IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27104

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NICOLE MUNDY-GEIDD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed June 16, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27104

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NICOLE MUNDY-GEIDD,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Nicole Mundy-Geidd, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." The settled record in the underlying criminal case, *State of South Dakota v. Nicole Mundy-Geidd,* Charles Mix County Criminal File No. 13-187, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." The transcript of the Court Trial held on October 16, 2013, will be referred to as "CT." Material contained within the Appendix to this brief will be referenced as "APP." All such references will be followed by the appropriate page designation.

JURISDICTIONAL STATEMENT

This matter stems from Defendant's conviction at a court trial for driving under the influence (DUI) in violation of SDCL 32-23-1(2).

CT 15. A Second Amended Judgment and Sentence was entered by the Honorable Gordon Swanson, Magistrate Court Judge, First Judicial Circuit, on January 13, 2014. SR 71-72. Defendant filed a Notice of Appeal to the circuit court on January 17, 2014. SR 73-74. The Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, affirmed the conviction on June 10, 2014. SR 83-94. Defendant filed a Notice of Appeal to this Court on June 16, 2014. SR 95. This Court has jurisdiction pursuant to SDCL §§ 15-26A-3(1) and 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

WHETHER SDCL 34-20A-93 PROHIBITS THE STATE FROM ENFORCING AND PROSECUTING THE CRIME OF DUI UNDER SDCL 32-23-1(1) and (2)?

The circuit court affirmed the magistrate court's denial of Defendant's motion to dismiss the complaint charging her with DUI.

Bandy v. Mickelson, 73 S.D. 485, 44 N.W.2d 341 (1950)

In re Expungement of Oliver, 2012 S.D. 9, 810 N.W.2d 350

Schafer v. Shopko Stores, Inc., 2007 S.D. 116, 741 N.W.2d 758

State v. Davis, 1999 S.D. 98, 598 N.W.2d 535

SDCL 32-23-1

SDCL 34-20A-93

SDCL 34-20A-94

SDCL 34-20A-95 (repealed by SL 2012, ch. 150)

STATEMENT OF THE CASE AND FACTS

Defendant was arrested and charged by complaint with driving under the influence in Charles Mix County on June 22, 2013.[1] SR 1.

On August 14, 2013, Defendant filed a Motion to Dismiss the complaint. SR 14-17. Defendant moved to dismiss her case by asserting the State was prohibited from charging her with driving under the influence of alcohol (DUI).[2] SR 14-16. Defendant's motion was based upon the provisions of SDCL 34-20A-93 and the Legislature's enactment of House Bill 1027 (SL 2012, ch. 150) during the 2012 legislative session (hereinafter "HB 1027") which, in part, repealed SDCL §§ 34-20A-95 and -96. Defendant asserted that the Legislature's repeal of these sections precludes her DUI prosecution because it nullified and implicitly repealed the state's DUI laws.

A hearing was held on August 27, 2013, before the magistrate court.[3] The magistrate court denied the Motion to Dismiss on August 30, 2013. SR 18-20. A trial to the magistrate court was held on October 16, 2013. CT 1-18. Defendant was found guilty of driving

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[1] The only underlying fact of the offense and arrest relevant to this appeal is that Defendant was charged with driving under the influence of alcohol only.

[2] All references to DUI in this brief are specific to driving under the influence of alcohol as prohibited by SDCL 32-23-1(1) and (2). Defendant does not challenge the ability of the State to enforce and prosecute driving under the influence of other substances such as controlled substances, marijuana or inhalants.

[3] No transcript of this hearing has been prepared.

under the influence. CT 15. A Second Amended Judgment and Sentence was filed on January 13, 2014. SR 71-72.

Defendant appealed her conviction to the circuit court. SR 73-74. The sole issue on appeal was the propriety of the magistrate's denial of Defendant's Motion to Dismiss. The circuit court upheld the magistrate court's decision in a lengthy Memorandum Decision that thoroughly analyzed and rejected all of Defendant's legal arguments. SR 83-94. Defendant has now appealed the denial of her Motion to Dismiss and subsequent conviction. SR 95.

ARGUMENT

SDCL 34-20A-93 DOES NOT PROHIBIT THE STATE FROM ENFORCING AND PROSECUTING THE CRIME OF DUI UNDER SDCL 32-23-1(1) AND (2).

Defendant argues that an isolated and literal reading of SDCL §§ 34-20A-93 and 34-20A-94 is required. Defendant then goes on to argue that following the repeal of SDCL 34-20A-95, this isolated and literal reading results in the State's inability to pursue any DUI prosecution. As such, as a matter of law, the trial court was required to dismiss her complaint. The result of this isolated and literal reading is the repeal by implication of all DUI and other alcohol related criminal laws. Defendant's proffered construction leads to absurd and unreasonable results and is not supported by the rules of statutory construction.

The clear intent of HB 1027 was to maintain the status quo. Only outdated and unnecessary statutes were intended to be repealed. The DUI and other alcohol related criminal laws were not to be affected. Repeal of SDCL 34-20A-95 by itself, without repealing SDCL §§ 34-20A-93 and -94, was a clear oversight which was corrected in 2014.

