IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27321

STATE OF SOUTH DAKOTA

Plaintiff and Appellee,

v.

EMILY LOU SMITH,

Defendant and Appellee,

MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD,

Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN J. HOUWMAN
CIRCUIT COURT JUDGE

BRIEF OF THE APPELLANT

ATTORNEYS FOR THE APPELLANT:

MINNEHAHA COUNTY STATE'S
ATTORNEY'S OFFICE

Mr. Kersten A. Kappmeyer
Ms. Sara E. Show
Deputy State's Attorneys
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: sshow@minnehahacounty.org

ATTORNEY FOR PLAINTIFF AND APPELLEE:

Mr. Matt Abel
Minnehaha County State's Attorney's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: mabel@minnehahacounty.org

ATTORNEY FOR DEFENDANT AND APPELLEE

Mr. Beau Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
Tel.: (605) 367-4242
E-mail: bblouin@minnehahacounty.org

REQUEST FOR PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: JANUARY 19, 2015
ORDER GRANTING PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: APRIL 6, 2015

Table of Authorities

FEDERAL AUTHORITY

SOUTH DAKOTA STATE CASES

OTHER STATE CASES

STATUTES

ADMINISTRATIVE RULES

Table of Contents

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Appellee/Plaintiff, vs. EMILY LOU SMITH, Appellee/Defendant, MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD, Appellant.	Appeal No. 27321 APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Appellant Minnehaha County Sheriff Mike Milstead, will be referred to as "Sheriff Milstead." Additionally, Sheriff Milstead has at times been referred to in circuit court as the "Minnehaha County Sheriff's Office;" however, the proper party is Minnehaha County Sheriff Mike Milstead. Appellee State of South Dakota shall be referred to herein as "the State" and Appellee Emily Lou Smith will be referred to as "Smith." The settled record in the underlying appeal at the circuit court level, *State v. Smith,* Minnehaha County Criminal File No. 14-6225, will be referred to as "R." Material contained within the Appendix to this brief will be referenced as "App." The transcripts from the hearing on January 13, 2015 will be referred to as "HT" followed by the page number.

Finally, it should be noted that while for purposes of this appeal, Deputy Adam Zishka's personnel files will be generally discussed, Sheriff Milstead is not affirming that complaints or disciplinary actions exist within this deputy's file. Nothing contained within this brief or any argument made should be construed to mean any such information exists.

JURISDICTIONAL STATEMENT

This matter came for hearing on Sheriff Milstead's Motion to Quash the subpoena duces tecum issued by Smith before the Honorable Robin J. Houwman, in Minnehaha County in the Second Judicial Circuit. The hearing was held on January 13, 2015. At that hearing, the circuit court made oral findings of fact and conclusions of law, and thereafter, incorporated those oral findings of fact and conclusions of law into a written order. HT at 30-32; R. 30. Notice of Entry of the Order was served on January 14, 2015. R. 28. A timely Notice of Appeal and request for permission to take a discretionary appeal were filed and served on January 19, 2015. R. 34. On April 6, 2015, this Court granted Sheriff Milstead's request to take a discretionary appeal, and this Court has jurisdiction for this appeal under SDCL 15-26A-3(2).

STATEMENT OF THE ISSUES

I. Did the circuit court err in holding that SDCL 23A-14-5 allows the discovery of information contained within a law enforcement officer's personnel record?

The circuit court required Sheriff Milstead to disclose any disciplinary records, reprimands, and/or complaints for the past five years within Deputy Zishka's personnel records for an *in camera* review. The circuit court held that SDCL 23A-14-5 allowed potential discovery of certain items in Deputy Zishka's personnel file because the defendant has a right to present a defense.

- SDCL 1-27-1.5(7)
- *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)
- *State v. Cottier*, 2008 S.D. 79, 755 N.W.2d 120
- *United States v. Akers*, 374 A.2d 874 (D.C. 1977)

II. Did the circuit court err in requiring an *in camera* inspection of any disciplinary records, reprimands, and/or complaints for the past five years contained within Deputy Zishka's personnel file?

The circuit court ordered Sheriff Milstead to provide any disciplinary records, reprimands, and/or complaints for the past five years to the court for an *in camera* review.

- *State v. Jones*, 59 A.3d 320 (Conn. App. 2013) *aff'd,* 102 A.3d 694 (Conn. 2014)
- *United States v. Akers*, 374 A.2d 874 (D.C. 1977)
- *State ex rel Johnson v. Schwartz,* 552 P.2d 571 (Or. App. 1976)
- *State v. Superior Court in & for Pima County,* 645 P.2d 1288 (Ariz. App. Ct. 1982)

STATEMENT OF THE CASE

This is an appeal from the Second Judicial Circuit, the Honorable Robin J. Houwman presiding. Smith served Sheriff Milstead with a subpoena duces tecum on or about October 22, 2014. App. 1.[1] On January 6, 2015, Sheriff Milstead moved to quash that subpoena. R. 19. On January 13, 2015, a hearing was held on Sheriff Milstead's motion to quash.

