D.S.*, 2022 S.D. 11, ¶ 31, 970 N.W.2d 547, 556. But a court doesn’t have to “indiscriminately accept the[m]. . . wholesale.” *Id.* (quoting *State v. Klinetobe*, 2021 S.D. 24, ¶ 35, 958 N.W.2d 734, 742).

What’s more, the prosecutor’s comments about Waln’s positive progress were also contradicted by Waln’s continued inability to follow conditions set by the courts and her parole officer and her continued drug use when out in the community. So the court did not, as Waln suggests, “ignore recent prognostic indicators suggesting the defendant does not presently pose a significant risk to the public.” AB: 10 (quoting *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5). Instead, it weighed the competing information and found that Waln posed a significant risk to the public. SR: 200-01; ST: 7-8. And Waln cannot ask this Court to substitute its judgment on the matter to reverse her sentence. *See State v. Toavs*, 2017 S.D. 93, ¶¶ 9-14, 906 N.W.2d 354, 357-58 (rejecting Toavs’s challenges to his sentences because “it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” (quoting *State v.*

Blair, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61)).

More importantly, under SDCL 22-6-11’s analysis, it’s the circuit court’s comments that matter because “the sentencing court, not the prosecutor, must state on the record the aggravating circumstances which impact public safety as a predicate to departing from a presumptive sentence. . . .” *State v. Roedder*, 2019 S.D. 9, ¶ 38, 923 N.W.2d 537, 548. So it doesn’t matter that the prosecutor seemed to think Waln was working to get clean and her actions were trending in the right direction. *See* AB: 9-10 (citing ST: 6-8). This case is the opposite of *Kurtz*, where Kurtz’s prison sentence was reversed because the sentencing court found “despite the existence of aggravating circumstances, Kurtz is not ‘much of a threat to society.’” *Kurtz*, 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5.

Because the circuit court made the required findings to depart from a fully suspended sentence, and the judgment of conviction follows suit, this Court should ignore Waln’s reliance on the prosecutor’s comments, conclude that no plain error occurred, and affirm her prison sentence.

3. *The circuit court’s punishment comments were not part of its SDCL 22-6-11 analysis, they were part of its analysis on how long of a prison sentence to impose on Waln.*

Before sentencing a defendant—regardless of whether SDCL 22-6-11 applies, or not—the circuit court “should acquire a thorough acquaintance with the character and history of the man before it. This

study should examine a defendant’s general moral character, mentality, habits[,] social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record.” *State v. Whitfield*, 2015 S.D. 17, ¶ 23, 862 N.W.2d 133, 140 (quoting *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412)(cleaned up). On top of that, the circuit court “should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation.” *Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d at 741.

Waln is correct that punishment cannot be a factor for departing from a presumptive sentence under SDCL 22-6-11. AB: 10-11 (quoting *Kurtz*, 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5). But that doesn’t mean that when a court decides departure is necessary, punishment cannot factor into the calculus of what is the appropriate prison sentence. This Court took the sentencing court to task in *Kurtz* for giving a prison sentence solely for punishment’s sake, and not because Kurtz posed a significant risk to public safety. *Kurtz*, 2024 S.D. 13, ¶ 13, 4 N.W.3d at 5. Yet it never said punishment could not be considered when fashioning a sentence after departure was warranted. *See generally Kurtz*, 2024 S.D. 13, ¶¶ 12-16, 4 N.W.3d at 4-5. And had the Legislature wanted to stretch the *Kurtz* decision to that point, it could have amended SDCL

22-6-11 or passed a new statute to that effect, but it hasn't done so.⁷

To sum up, while the circuit court mentioned punishment in its sentencing analysis, it was appropriate to do so. The court did not depart from a presumptive fully suspended sentence solely on the desire to punish Waln. The court found aggravating factors warranting a departure from the presumed sentence. It put the required risk finding in writing in the judgment of conviction. And the court rightly used punishment when fashioning the prison sentence it believed was appropriate for Waln.

CONCLUSION

As the above arguments and authorities show, the circuit court did not commit plain error when it sentenced Waln to five years in prison with three years suspended, instead of suspending the full prison sentence. Because the circuit court's required findings are clear in its

⁷ The Legislature is not shy about limiting the circuit courts' sentencing authority when it thinks those limits are necessary. *E.g.*, SDCL 22-6-1(1) (mandating a life sentence as lowest sentence for Class A felonies); SDCL 22-6-1(2) (mandating a life sentence for Class B felonies); SDCL 22-22-1.2 (setting mandatory minimum sentences for rape and sexual contact with children); SDCL 22-42-4.3 (setting mandatory penitentiary sentences for manufacturing, distributing, counterfeiting, or possessing methamphetamine while possessing other indicators of drug distribution activity).

final disposition and Waln admits she cannot show plain error, the State requests that this Court affirm Waln's prison sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,023 words.

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

Dated this 7th day of April, 2026.

/s/ Matthew W. Templar
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of April, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kira Rae Waln* was served via the Odyssey electronic filing system upon Justine Avtjoglou at Justine.Avtjoglou@state.sd.us.