HB 1027's title and legislative history provide no support for the argument that, by enacting HB 1027, the Legislature intended that all then existing and future criminal and regulatory laws that had or will have alcohol consumption or impairment as an element of a statutory offense are no longer enforceable. Such a result is especially absurd and unreasonable given the compelling public interest behind the state's DUI laws; furthering public safety by deterring impaired operation of vehicles on our public highways and removing those drivers from our highways who violate these laws. *See, e.g., Beare v. Smith*, 82 S.D. 20, 140 N.W.2d 603, 606 (1966); *Peterson v. State*, 261 N.W.2d 405 (S.D. 1977).

Though this Court's review is de novo, the State respectfully requests that the Court consider the circuit court's well-reasoned Memorandum Decision and reject Defendant's arguments. The only reasonable statutory construction is that provided by the circuit court – that, despite the repeal of SDCL 34-20A-95, the prohibitions in SDCL 34-20A-93 and -94 are limited to government action that makes the

status of public intoxication, drunkenness, or drinking, with nothing more, a crime. SR 90-92. Such a reading is consistent with the intent behind the Legislature's 1974 enactment and amendments, and the enactment and amendments to the State's DUI laws.

A. *Standard of Review*

"Statutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review." *State v. Miranda,* 2009 S.D. 105, ¶ 14, 776 N.W.2d 77, 81. *See also In re Expungement of Oliver,* 2012 S.D. 9, ¶ 5, 810 N.W.2d 350, 351. Under the de novo standard of review, no deference is given to the circuit court's conclusions of law. *Steiner v. Weber,* 2012 S.D. 40, ¶ 4, 815 N.W.2d 549, 551; *State v. Ludeman,* 2010 S.D. 9, ¶ 14, 778 N.W.2d 618, 622.

B. *Statutory Background*

In 1974, the Legislature enacted SL 1974, ch. 240, "AN ACT Entitled, An Act enacting the uniform alcoholism and intoxication treatment act, and to amend SDCL §§ 27-8-14 and 35-5-21.3 and to repeal SDCL 22-13-4, 27-3-18, 27-3-20, 27-3-21, 27-3-22, 27-8-3.1, and 27-8-12, all relating to alcoholism." *See* State's Motion for Judicial Notice, Ex. 2, 1974 Session Law Chapter 240 (HB 541), SR 151-65. The Act substantially adopted the Uniform Alcoholism and Intoxication Treatment Act (1971 Act). *See* State's Motion for Judicial Notice, SR 116-17; Ex. 1, Unif. Alcoholism and Intoxication Treatment

Act (1971), 9 U.L.A. 229-59 (1999), SR 120-50. The purpose of the uniform law was to decriminalize alcoholism and public intoxication and enact a statutory process and procedures to provide treatment. *See* Unif. Alcoholism and Intoxication Treatment Act § 1, 9 U.L.A. § 1 and Comment at 230, SR 121-22. Sections 1, 19, and 37 of the Uniform Alcoholism and Intoxication Treatment Act addressed its decriminalization aspects:

> **§ 1. [Declaration of Policy]**
>
> It is the policy of this State that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.
>
> **COMMENT**
>
> This section is intended to preclude the handling of drunkenness under any of a wide variety of petty criminal offense statutes, such as loitering, vagrancy, disturbing the peace, and so forth. As the Crime Commissions pointed out, drunkenness by itself does not constitute disorderly conduct. The normal manifestations of intoxication – staggering, lying down, sleeping on a park bench, lying unconscious in the gutter, begging, singing, etc. – will therefore be handled under the civil provisions of this Act and not under the criminal law. See District of Columbia v. Greenwell, 96 Daily Wash.L.Reptr. 2133 (D.C.Ct.Gen.Sess. December 31, 1968).
>
> **§ 19. [Criminal Laws Limitations]**
>
> (a) No county, municipality, or other political subdivision may adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.

(b) No county, municipality, or other political subdivision may interpret or apply any law of general application to circumvent the provision of subsection (a).

(c) Nothing in this Act affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.

COMMENT

An important corollary to Section 19 is Section 37, which provides for the repeal of the State laws that are inconsistent with this Act. Under Section 37, therefore, States would be expected to repeal all the relevant portions of their criminal statutes under which drunkenness is the gravamen of the offense with the exception of (c).

§ 37. [Repeal]

The following acts and parts of acts are repealed:

(1)

(2)

(3)

See 9 U.L.A. 230, 251, and 259, SR 121, 142, 150.

The Legislature substantially adopted Sections 1, 19, and 37 of the Uniform Alcohol and Intoxication Treatment Act in 1974 SL, ch. 240, § 1 (codified in 34-20A-1 and repealed in 1985 by SL 1985, ch. 278, § 1); § 16 (codified in SDCL §§ 34-20A-93 through -95); and § 20 (repealing SDCL §§ 22-13-4, 27-3-18, 27-3-20, 27-3-21, 27-3-22, 27-8-3.1 and 27-8-12). Consistent with the Comments to Sections 1

and 19 of the Uniform Alcohol and Intoxication Treatment Act and SL 1974, ch. 240 §§ 16(a) and (c), the Legislature did not repeal any of the state's DUI laws and laws that had alcohol impairment as an element.