The circuit court issued oral findings of fact and conclusions of law at the January 13, 2015 hearing. HT at 30-32. The circuit court ordered that Sheriff Milstead produce for an *in camera* review all of Deputy Zishka's personnel records

[1] The circuit court questioned whether Smith had filed the subpoena and Smith indicated that her paralegal must not have filed the subpoena. The trial court, however, took judicial notice of the subpoena which has still not been filed. HT at 7. Therefore, Sheriff Milstead has attached the subpoena to this brief. App. 1.

that contain disciplinary records, reprimands, and complaints for the past five years. R. 30. Thereafter, Sheriff Milstead sought to appeal this decision by submitting both a notice of appeal and alternatively a request for permission to take a discretionary appeal. R. 34. On April 6, 2015, this Court granted Sheriff Milstead's petition for allowance of appeal. R. 97.

STATEMENT OF THE FACTS

The State charged Smith with several counts including multiple counts of simple assault against a law enforcement officer, driving under the influence, resisting arrest, obstruction of a police officer, driving while suspended, and an open container violation. R. 1-4, 14-18. A subpoena duces tecum was issued to Sheriff Milstead on or about October 22, 2014. App. 1. The subpoena duces tecum required Sheriff Milstead to produce "[a]ll disciplinary records/reprimands/complaints in regard to Deputy Adam Zishka from the Minnehaha County Sheriff['s] Department." App. 1. On January 6, 2015, Sheriff Milstead moved to quash the subpoena on the grounds that it was unreasonable and oppressive. R. 19.

On January 13, 2015, Smith moved to compel production of *Brady* material. R. 21. A hearing was held on January 13, 2015. The Court ultimately denied Smith's *Brady* motion,[2] but ordered Sheriff Milstead to turn over any disciplinary records, reprimands, and/or complaints for the past five years within Deputy Zishka's personnel file for *in camera* review. R. 30. Smith is not asserting that she was acting in self-defense on the date of the alleged incident. HT at 17, 31. Instead, Smith's

[2] Smith has not filed a notice of review on the denial of her *Brady* motion.

defense is that no assault took place but that she kicked Deputy Zishka in the groin in reaction to alleged excessive force he was using on her. HT at 17.

SCOPE OF REVIEW

This Court reviews "the circuit court's rulings on discovery matters under an abuse of discretion standard." *Maynard v. Heeren*, 1997 S.D. 60, ¶ 5, 563 N.W.2d 830, 833 (citing *Weisbeck v. Hess,* 524 N.W.2d 363, 364 (S.D.1994) (additional citations omitted)). "This court has long held that the test utilized in review of matters "involving judicial discretion is *'whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.'" Hess*, 524 N.W.2d at 376 (emphasis original) (quoting *Myron v. Coil,* 82 S.D. 180, 185, 143 N.W.2d 738, 740 (1966); *F.M. Slagle & Co. v. Bushnell,* 70 S.D. 250, 254, 16 N.W.2d 914, 916 (1944)) (additional citations omitted). Questions of statutory interpretation, however, are reviewed *de novo* by this Court. The first issue presents a mixed question of statutory interpretation and a ruling on a discovery motion. The second issue here is a ruling on a discovery motion.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT SDCL 23A-14-5 ALLOWS THE DISCOVERY OF INFORMATION CONTAINED WITHIN A LAW ENFORCEMENT OFFICER'S PERSONNEL RECORD.

The circuit court erred in holding that the subpoena power under SDCL 23A-14-5 allows discovery of information contained within a law enforcement officer's personnel record. If this Court adopts the same rationale used by the federal courts,

under these circumstances, a judicial mind could not reasonably have reached the conclusion the circuit court reached in this case.

A. South Dakota law demonstrates a public policy of keeping personnel records confidential.

While South Dakota law requires that public records be open to inspection, South Dakota law also recognizes that personnel records are confidential and not open to public inspection:

> The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:…Personnel information other than salaries and routine directory information. However, this subdivision does not apply to the public inspection or copying of any current or prior contract with any public employee and any related document that specifies the consideration to be paid to the employee;

SDCL 1-27-1.5(7). Therefore, personnel records of local government employees, such as sheriff's deputies, are not open to public inspection.

Likewise, ARSD 55:09:02:01 provides that personnel records of State employees are confidential:

> The personnel file and all personnel records pertaining to applications for employment, personnel investigations, performance appraisals, donation or receipt of vested leave, health or retirement benefits, and competitive examination materials *are confidential.* An employee's name, classification, and salary may be released to a person upon written request. Additional information may be released if the request is accompanied by an authorization signed by the employee. Lists of employees with their home or office locations or other statistical compilations may only be released for legitimate state government purposes.

Id. (emphasis supplied). While this administrative rule applies to the records of State employees, including DCI agents and highway patrol officers in South Dakota, these two statutes demonstrate that the Legislature has stated in multiple contexts that

personnel information is confidential.[3] Here, Smith sought Deputy Zishka's confidential personnel information.