/s/ Matthew W. Templar
Matthew W. Templar
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

KIRA RAE WALN,

Defendant/Appellant.

No. 31259

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

HONORABLE CHRISTINA KLINGER
Circuit Court Judge

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Notice of Appeal Filed on October 23, 2025

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

No. 31259

KIRA RAE WALN,

Defendant and Appellant.

PRELIMINARY STATEMENT

To avoid repetitive arguments, Appellant, Kira Waln, confined this response to “new matters” raised in Appellee’s brief. SDCL 15-26A-62. Any issue raised in Waln’s initial brief, but not mentioned herein, is not intended to be waived.

The brief of the Plaintiff Appellee, the State of South Dakota, is referred to as “SB.” The brief of Appellant, Kira Waln, will be referred to as “AB.” All citations will be followed by the appropriate page number. Waln relies on the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in her initial brief.

ARGUMENT

I. THE STANDARD OF REVIEW IS DETERMINED BY WHETHER THE CIRCUIT COURT'S ERROR WAS PROCEDURAL OR SUBSTANTIVE.

While arguing in favor of the plain error standard of review, the State failed to acknowledge the distinction between procedural issues and substantive issues recognized in *Feucht* and *Kurtz*. 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).

The State also claimed, "Waln concedes that her challenges to the circuit court's sentencing decision 'do [] not meet the strict standard of plain error review.'" SB 6. This is untrue. The citation the State used provided an important qualification: "[o]n this point, Waln concedes that the circuit court's failure to state aggravating circumstances on the record at sentencing does not meet the strict standard of plain error review." AB 7 (emphasis added). Waln is clear that this concession is directly referring to a single "alleged procedural error" – but not the other challenges to the circuit court's sentencing decision. See AB 6. Waln's

initial brief focused on substantive issues that would require a de novo standard of review.¹ See AB 7-8.

The State further claimed, “[w]hen no objection is made at sentencing, the alleged error is unpreserved and plain error review applies.” SB 5-6 (citing *Feucht*, 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569). But the State failed to include the word *procedural* in making this claim. In the words of this Court in *Feucht*, “we conclude that when a circuit court fails to comply with the *procedural* requirements of SDCL 22-6-11, parties must first raise the issue to the circuit court to preserve the error for appeal and avoid plain error review.” *Id.* at ¶ 24, 5 N.W.3d at 569 (emphasis added) (citing *Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d at 443) (citations omitted).

The State did acknowledge that other standards of review are applicable to cases involving SDCL 22-6-11, but argued that only plain error applies because *Beckwith*, *Kurtz*, and *Underwood* predate *Feucht*. SB 6 (citing *State v. Beckwith*, 2015 S.D. 76, 871 N.W.2d 57; *State v. Underwood*, 2017 S.D. 3, 890 N.W.2d 240; *Kurtz*, 2024 S.D. 13, 4 N.W.3d 1; *Feucht*, 2024 S.D. 16, 5 N.W.3d 561). The fact that *Feucht* was decided later in time has no bearing on the substantive issues presented in this case.

¹ If this Court determines that this issue is not properly characterized as a misapplication of SDCL 22-6-11, then this Court should, as it did in *Beckwith*, “apply the abuse of discretion standard in reviewing a sentencing court’s decision to depart from presumptive probation.” *Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d at 59.

II. THE STATE MISCHARACTERIZED WALN'S ARGUMENTS.

At numerous points throughout Appellee's Brief, the State misstated Waln's arguments. Waln did not argue that "the circuit court did not say the right words." SB 7. Rather, the argument was that the circuit court failed to draw an explicit connection between aggravating factors and public safety. The State further mischaracterized the arguments by stating, "Waln claims she is not a risk to the public..." SB 13. This statement is misleading. Waln argued that the circuit court misapplied the statute when it did not consider recent prognostic indicators, as shown by the State's comments on the record, that Waln did not pose a significant risk to the public.

Lastly, the State claimed that Waln "fault[ed] the court for determining that a prison sentence was needed to punish Waln when she argu[ed] she could have been rehabilitated with probation instead." SB 12. Again, this statement did not address Waln's specific contention. Waln argued that the circuit court focused on punishment rather than rehabilitation, an issue this Court addressed in *Kurtz*. 2024 S.D. 13, ¶ 13, 4 N.W.3d. 1, 5. The argument was based on the policy goals underpinning SDCL 22-6-11; it had nothing to do with whether Waln would have in fact been rehabilitated by probation. A circuit court cannot depart from a presumptively suspended penitentiary sentence to punish the defendant, instead, it must find aggravating circumstances exist that pose a significant risk to the public.

CONCLUSION

The circuit court's error in misapplying SDCL 22-6-11 was substantive in nature rather than procedural. Therefore, de novo review applies. Furthermore, the circuit court erred by neglecting to make an explicit finding of a connection between aggravating circumstances how those circumstances pose a risk to public safety. Without such a finding, Waln's penitentiary sentence must be suspended under SDCL 22-6-11.

Respectfully submitted on this 5th day of May, 2026.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12-point type. Appellant's Reply Brief contains 1,358 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 5th day of May, 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:

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