SDCL §§ 34-20A-93, -94, and -95, provided:

> 34-20A-93. **Intoxication not an element of criminal offense.** Except as hereinafter provided, neither the state nor any county, municipality, charter unit of government, or other political subdivision may adopt or enforce a law, ordinance, resolution, or rule having the force of law that includes drinking, drunkenness, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.
>
> 34-20A-94. **Application of laws to circumvent criminality limitation prohibited.** Neither the state nor any county, municipality, charter unit of government, or other political subdivision may interpret or apply any law of general application to circumvent the provision of § 34-20A-93.
>
> 34-20A-95. **Drunken operating excepted—Laws regulating possession or sale of beverages—Possession of loaded firearm while intoxicated exempted.** Nothing in this chapter affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons or possessing a loaded firearm while intoxicated.

These laws remained unchanged until 2012.

In 2012, House Bills 1026 (SL 2012, ch. 151) and 1027 (SL 2012, ch. 150) were introduced at the request of the Department of Social Services as part of that agency's initiative to eliminate outdated

and unnecessary statutes. *See* State's Motion for Judicial Notice, Ex. 5, House Bill 1026 (2012), and Ex. 6, 2012 Session Law Chapter 151 (HB 1026), SR 169-79. The legislative history of these bills can be found on the Legislative Research Council website. *See* State's Motion for Judicial Notice, Ex. 4, Bill History – House Bill 1026 (2012), and Ex. 7, Bill History – House Bill 1027 (2012), SR 168, 180. HB 1027's title expressed its intended purpose: "An Act to repeal certain outdated or unnecessary statutes related to the Division of Behavioral Health within the Department of Social Services." HB 1027 repealed forty-seven sections in SDCL title 27A and SDCL chapter 34-20A. Nothing in the title of the bill or its legislative history suggests that the repeal of the forty-seven sections of state law would have a substantive effect on any other laws. Admittedly, HB 1027 repealed 34-20A-95, one of the three subsections in SL 1974, ch. 240 §16. Why this provision was repealed, and SL 1974, ch. 240 § 16 (a) and (b) (SDCL §§ 34-20A-93 and -94) remained, cannot be determined from the language of the Act itself. However, legislative intent is readily evident from review of HB 1027's title and legislative history. The provision was purportedly outdated and unnecessary, and thus could be repealed without any unintended consequences.

Defendant has stated that SDCL 34-20A-93 is still in effect. *See* DB 7. This is incorrect. During the 2014 Legislative Session, House Bill 1017 (SL 2014, ch. 132) was introduced at the request of the

Department of Social Services.[4] APP 1-7. HB 1017's title expressed its intended purpose: "An Act to repeal certain outdated and unnecessary statutes related to the Department of Social Services." Included in the bill was repeal of SDCL §§ 34-20A-93 and 34-20A-94. HB 1017 passed both houses of the Legislature; was signed by the Governor; and became law on July 1, 2014.

C. *The Repeal of SDCL 34-20A-95 Did Not Require Dismissal of the DUI Complaint Against Defendant.*

Defendant's arguments on appeal must be rejected. The enactment of HB 1027 that repealed SDCL 34-20A-95 did not require dismissal of Defendant's DUI charges. Contrary to Defendant's argument, legislative intent in this case cannot be determined by a literal reading of HB 1027 and SDCL §§34-20A-93 and -94.

"Defining and interpreting the law is a judicial function and the legislative branch may not limit or restrict the power granted to the courts by the constitution." *Bandy v. Mickelson*, 73 S.D. 485, 44 N.W.2d 341, 342 (1950). "'The most important rule of statutory construction is to determine and give effect to the intention of the Legislature.'" *Ellis v. City of Yankton*, 526 N.W.2d 124, 126 (S.D. 1995) (Internal citations omitted). The general rules of statutory construction utilized by the Court were set forth in *Meyerink v.*

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[4] The State respectfully requests, pursuant to SDCL ch. 19-10, that the Court take judicial notice of the legislative history of House Bill 1017 found on the Legislative Research Counsel website regarding SL 2014, ch. 132.

Northwestern Public Service Company, 391 N.W.2d 180, 183-84 (S.D. 1986):

> Each statute must be construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure. Where conflicting statutes appear, it is the responsibility of the court to give reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. However, terms of a statute relating to a particular subject will prevail over general terms of another statute. Finally, we must assume that the legislature, in enacting a provision, had in mind previously enacted statues relating to the same subject.

(citations omitted). *See also, Martinmass v. Englemann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611.

The circuit court, utilizing the above rules of construction, correctly concluded that, without SDCL 34-20A-95, the DUI statute, SDCL 32-23-1, conflicted with SDCL 34-20A-93. SR 89. Under literal readings, the two statues cannot coexist. Thus, given Defendant's proposed construction, this is one of the occasions where this Court must look beyond the express language of the statutes and enactments at issue to determine legislative intent.

Properly applying all of the rules of statutory construction, the circuit court reached the proper conclusions. To resolve the statutory conflict, SDCL 34-20A-93 and -94 must be construed in a manner that limits their application to governmental attempts to enact or enforce

criminal provisions that make being intoxicated, drunk, or engaging in the act of drinking alcohol, without more, a crime, and not to repeal, nullify, or make unlawful the enforcement of the DUI statutes.

SR 90, 94.