The Court should balance the confidentiality of information contained within a personnel record with the need to use such information to defend against the criminal charges. If, however, such information is not relevant and will not be admissible then clearly the public policy of keeping personnel information private outweighs the evidentiary value of such information. Furthermore, the public policy of allowing supervisors to conduct candid reviews of officer conduct outweighs allowing defendants to go on a fishing expedition and have access to irrelevant, inadmissible information.

B. The proper test to be applied to a subpoena under SDCL 23A-14-5 is whether the subpoena seeks information that is relevant and admissible and whether the subpoena is specific.

The proper test to apply is to require Smith to show relevancy, admissibility, and specificity of the information sought in his subpoena before these confidential personnel records are declared discoverable. Under SDCL 23A-14-5, the Court may quash a subpoena when it is "unreasonable and oppressive." SDCL 23A-14-5 is substantially similar to Fed.R.Crim.P. 17. As persuasive authority, the federal magistrate court succinctly explained how federal courts, including the Eighth Circuit and United States Supreme Court, have recognized that, unlike the rules of civil

[3] It seems illogical that the Legislature would afford the state employees, even its highway patrolmen, greater protections of personnel records than local government employees working in a similar law enforcement capacity for city police departments or county sheriff's departments.

procedure, Rule 17 is not intended for discovery purposes, and a threshold showing must be made:

> Federal Rule of Criminal Procedure 17(c) provides that a subpoena in a federal criminal case "may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates." Fed.R.Crim.P. 17(c)(1). Rule 17 was not intended to provide a means to obtain discovery, unlike its corresponding counterpart in the Federal Rules of Civil Procedure. *See United States v. Nixon,* 418 U.S. 683, 698, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). As the government correctly points out, Rule 17 was intended to "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Id.* at 698-99.
>
> To obtain the subpoenaed materials, the party who caused the subpoena to be issued must demonstrate: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' " *Id.* at 699-700. Put more simply, the moving party "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id.* at 700. The "specificity and relevance elements require more than the title of a document and conjecture as to its contents." *United States v. Hardy,* 224 F.3d 752,754 (8th Cir.2000) (quoting *United States v. Arditti,* 955 F.2d 331, 346 (5th Cir.), cert. denied, 506 U.S. 998, 113 S.Ct. 597, 121 L.Ed.2d 534 (1992)).

United States v. Marshall, CR. 08-50079-02, 2010 WL 1409445, *1-2 (D.S.D. Mag. Div. April 1, 2010). This is a matter of first impression in South Dakota, and Sheriff Milstead submits that this is the proper test to be applied under the substantially similar language to the Federal Rule counterpart.

This Court routinely looks to federal law where similar rules of procedure are in place. *State v. Berget*, 2014 S.D. 61, ¶ 50, 853 N.W.2d 45, 65, *reh'g denied (Oct. 16, 2014)* (citing *Jacquot v. Rozum,* 2010 S.D. 84, ¶ 15, 790 N.W.2d 498, 503) ("This Court

routinely looks to other courts' decisions for analytical assistance in interpreting a South Dakota rule of civil procedure that is equivalent to a Federal Rule of Civil Procedure"). Here the circuit court applied this test and Sheriff Milstead respectfully requests that this Court adopt the test employed by the federal courts and require the party seeking the records to demonstrate specificity, admissibility, and relevancy.

C. Deputy Zishka's personnel records are not relevant or admissible.

The circuit court erred in holding that Deputy Zishka's personnel records could potentially be admissible and that the defense has a right to try to ascertain whether or not there is relevant evidence within Deputy Zishka's personnel records. The trial court questioned the relevance and admissibility of such evidence, but ultimately required an *in camera* review to determine if such relevant and admissible evidence existed within those records:

> …I'm having a very difficult time understanding how, even if there was information contained in the personnel files, how any of it would be relevant under 19-14-10, and I don't see this as a *Brady* issue. That being said, the defense does have a right to present a defense and a right to try and ascertain whether or not there is evidence that could be relevant and could be admissible, so I do believe that I need to review the documents *in-camera* to make that ultimate determination and to resolve the issue in this case.

HT at 31. The trial court erred in not making any findings as to how such records would be relevant or admissible before requiring Sheriff Milstead to turn over these records for an *in camera* review.

While the trial court held that Smith had a right to present a defense, the trial court failed to recognize this Court's prior holding that the right to present a defense is not absolute:

> It is well settled that the right to cross-examine is not absolute. *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54–5. The ability to cross-examine witnesses does not include the power to compel production of all information that *may* be useful to the defense. "[T]he Confrontation Clause only guarantees an opportunity for *effective* cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54 (emphasis added).

State v. Karlen, 1999 S.D. 12, ¶ 38, 589 N.W.2d 594, 602 (emphasis in original); *see also Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988) ("While the Defendant has a right to present a defense as the circuit court recognized, '[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence'"). The trial court held, contrary to this Court's prior holdings, that such evidence may be admissible and therefore, an *in camera* review of the personnel files was necessary. Because nothing contained within Deputy Zishka's personnel file was admissible or relevant, the trial court erred in requiring an *in camera* review of this confidential file.

i. Deputy Zishka's personnel records are not admissible under SDCL 19-12-4(2) (Rule 404(a)).