In determining legislative intent, the Court is guided by its prior decisions. In *Schafer v. Shopko Stores, Inc.*, 2007 S.D. 116, ¶ 7, 741 N.W.2d 758, 761, the Court stated:

> "There are instances when it is necessary to look beyond the express language of a statute in determining legislative intent. Most notably . . . if confining ourselves to the express language would produce an absurd result." "We presume that the Legislature intended no absurd or unreasonable result." "[W]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them 'harmonious and workable.' "
> "Furthermore, '[w]e should not adopt an interpretation of a statute that renders the statute meaningless when the Legislature obviously passed it for a reason.' "

(citations omitted). In *State v. Davis*, 1999 S.D. 98, ¶ 7, 598 N.W.2d 535, 537-38, this Court stated:

> [c]ourts should not enlarge a statute beyond its declaration if its terms are clear and unambiguous [,] ... in cases where a literal approach would functionally annul the law, the cardinal purpose of statutory construction—ascertaining legislative intent—ought not be limited to simply reading a statute's bare language; [courts] must also reflect upon the purpose of the enactment, the matter sought to be corrected and the goal to be attained.
>
> Or, as this Court has also stated:
>
> " '[a]mbiguity is a condition of construction, and may exist where the literal meaning of a statute leads to an

> absurd or unreasonable conclusion.' " Furthermore, "[s]tatutes should be given a sensible, practical and workable construction, and to such end, the manifest intent of [the] legislature will prevail over [the] literal meaning of words."

(citations omitted).

Defendant's proposed construction of HB 1027 results in the repeal by implication of numerous state statutes. Repeal by implication is strongly disfavored. *Faircloth v. Raven Industries, Inc.*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202. This is particularly true here, where the implied repeal arises from enactment of a House Bill the Department of Social Services concluded only contained outdated and unnecessary statutory provisions. Before implying a repeal of the state's DUI and other criminal laws, the Legislature's intent to do so must be apparent. *Id.* The Court must refrain from negating these legislative statutes unless it is demanded by manifest necessity. *Id.* Defendant cannot show manifest necessity in this case.

To determine legislative intent, this Court must initially determine the intent behind the enactment of SDCL §§ 34-20A-93, -94 and -95. "The legislative intent that is controlling in the construction of a statute has reference to the legislature which enacted it, not a subsequent one." *Hot Springs Independent School District No. 10 v. Fall River Landowners Association*, 262 N.W.2d 33, 39 (S.D. 1978). In resolving issues of legislative intent, legislative history may be utilized. *In re Expungement of Oliver*, 2012 S.D. 9, ¶ 15, 810 N.W.2d 350, 354.

The Court may look to the legislative history, title, and total content of the legislation.

The legislative intent behind the passage of these provisions is readily apparent from review of the language the Legislature used in enacting SL 1974, ch. 240, in particular Sections 1, 16, and 20. To the extent there is any remaining ambiguity, the ambiguity is resolved by review of the provisions and comments in the Uniform Alcoholism and Intoxication Act, which the Legislature adopted in substantial part. The Legislature's intent in enacting SL 1974, ch. 240 was to repeal provisions criminalizing public intoxication and alcoholism, and prohibit statutory and regulatory constructions that were inconsistent with this purpose. The Legislature accomplished this intent by including the repeal of SDCL 22-13-4 in SL 1974, ch. 240 § 20. *See* State's Motion for Judicial Notice, Ex. 3, SDCL 22-13-4 (1967) – Repealed 1974. SR 166-67. It is also clear that the intent to repeal conflicting provisions was expressly limited to those laws that made public intoxication a crime, not crimes such as DUI, which were untouched by the Legislature in 1974.

The legislative intent behind the enactment of HB 1027, which included the repeal of SDCL 34-20A-95, is also not resolved by a literal reading of that Act's plain language. An ambiguity exits as to what the Legislature intended by the initial phrase "[e]xcept as hereinafter provided" in SDCL 34-20A-93. Based upon the language of the 1974

act, the phrase is easily construed when it is read in conjunction with SDCL 34-20A-95. The intent was to limit the statute's applicability to public intoxication crimes. This expressed clarity, however, is absent when SDCL 34-20A-95 was repealed and only 34-20A-94 remains. There is no express language in 34-20A-94 or elsewhere that can be construed to be an exception or limitation to SDCL 34-20A-93. Under a plain reading of the statute, the "except as hereinafter provided" language in SDCL 34-20A-93 must mean something. The language is not mere surplusage.

The statute's ambiguity is only heightened when SDCL 34-20A-93 is construed with the state's DUI laws, underage drinking laws, and other state laws which establish crimes or penalties that fall within the literal interpretation of SDCL 34-20A-93. Unlike SL 1974, ch. 240, HB 1027 did not include the repeal of any laws which were inconsistent with the plain meaning of SDCL 34-20A-93. Further, without SDCL 34-20A-95, the DUI laws are in inherent conflict with the prohibitions in SDCL 34-20A-93, as SDCL 32-23-1 includes the criminal elements of drinking alcohol and intoxication.

HB 1027's title and legislative history do not support the conclusion that the Legislature intended to render the state's DUI laws and other alcohol-related criminal laws a nullity when it enacted the bill. The importance of the title of a bill is derived from Article III, Section 21 of the South Dakota Constitution that provides: "[n]o law

shall embrace more than one subject, which shall be expressed in its title." Article III, § 21 has three purposes:

> (1) To prevent the combining into one bill of several diverse measures which have no common basis except, perhaps, their separate inability to receive a favorable vote on their own merits;
>
> (2) To prevent the unintentional and unknowing passage of provisions inserted in a bill of which the title gives no intimation; and,
>
> (3) To fairly apprise the public of matters which are contained in the various bills and to prevent fraud or deception of the public as to matters being considered by the Legislature. *We have interpreted Section 21 to contain two requirements: " 'First, that no law shall embrace more than one subject, and second, that the subject shall be expressed in the title.' "* The requirements of this provision are mandatory.