Under no circumstances are Deputy Zishka's personnel records admissible under SDCL 19-12-4(2) (Rule 404(a)).[4] While this Court has not had the opportunity

[4] SDCL 19-12-4 provides:

to review the admissibility of law enforcement personnel records, this Court did review similar facts in *State v. Cottier*, 2008 S.D. 79, 755 N.W.2d 120. In that case, the defendant alleged that the trial court erred in not allowing the victim's prison records to be admitted at trial, which the defendant argued would show "the aggressive and threatening nature of [the victim], and the reasonableness of [the defendant's] response to [the victim's] aggression." *Id.* at ¶ 31, 755 N.W.2d at 132.

In *Cottier*, this Court noted that the law permits propensity evidence of violence only if the defendant knew of the victim's violent character before the crime:

> SDCL 19–12–4(2) (Rule 404(a)) permits evidence of a victim's violent propensities through reputation and opinion evidence. "[T]he purpose of introducing victim character evidence is to show that the victim had a propensity for violence and thus is more likely to have been using unlawful force at the time of the crime." 2 Weinstein's Federal Evidence § 404.11 [3] [a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed 2007). *"[I]f it is established that the accused knew of the victim's violent character*, evidence of the victim's character may be offered not only to show that the victim acted in conformity with that character, but also to establish the accused's justifiable apprehension and the reasonableness of his or her defensive measures." *Id.*

Id. at ¶ 33, 755 N.W.2d at 133 (emphasis supplied). Here, Smith did not present any evidence or argument that she was aware of Deputy Zishka's history or alleged

---

Character evidence generally inadmissible--Exceptions. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Evidence of the character of a witness, as provided in §§ 19-14-8 to 19-14-16, inclusive.

propensity for violence at the time she kicked him in the groin. Thus, reputation evidence in the form of complaints by citizens is not relevant or admissible under the circumstances presented in this case, and the trial court erred in holding that Smith had the right to try to ascertain whether the personnel files contain evidence that could be admissible.

ii. Other acts evidence contained within a law enforcement officer's personnel record is not relevant or admissible.

Other acts evidence contained within a law enforcement officer's personnel record is not relevant or admissible. SDCL 19-12-5 does not allow the introduction of other acts evidence, unless certain circumstances are met:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id. Smith seeks Deputy Zishka's personnel records in order to allege that he had a history of excessive force and that he acted in conformance therewith on the date of this assault. Additionally, Smith seeks peer review information, including disciplinary actions taken against Deputy Zishka. This information is not admissible under the facts presented in this case, even those facts alleged by Smith. Because Smith failed to demonstrate at the trial court level how such evidence would ever be admissible, the trial court erred in finding that such information was discoverable.

iii. Prior complaints against a deputy are specific instances of conduct, which are not admissible under SDCL 19-12-7.

Specific instances of conduct are not admissible to prove that someone acted in conformity therewith. For example, even if Deputy Zishka had several complaints about assaultive behavior or excessive force in his personnel record, such information is not admissible because it is a specific instance of conduct that does not involve his character for truthfulness.[5] Through her subpoena, Smith is not seeking evidence regarding truthfulness but instead is seeking propensity evidence.

SDCL 19-12-7 allows a party to introduce specific instances of conduct; however, this rule requires that "character or a trait of character of a person is an essential element of a charge, claim, or defense." Here, Smith is not claiming self-defense and therefore, character is not an element of the defense.[6] Additionally, Smith has not set forth any evidence that she had knowledge of Deputy Zishka's alleged violent tendencies. In fact, Smith did not set forth any evidence showing she had ever met Deputy Zishka prior to her arrest.

In *Cottier*, this Court noted that specific acts, in that case specific acts documented in prison records, were not admissible to prove that the victim acted in conformity therewith:

---

[5] This statement is made for illustrative purposes only and does not reflect on any information actually contained within Deputy Zishka's personnel file.

[6] Even if Smith was claiming self-defense, she still would need to demonstrate that the specific instances of conduct allegedly contained within Deputy Zishka's files were known to her at the time of the assault. *See State v. Knecht*, 1997 S.D. 53, ¶ 15, 563 N.W.2d 413, 419 ("only specific instances of conduct known to [the defendant] at the time of the incident in question were relevant") (citations omitted).

> However, evidence of the victim's specific acts, like the prison records of Red Star or discussion of specific incidents of violence, are not admissible to prove the victim acted in conformity therewith. *Id.;* SDCL 19–12–5; *see also State v. Knecht,* 1997 SD 53, ¶ 15, 563 N.W.2d 413, 419 (quoting *State v. Latham,* 519 N.W.2d 68, 71 (S.D.1994)).

Id. As this Court noted, only where the defendant knew of the acts at the time of the offense, may such acts be used to prove state of mind:

> Nonetheless, a victim's specific acts may be admissible to demonstrate a defendant's state of mind, but only if the acts were known to the defendant at the time of the offense. *Weinstein's, supra* at §§ 404.11[3][a], 405.05 [4] (noting that although specific acts of violence may not be used to prove the victim's violent propensities, "specific acts ... known to the defendant at the time of the offense may be admissible to prove the defendant's state of mind"); *see also Knecht,* 1997 SD 53, ¶ 15, 563 N.W.2d at 419 (quoting *Latham,* 519 N.W.2d at 71 (citation omitted) (noting that specific instances of the victim's violent conduct are relevant only if "known to [defendant] at the time of the incident")).

Id. There is absolutely no evidence in the record to demonstrate that Smith had any prior knowledge of any specific acts of Deputy Zishka before this incident.

Smith's subpoena was nothing more than a fishing expedition that attempted to dig up irrelevant and inadmissible character evidence within Deputy Zishka's personnel file. Because Smith failed to demonstrate knowledge of any specific instances of conduct, the trial court erred in finding that such propensity evidence contained within a law enforcement officer's personnel file even potentially could be relevant or admissible. Like in *Cottier*, such evidence is not admissible to demonstrate that a victim acted in conformity therewith, unless the defendant had knowledge of the acts before the incident. Because such allegation was not made in this case, the trial court should have granted Sheriff Milstead's motion to quash in its entirety.

iv. Smith has not demonstrated that peer review information from supervisors, including disciplinary procedures, is relevant or admissible.

Disciplinary actions and other peer review of officer conduct is not relevant or admissible and thus, not discoverable. In this case, Smith seeks records of disciplinary actions including certain use of force or response to resistance forms where an officer explains what force, if any, was used, and where the supervisor determines whether appropriate force was used.[7] These forms sometimes contain information from a supervisor as to how a deputy could improve his or her performance in the future. Smith has not demonstrated how such peer review information is relevant to the question of whether she assaulted Deputy Zishka. A supervisor's after-the-fact opinion on how a situation was handled or any recommendations for improvement is not relevant to whether or not the deputy was or was not assaulted.

While this is a matter of first impression in South Dakota, other courts have found that information from internal affairs investigations are not discoverable. *See Com. v. Wanis*, 690 N.E.2d 407, 412 (Mass. 1998) (internal affairs information, other than witness statements, are not discoverable unless defendant shows relevance and that information "could be of real benefit" to the defendant); *State ex rel. St. Louis Cnty. v. Block*, 622 S.W.2d 367, 370-72 (Mo. Ct. App. 1981) (finding a "strong need to maintain the confidentiality" of internal affairs files but allowing discovery of victim

[7] Sheriff Milstead is not asserting that the deputy's statements as defined by SDCL 23A-13-10 within these forms are not discoverable under SDCL 23A-13-7 only that the supervisor's comments and/or discipline should not be discoverable.

officer's statements); *People v. Gissendanner*, 399 N.E.2d 924, 927 (N.Y. 1979) (recognizing the important interest of "the State and its agents in maintaining confidential data relating to performance and discipline of police"). The *Gissendanner* court also recognized that such records are not discoverable when "requests to examine records are motivated by nothing more than impeachment of witnesses' general credibility." *Id.*

Smith did not demonstrate how a performance evaluation or disciplinary procedure is relevant in any way to the criminal case. If this Court were to hold that a defendant is entitled to receive such information when it is not relevant or admissible, this would no doubt have a chilling effect upon review of officer conduct and discipline of officers. The trial court erred by requiring such disciplinary forms to be disclosed and in effect, finding that such disciplinary forms were possibly relevant and admissible in the underlying criminal case. Because such disciplinary and evaluation forms are not relevant or admissible, Sheriff Milstead respectfully requests that the Court reverse the circuit court's order requiring an *in camera* review of such records.

D. Smith's subpoena lacked specificity.

The circuit court correctly found that Smith's subpoena lacked specificity. HT at 32. Smith sought all disciplinary records and did not parse out any certain type of disciplinary record that may be relevant or admissible. Furthermore, she gave no time frame for such records, however, the trial court did limit the disclosure for an *in camera* review to the previous five years.

While the trial court limited the time frame, this did not cure the fact that Smith presented no evidence of what potential information could be contained within Deputy Zishka's personnel record. Smith's subpoena was merely a fishing expedition into confidential personnel records. Just as the Court in *Marshall* stated, the person seeking the documents must give more than a title of a document and "mere conjecture as to its contents." *Marshall*, No. CR. 08-50079-02, 2010 WL 1409445, at *1-2. Because Smith's subpoena lacked the necessary specificity, the trial court erred in finding that portions of Deputy Zishka's personnel records should be disclosed for an *in camera* review.

Based upon the fact that Smith did not demonstrate relevance or admissibility of these peer review documents, a judicial mind, in view of the law and the circumstances, could not reasonably have reached the same conclusion as the circuit court did in this case. *Weisbeck*, 524 N.W.2d at 376. For the sake of argument, even if Deputy Zishka's file contained several instances of him using excessive force,[8] such evidence is not relevant or admissible unless Smith knew about those incidents at the time of the assault. Because the information Smith sought from Deputy Zishka's personnel file would not be relevant or admissible under any circumstances, the trial court erred in holding that SDCL 23A-14-5 requires the disclosure of such information even for an *in camera* review.