Apa v. Butler, 2001 S.D. 147, ¶ 39, 638 N.W.2d 57, 71-72 (citations omitted).

If the Legislature intended HB 1027 to do what Defendant asserts, it would have needed to include notice of the nullification and implied repeal of not only all of the state's DUI laws, but also all other laws that have criminal penalties that comfortably fall within the provisions of SDCL 34-20A-95. There was no such notice. Such notice would have been important, not only to advise the public regarding the inability to enforce specified criminal laws, but also to give notice to other state agencies impacted by the repeal of DUI and other alcohol-related crimes. Agencies such as the Department of Transportation has federal highway funds directly tied to the

continued existence and enforcement of the state's DUI and underage drinking laws. *See, e.g.,* 23 U.S.C. § 158 (authorizes the withholding of funds if the State does not make unlawful the purchase or public possession any alcoholic beverage by a person who is less than twenty-one years of age.); 23 U.S.C. § 161 (authorizes withholding of funds if the State has not enacted and is not enforcing a law that considers an individual under the age of 21 who has a blood alcohol concentration of 0.02 percent or greater while operating a motor vehicle in the State to be driving while intoxicated or driving under the influence of alcohol); and 23 U.S.C. § 163 (authorizes the withholding of funds if the State has not enacted and is not enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense)).

Further, under Defendant's proposed construction, it is impossible to reconcile the enactment of HB 1027 with other 2012 legislative enactments: Senate Bill 10 (2012 SL, ch. 208) which revised the boating while under the influence laws in SDCL chapter 42-8; and House Bill 1039 (2012 SL, ch. 119) that excepted out DUI and other alcohol-related offenses in SDCL ch. 32-23 from the enhanced penalty limitations in SDCL 22-6-5.2. *See* State's Motion for Judicial Notice, Ex. 10, 2012 Session Law Chapter 119 (HB 1039), and

Ex. 11, 2012 Session Law Chapter 208 (SB 10), SR 199-203. Additionally, such a construction would nullify the Legislature's 2013 enactment of Section 63 of Senate Bill 70 (2013 SL, ch. 101), which provided for an enhanced DUI offense for individuals whose conviction for SDCL 32-23-1 is the sixth or subsequent offense occurring within twenty-five years. *See* State's Motion for Judicial Notice, Ex. 12, 2013 Session Law Chapter 101 (SB 70), SR 204-23.

Finally, the Legislature's subsequent actions in 2014 may be considered in construing HB 1027. "' [I]t is well established under South Dakota Law that the legislative interpretation of a statute through the adoption of a subsequent amendment is not binding on this court, though the court may deem it worth of consideration in construing the law.' " *Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, ¶ 17 n.9, 821 N.W.2d 824, 230 (citations omitted). In this case the subsequent repeal of SDCL §§ 34-20A-93 and -94 is worth consideration. There would have been no subsequent repeal of these provisions had the Legislature intended to render the DUI and other alcohol laws with criminal penalties unenforceable through the enactment of HB 1027.

Unlike Defendant's proffered construction, the circuit court's construction of all the relevant statutes gives effect to all statutory provisions without nullifying or repealing any statute by implication. A construction of SDCL 34-20A-93 in a manner that does not nullify

or impliedly repeal the State's DUI and other criminal laws is the proper construction. In fact, it is the only construction that maintains the stated purpose of HB 1027 to repeal outdated and unnecessary statutes.

Absent any clear showing of legislative intent or manifest necessity, Defendant's argument that HB 1027 and SDCL §§ 34-20A-93 and -94 required dismissal of her DUI charges must be rejected.

CONCLUSION

Wherefore, based upon the forgoing arguments, the State respectfully requests that Defendant's conviction and sentence in this matter be affirmed in all respects.

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 4,495 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 8th day of August, 2014.

/s/ *Jeffery P. Halem*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of August, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Nicole Mundy-Geidd* was served by electronic mail on Timothy R. Whalen at whalawtim@cme.coop.

/s/ *Jeffery P. Halem*
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IN THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA

APPELLANT'S REPLY BRIEF

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

vs.

NICOLE MUNDY-GEIDD
Defendant and Appellant.

FILE NO. CR-13-187

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HONORABLE BRUCE V. ANDERSON
Presiding Circuit Judge

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NOTICE OF APPEAL FILED DECEMBER 16, 2013

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PRELIMINARY STATEMENT

Appellant will rely on the Jurisdictional Statement, Statement of the Legal Issue, Statement of the Case, and Statement of the Facts as set forth in the Appellant's Brief and will not restate said matters herein. The Appellant shall be referred to herein as "Mundy". The Appellee shall be referred to herein as "State". References to the court trial transcript shall be by "CT" followed by the page numbers. References to the settled record shall be by "SR" followed by the page number for the beginning of the document. References to trial exhibits shall be by "Exh." followed by the exhibit number or, if used, the exhibit letter.