[8] This statement is made for illustrative purposes only and does not reflect on any information actually contained within Deputy Zishka's personnel file.

E. Other courts have held under similar facts that an officer's personnel records are not discoverable.

In addressing a request for similar materials, the District of Columbia Court of Appeals in *United States v. Akers*, 374 A.2d 874 (D.C. 1977) reasoned that because evidence of a prior assault would not be admissible at trial, even as impeachment evidence, the evidence is not discoverable. The rationale used in *Akers* was that proof of aggressive character is not admissible to prove self-defense unless the defendant knew of the other instances of aggression at the time of the incident. South Dakota applies the same standard. *See Knecht*, 1997 S.D. 53, at ¶ 15, 563 N.W.2d at 419.

If the Court continues to follow this rationale, such information would not be admissible at trial unless Smith could demonstrate that she had knowledge of any alleged complaints or alleged assaultive conduct *before* her assault on Deputy Zishka. Smith has not demonstrated that she knew of any alleged assaultive conduct before this incident. She also failed to demonstrate prior knowledge of anything contained in Deputy Zishka's personnel record.

In *Akers,* the defendant also argued that evidence of prior complaints could be used as impeachment evidence; however, the *Akers* court found that personnel records, including complaints, are not proper impeachment evidence and thus, are not discoverable. *Akers*, 374 A.2d at 878. As the *Akers* court noted, under the rules of evidence, the following rules apply to impeaching credibility:

> The federal circuit court has suggested that a cross-examiner may ask a witness about a prior act of misconduct which falls short of arrest or conviction provided (1) the examiner has a factual predicate for such

> question, and (2) the bad act "bears directly upon the veracity of the witness in respect to the issues involved in the trial." *Kitchen v. United States*, 95 U.S.App.D.C. 277, 279, 221 F.2d 832, 834 (1955), cert. denied, 357 U.S. 928, 78 S.Ct. 1378, 2 L.Ed.2d 1374 (1958). See 3A J. Wigmore on Evidence s 983 (Chadbourn Rev. 1970); 98 C.J.S. Witnesses § 515 (1957). Even if we were to view the documents here as reflecting prior acts of misconduct by the officers, viz., unlawful assaultive acts, this court has expressly held that *the crime of assault does not involve dishonesty or false statement. Williams v. United States*, D.C.App., 337 A.2d 772 (1975). Hence, appellees' counsel would not be permitted to use the documents to impeach the credibility of the officers even under the circuit court's Kitchen-Robinson theory.

Id. (emphasis supplied). In *Akers*, the court found that even where the defendant's theory was that officers instigated an event and acted with unreasonable force, evidence of prior complaints against such officers was not discoverable. 374 A.2d 874.

Smith is not claiming self-defense and has not shown prior knowledge of any conduct alleged to be in Deputy Zishka's personnel file. HT at 17, 31. If this Court follows the federal interpretation of this statute, Smith has the burden to demonstrate that such evidence is relevant, admissible, and that the subpoena is specific. *See Nixon,* 418 U.S. at 699, 94 S. Ct. at 3103, 41 L. Ed. 2d 1039 (requiring the party subpoenaing records to demonstrate relevance, admissibility, and specificity under Fed.R.Crim.P. 17); *but see Phipps Bros. Inc. v. Nelson's Oil & Gas, Inc.*, 508 N.W.2d 885, 890 (S.D. 1993) (holding in a civil case that "a party seeking to modify or quash such a subpoena has the burden of proving the necessity of doing so"). Because Smith did not present any evidence of how such records are relevant or admissible, the trial court erred in finding Deputy Zishka's personnel record should be subject to an *in camera* inspection.

II. THE CIRCUIT COURT ERRED IN REQUIRING AN *IN CAMERA* INSPECTION OF DEPUTY ZISHKA'S PERSONNEL RECORDS.

The circuit court erred in requiring an *in camera* inspection of Deputy Zishka's personnel record. The information contained within Deputy Zishka's personnel records is not admissible unless it is a prior conviction that was a felony or it concerns the character for truthfulness or untruthfulness, in which case such information would be turned over under *Brady*. *See* SDCL §§ 19-14-10 and 19-14-12. While Sheriff Milstead recognizes that in the context of civil cases this Court has held that "the preferred procedure for handling privilege issues is to allow for an *in camera* review of the documents," where, as here, there is no likelihood that the requested information ever becomes relevant or admissible in the underlying criminal case, an *in camera* review is unnecessary and burdensome. *Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 31.

The request for law enforcement personnel records has not been specifically addressed in South Dakota. The Oregon Court of Appeals, however, has reviewed a similar request and found that the trial court did not err in refusing to conduct an *in camera* review of law enforcement personnel files where such evidence was not material to the criminal case. *See State ex rel Johnson v. Schwartz*, 552 P.2d 571 (Or. App. 1976). The court held that a trial court is not obligated to conduct an *in camera* review of files when "claimed materiality of evidence is only 'pure conjecture.'" *Id.* at 572.