ARGUMENT

At the onset it is important to note that the statutes subject of this appeal are SDCL 34-20A-93, 34-20A-94, and 34-20A-95. 34-20A-93 and 34-20A-94 were in effect at the time Mundy was arrested, tried and convicted of driving or control of a motor vehicle while under the influence of alcohol (DUI). 34-20A-95 had been repealed effective July 1, 2012. See, SL 2012, ch 150, §§46, 47. Subsequent to this appeal, the South Dakota Legislature repealed 34-20A-93 and 34-20A-94; however, this repeal does not affect Mundy's appeal from a legal standpoint, but both parties argue that it lends credence to their positions as argued in their briefs. It is also important to note that if any ambiguity in the above statutes existed at the time of Mundy's conviction herein, it was created by the South Dakota Department of Social Services (DSS) pursuant to its action and/or negligence in asking the legislature to repeal 34-20A-95 and the legislature's compliance with the DSS proposal. The Courts are not in a position to cure legislative

defects due to the negligence or miscues of the legislative body, but are simply required to interpret and give meaning to statutes as they exist and not as the Courts think they should exist. See, In the Matter of the Petition of Famous Brands, Inc., 347 N.W.2d 882, 884 (SD 1984).

A. Legislative intent.

The State's argument in this matter is exclusively based on legislative intent ostensibly derived from the legislative history associated with existing statutes and one repealed statute. The Supreme Court has mandated the precaution necessary when delving into the abyss of legislative history to determine legislative intent. The well define roles between the constitutional branches of government can become blurred and inadvertently crossed in an effort to resolve that which does not require resolution, but merely needs to be declared. See, Matter of Oliver, 2012 S.D. 9, ¶6, 810 N.W.2d 350. Simply put,

> ... [w]hile it may be elementary, it behooves us to acknowledge that as a result of constitutional provisions distributing the powers of government among three departments, the legislative, executive, and judicial, courts have no legislative authority, and should avoid judicial legislation, a usurpation of legislative powers, or any entry into the legislative field. Thus it has been said that whatever its opinion may be as to the wisdom of a statute or the necessity for further legislation, the duty of a court is to apply the law objectively as found, and not to revise it. ... (citations omitted).

Famous Brands, Inc., 347 N.W.2d at 884. The rules of statutory construction and the associated determination of legislative intent have been cited and discussed by both parties at length, but one rule that seems to have slipped the noose is of extreme importance and must be stated directly. Specifically,

> ...the general rule is that where a statute is repealed without a re-enactment of the repealed law in substantially the same terms, and there is no saving clause or general statute limiting the effect of the repeal, the repealed statute, in regard to its operative effect, is considered as if it had never existed. In this regard, the courts have no power to perpetuate a rule of law which the legislature has repealed.

73 *Am.Jur.2d Statutes* §264. Consequently, once 34-20A-95 was repealed, it no longer had any bearing on any statutory construction based upon legislative history to ascertain legislative intent. The repeal effectively and actually rendered 34-20A-95 a nullity and relegated it to the annuls of the unknown. This is important because the State has argued extensively a position based upon the existence of laws, rules, and regulations which are repealed or have been modified by subsequent legislative action. A quick scan of the State's brief clearly shows the extensive discussion about the general laws, rules and regulations as same existed or as they have been modified. The lower courts relied upon the same arguments in support of their decisions. This entire effort, by both the State and the lower courts, is contrary of the above cited general rule of law and the dictates of 34-20A-94 which provides that no argument can be made by the State to circumvent the impact of 34-20A-93. The State and the lower courts simply disregarded the prohibitive nature of the law and interpret, apply and rely upon laws "... of general application to circumvent the provision of §34-20A-93." SDCL 34-20A-94. This is inappropriate and constitutes reversible error.

Moreover, the State argues that there is actual legislative history to support its argument. Legislative history is defined as the "... background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates.".

Black's Law Dictionary, 8th Ed., p. 919. No actual legislative history was cited by the State, nor does any such history exist from which to derive legislative intent. Legislative history to support a finding of legislative intent regarding a statute cannot be imagined nor implied, but must actually exist in fact. Id., at p. 919. Generally, absent some actual legislative history, comment or facts associated with the actual passage of the statute in questions the courts "... may look to the ... title, and the total content of the legislation to ascertain the meaning" of statutes. LaBore v. Muth, 473 N.W.2d 485, 488, (S.D. 1991). This permissive action, however, is not available here since the general rule of law on repealed statutes and 34-20A-94 prohibit the Court as well as the State from engaging in the legislative sojourn that occurred here. See, 73 *Am.Jur.2d Statutes* §264. The title of the legislation may be relied upon, but the courts cannot look to the title or the heading of the statute "... to lessen or expand the meaning of the statute." In re Certification of Question of Law, 402 N.W.2d at 340, 343, (SD 1987); see also, SDCL 2-14-9 (source notes, cross-references, titles, parts, chapters, sections, or subdivisions, constitute no part of any statute.). Moreover, the exploration of the title of legislation, total content of legislation, or the placement of the legislation in a particular location in the code is not relevant for the purposes of the case at bar because of the legal prohibitions cited above.