The information Smith seeks is pure conjecture and is not material to any issue in this case. As other courts have held, "[a]ssaultive conduct does not involve dishonesty or false statement and therefore could not be used to impeach the credibility of the officers." *State v. Superior Court In & For Pima Cnty.*, 645 P.2d 1288, 1290 (Ariz. Ct. App. 1982) (citing *Akers*, 374 A.2d 874); *People v. Torres*, 352 N.Y.S.2d 101 (Crim. Ct. Kings County 1973)); *see also State v. Cano*, 743 P.2d 956, 957 (Ariz. Ct. App. 1987) ("Information in internal records such as those at issue is not discoverable unless it could lead to admissible evidence or would be admissible itself").

Likewise, the Arizona Court of Appeals held that, "no complaint of over-aggressiveness in the internal affairs records of an arresting police officer may be subject to an *in camera* examination by the court and possible disclosure to the defendant in the criminal prosecution." *Id.* Because disciplinary records or citizen complaints are not relevant or admissible, there is no reason for the circuit court to conduct an *in camera* inspection of such records.

A court should not conduct an *in camera* review of police files and reports if a defendant fails to demonstrate relevance and admissibility of such records:

> a trial court is not required to conduct an *in camera* review of police files and reports if the defendant fails to show how the information requested is relevant to the case at issue. *See generally United States v. Flagg,* 919 F.2d 499 (8th Cir.1990) (affirming trial court's denial of request for *in camera* review of police department file because defendant, *inter alia,* did not show that the alleged evidence in the file was critical to a finding of probable cause); *United States ex rel. Drain v. Washington,* 52 F.Supp.2d 856 (N.D.Ill.1999) (affirming the trial court's decision not to hold *in camera* review of police records because

> defendant could not show how the records were specifically relevant to his case).

People v. Blackmon, 20 P.3d 1215, 1220 (Colo. App. 2000), *as modified on denial of reh'g* (Oct. 19, 2000); *see also People v. Norman*, 350 N.Y.S.2d 52 (Sup. Ct. 1973) ("it is not a condition of a police officer's employment that his life story should be the subject of perusal by Judge, prosecutor and defense counsel each time he makes an arrest. To impose such a broad burden on the officer would be tantamount to an unconstitutional deprivation of his right of privacy").

The circuit court should have required a threshold showing of relevance, specificity, and admissibility. As the Colorado Court of Appeals noted, "[t]o require *in camera* review in these circumstances would mean that in virtually every criminal case, a defendant could obtain an *in camera* review of all documents concerning the prior conduct of arresting officers. Such reviews would be unnecessarily burdensome to the courts and the police." *Id.* at 1220. The same is true here. Requiring a party to disclose information where such information is irrelevant and inadmissible would lead to further litigation and an *in camera* inspection of personnel files in every case where an officer testifies.

Furthermore, a significant portion of a deputy's job is to testify in court. Allowing defendants and their attorneys to obtain confidential personnel records without a threshold showing of admissibility, relevance, or even an allegation founded on more than speculation that relevant or admissible information is contained within the personnel file is untenable. Such information would undoubtedly be used against that deputy repeatedly in each case in which he or she testifies. If the law

enforcement agency can no longer rely upon that deputy to give testimony because his or her credibility is being unfairly impugned through the use of irrelevant, unfounded citizen complaints, the deputy very likely could lose his or her job.

Finally, allowing the release of information contained within personnel files, including internal investigations, hampers supervisors from correcting performance issues and discourages them from being forthright with a deputy for fear that their candid comments may be used against the deputy in the future. A more reasonable approach is the one employed by other courts.

Other courts have placed an affirmative duty on a party seeking such evidence to demonstrate more than mere speculation on what information might be within such a file to prevent a "fishing expedition." *See State v. Jones*, 59 A.3d 320, 332-33 (Conn. App. Ct. 2013) *aff'd,* 102 A.3d 694 (Conn. 2014) ("A showing sufficient to warrant an *in camera* review of a personnel file requires more than mere speculation"). The affirmative showing for an *in camera* review strikes a proper balance between allowing such review and comporting with clearly established public policy that personnel information is confidential. *See* SDCL 1-27-1.5(7); ARSD 55:09:02:01. Thus, in this case, an *in camera* review is unnecessary because such a review would not yield discoverable information, is overly burdensome on the Court and law enforcement, and violates the public policy of keeping personnel records confidential where no affirmative showing that discoverable information is contained within the personnel records. Based upon these facts, Sheriff Milstead respectfully requests that

this Court reverse the circuit court's order requiring him to turn over these records for an *in camera* review.

CONCLUSION

The circuit court erred in holding that SDCL 23A-14-5 required the release of the contents within a law enforcement officer's confidential personnel record to the circuit court, and potential disclosure of evidence within that record to opposing counsel. Public policy dictates that such information is confidential. Smith failed to make a threshold showing that such records would contain relevant and admissible information and therefore, the circuit court erred in ordering Sheriff Milstead to turn over certain records for an *in camera* review.

Based upon the foregoing facts and case law, Sheriff Milstead respectfully requests that the Court apply the standard discussed by the federal courts and reverse the circuit court's order requiring him to provide any disciplinary records, reprimands, and/or complaints for the past five years within Deputy Zishka's personnel file for an *in camera* inspection.