In addition, the State has moved for the Court to take judicial notice of the "... legislative history of House Bill 1017 found on the Legislative Research Counsel wedsite regarding SL 2014, ch.132.". Appellee's Brief, p. 11. While judicial notice of evidence at this eleventh hour is generally objectionable, Mundy does not object given the circumstances associated with the "evidence" the State believes it brings to the table

by its request for judicial notice. HB 1017 was presented to the House Committee on Health and Human Services and an Assistant Attorney General representing the Department of Social Services, Dan Todd, was the only proponent of the bill. No other persons appeared in support of the bill nor against it. One question was asked about an unrelated section of the bill, and no comments were made about the repeal of 34-20A-93 and 34-20A-94. Mr. Todd's appearance was at a time when this appeal was pending in the court system and when the South Dakota Attorney General's Office was aware of other similar motions to dismiss such as the one at issue here. Mr. Todd did not explain HB 1017 in detail, but merely called it a housekeeping bill. Mr. Todd appeared at the Senate Committee on Health and Human Services as well and his comments were virtually identical to those he made at the House committee meeting; however, no questions were asked at the Senate committee meeting and no comments of any substance were made relative to the statutes at issue herein. Consequently, the legislative website is of little or no value from an historical stand point.

In addition, of particular significance is the fact that no action to repeal 34-20A-93 and 34-20A-94 was made for two years after the repeal of 34-20A-95. If the repeal of 34-20A-93 and 34-20A-94 were truly housekeeping measures such as claimed by the State, then it seems logical that such action should have occurred in 2013 after the State learned of the problem facing it in the court system on driving or control of a motor vehicle under the influence (DUI) arrests and prosecutions. The transparency of the State's motivation on the legislative action which occurred in 2014 is glaring and is simply one more maneuver to avoid the consequences of the repeal of 34-20A-95.

Moreover, the silence at committee hearings as to the reasons for the inclusion of two statutes that deal directly with the ability of the State to prosecute DUIs speaks volumes as to the State's motivation for the legislative action in 2014. Likewise, the state asserts that the repeal of 34-20A-95 was part of a housekeeping bill to get rid of unnecessary statutes. The problem with this argument is that 34-20A-95 was not an unnecessary law. If was of vital importance to the State in order to maintain its ability to prosecute DUIs. Moreover, 34-20A-95 had nothing to do with the laws governing or affecting DSS. There was no reason for 34-20A-95 to be included in with a housekeeping bill for the clean up of useless statutes affecting DSS. The plain and simple fact of the matter is that 34-20A-95 was inadvertently included in the repeal of other, unnecessary laws and left the State in a lurch as to what to do. The fix, as indicated above, was to render 34-20A-93 and 34-20A-94 "unnecessary" and repeal them as well in the same DSS housekeeping action in 2014. This was not the plan, but became necessary to clean the slate as to the mistake made by the legislature in 2012. The only problem is that the action by the State is too little and too late to resolve the issue in this case.

If, on the other hand, the Court does elect to engage in statutory construction in this case, then there is a clear intent on the part of the legislature to set forth a scheme on the prosecutorial limitations of crimes involving intoxicated persons. The statutory scheme prior to 2012 was as follows:

> Except as hereinafter provided, neither the state nor any county, municipality, charter unit of government, or other political subdivision may adopt or enforce a law, ordinance, resolution, or rule having the force of law that includes drinking, drunkenness, or being found in an

> intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.

SDCL 34-20A-93. This statute is clear and unambiguous and it clearly prohibited the enactment or enforcement of a law having as one of its criminal elements "... drinking, drunkenness, or being found in an intoxicated condition.". SDCL34-20A-93. The next statute provided that

> [n]either the state nor any county, municipality, charter unit of government, or other political subdivision may interpret or apply any law of general application to circumvent the provision of § 34-20A-93.

SDCL 34-20A-94. This statute is unambiguous and clearly prohibited the State from making any argument based upon the general application of the laws to circumvent the provisions of 34-20A-93. The final statute in the statutory scheme indicated that

> [n]othing in this chapter affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possession, or use of alcoholic beverages at stated times and places or by a particular class of persons or possessing a loaded firearm while intoxicated.

SDCL 34-20A-95. This statute is unambiguous and excepted out of the statutory application crimes for DUI. The effect and application of the above statutory scheme was not complex nor was it ambiguous. The State, however, ascribes ambiguity to 34-20A-93, due to the repeal of 34-20A-95, because it uses the phrase "...except as hereinafter provided ...". Appellee's Brief, p. 15. This argument is meritless. This type of language is used consistently throughout the code in a variety of statutes and it is not unusual for a statute to contain the caveat that appears in 34-20A-93. Moreover, the presence of this

language in 34-20A-93 does not in and of itself render the entire statute ambiguous. Finally, if any ambiguity is created by the above language, it was, in fact, created by DSS which is a State agency and had no business acting on statutes that apply to DUIs. It appears highly inappropriate for the a state agency such as DSS to take action to repeal certain statutes that have no bearing on its operation, then when the problem is discovered for the State to avail itself to the "ambiguity" argument. Under these circumstances the State's argument should be rejected in its entirety.

The repeal of SDCL 34-20A-95 caused the collapse of the statutory authority to prosecute DUIs, but it did not render the remaining statutes ineffectual nor ambiguous. The remaining statutes were just as clear as before, the only problem was that they now prohibited the prosecution of DUIs. This did not, however, create a statutory construction issue due to an ambiguity because the DUI statute, SDCL 32-23-1, is still applicable to persons who drive or are in actual physical control of a motor vehicle while under the influence of drugs or marijuana. Consequently, while the DUI prosecution was excluded from 32-23-1, the remaining provisions of SDCL 32-23-1 were harmonious with the rest of the statutory provisions at issue herein, all of which comports with the general rules of statutory construction. See, Gloe v. Iowa Mut. Ins. Co., 2005 S.D. 29, ¶36, 694 N.W.2d 238; Matter of Oliver, 2012 S.D. 9, ¶6, 810 N.W.2d 350.

In light of the above, the Court merely needs to declare the intent of the statute from the plain meaning of the words included therein and reverse the decisions of the lower courts on this matter.

B. Repeal by implication and effects of repeal.

The State argues that repeal by implication is applicable to this case and is determinative because, essentially, the legislature did not intend to repeal SDCL 32-23-1. This conclusion is unsupported by any legislative history or facts and is reached by convoluted analysis and application of other general laws of application. This maneuver was strictly prohibited by SDCL 34-20A-94. Moreover, the analysis engaged in by the State is strictly prohibited by the case law governing statutory construction and the Courts are strictly prohibited from guessing or surmising what the legislature intended when no facts or history are present to support their conclusions. In the Matter of the Petition of Famous Brands, Inc., 347 N.W.2d 882, 884 (SD 1984).

The function of the Court is to give the applicable statutes meaning and effect. This duty includes giving SDCL 34-20A-93 and 34-20A-94 full effect before they were repealed. The State would have this Court ignore these two statutes in favor of SDCL 32-23-1 for the only reason that it fits with the State's arguments. It is important to note again, that the State presents this Court with absolutely no legislative history, comment, record, or facts which support its arguments. Further, the State bases this argument on the belief that if the Court allows 34-20A-93 and 34-20A-94 to stand it will render 32-23-1 inapplicable and useless. As argued above, this is not the case, as 32-23-1 will still apply to driving or control of a vehicle while under the influence of drugs and/or marijuana. Moreover, phantom disasters in funding are not a valid consideration by this Court since both 34-20A-93 and 34-20A-94 have been repealed and the State believes it has rendered a nullity the issue created by the repeal of 34-20A-95. Under these

circumstances, the effect argument advanced by the State is not persuasive. Furthermore, the Court's duty is not to render decisions based upon potential outcome of cases or the applicability of laws, but to give the statute meaning based upon the plain meaning of the words used therein. Gloe, 2005 S.D. at 29, ¶36. Finally, if the Court reverses the lower courts in this matter, the effect of the reversal will be limited to only those cases that were prosecuted during the time frame of July 1, 2012, through July 1, 2014.

CONCLUSION

Based upon the above and foregoing and the error committed by the lower courts, this Court should reverse the decision of the lower courts and remand this case back to the trial court for dismissal of the charges against Mundy.

REQUEST FOR ORAL ARGUMENT

Mundy hereby requests that she be granted oral arguments on this appeal.

Dated this 26th day of August, 2014.

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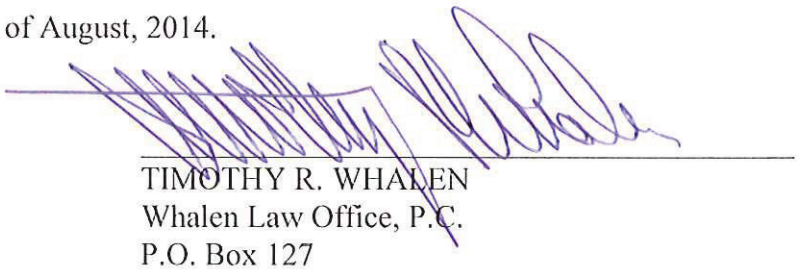
CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant hereby certifies that the Appellant's Reply Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant's Reply Brief contains 14,577 characters and 2,920

words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellant's Reply Brief.

Dated this 26th day of August, 2014.



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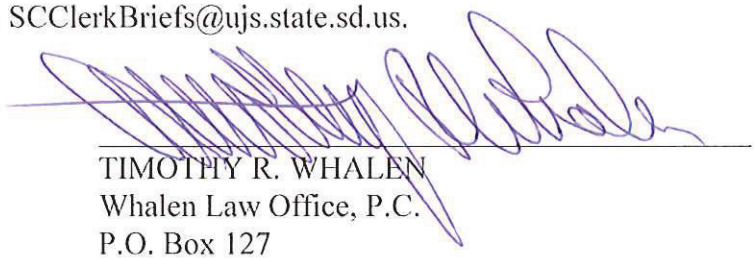
The undersigned hereby certifies that he served two true and correct copies of the Appellant's Reply Brief on the attorneys for the Appellee at their addresses as follows: Marty J. Jackley and Jeffrey P. Halem, South Dakota Attorney General's Office, 1302 East Highway 14, Suite #1, Pierre, SD 57501-8501, atgservice@state.sd.us, and Scott Podhradsky, Charles Mix County Deputy State's Attorney, P.O. Box 370, Lake Andes, SD 57356, scottjpodhradsky@icloud.com, by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 26th day of August, 2014, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellant's Reply Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 26th day of August, 2014. Further, one copy of the Appellant's Reply Brief was

e-mailed to the aforesaid Clerk of the Supreme Court on the 26th day of August, 2014, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.



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