Dated this 26th day of May, 2015.

RESPECTFULLY SUBMITTED:

/s/ Sara E. Show

Kersten A. Kappmeyer
Sara E. Show
Counsel for Minnehaha County Sheriff Mike Milstead
415 N. Dakota Avenue
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

Sara Show, Deputy State's Attorney for Minnehaha County, hereby certifies that a true and correct copy of the foregoing **Appellant's Brief** in the above-entitled matter was served via electronic service upon the following individuals:

Mr. Beau Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
bblouin@minnehahacounty.org

Mr. Matt Abel
Minnehaha County State's Attorney's Office
415 N. Dakota Avenue
Sioux Falls, SD 57104
mabel@minnehahacounty.org

Dated this 26th day of May, 2015.

/s/ Sara E. Show
Sara E. Show

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 6,056 words from the Statement of Case through the Conclusion. I have relied upon the word count of a word processing program to prepare this certificate.

Dated this 26th day of May, 2015.

/s/ Sara E. Show
Sara E. Show

Appendix Table of Contents

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27321

STATE OF SOUTH DAKOTA

Plaintiff and Appellee,

v.

EMILY LOU SMITH,

Defendant and Appellee,

MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD,

Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN J. HOUWMAN
CIRCUIT COURT JUDGE

BRIEF OF STATE OF SOUTH DAKOTA, APPELLEE

ATTORNEY FOR THE APPELLEE:

MINNEHAHA COUNTY STATE'S
ATTORNEY'S OFFICE

Mr. Matthew J. Abel
Deputy State's Attorney
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: mabel@minnehahacounty.org

ATTORNEYS FOR APPELLANT:

Mr. Kersten Kappmeyer
Ms. Sara Show
Minnehaha County State's Attorney's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: kkappmeyer@minnehahacounty.org
sshow@minnehahacounty.org

ATTORNEY FOR DEFENDANT AND APPELLEE:

Mr. Beau Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
Tel.: (605) 367-4242
E-mail: bblouin@minnehahacounty.org

REQUEST FOR PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: JANUARY 19, 2015
ORDER GRANTING PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: APRIL 6, 2015

Table of Authorities

FEDERAL AUTHORITY

SOUTH DAKOTA STATE CASES

STATUTES

Table of Contents

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Appellee/Plaintiff, vs. EMILY LOU SMITH, Appellee/Defendant, MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD, Appellant.	Appeal No. 27321 APPELLEE/PLAINTIFF'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Appellee State of South Dakota shall be referred to herein as "the State" and Appellee Emily Lou Smith will be referred to as "Smith." Appellant Minnehaha County Sheriff Mike Milstead, will be referred to as "Sheriff Milstead." The settled record in the underlying appeal at the circuit court level, *State v. Smith,* Minnehaha County Criminal File No. 14-6225, will be referred to as "R." Materials cited that are appended to Appellant's Brief will be referred to as "App." The transcripts from the hearing on January 13, 2015 will be referred to as "HT" followed by the page number.

JURISDICTIONAL STATEMENT

This matter came for hearing on Sheriff Milstead's Motion to Quash the subpoena duces tecum issued by Smith before the Honorable Robin J. Houwman, in Minnehaha County in the Second Judicial Circuit. The hearing was held on January 13, 2015. At that hearing, the circuit court made oral findings of fact and conclusions of law, and thereafter, incorporated those oral findings of fact and conclusions of law into a written order. HT at 30-32; R. 30. Notice of Entry of the Order was served on January 14, 2015. R. 28. A timely Notice of Appeal and request for permission to take a discretionary appeal were filed and served on January 19, 2015. R. 34. On April 6, 2015, this Court granted Sheriff Milstead's request to take a discretionary appeal, and this Court has jurisdiction for this appeal under SDCL 15-26A-3(2).

STATEMENT OF THE ISSUE

I. Did the circuit court err in holding that SDCL 23A-14-5 allows the discovery of information contained within a law enforcement officer's personnel record?

The circuit court required Sheriff Milstead to disclose any disciplinary records, reprimands, and/or complaints for the past five years within Deputy Zishka's personnel records for an *in camera* review. The circuit court held that SDCL 23A-14-5 allowed potential discovery of certain items in Deputy Zishka's personnel file because the defendant has a right to present a defense.

- SDCL 19-19-401
- *United States v. Hardy,* 224 F.3d 752 (8th Cir.2000)
- *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)
- *State v. Cottier*, 2008 S.D. 79, 755 N.W.2d 120

STATEMENT OF THE CASE

This is an appeal from the Second Judicial Circuit, the Honorable Robin J. Houwman presiding. Smith served Sheriff Milstead with a subpoena duces tecum on or about October 22, 2014. App. 1. On January 6, 2015, Sheriff Milstead moved to quash that subpoena. R. 19. On January 13, 2015, a hearing was held on Sheriff Milstead's motion to quash.

The circuit court issued oral findings of fact and conclusions of law at the January 13, 2015 hearing. HT at 30-32. The circuit court ordered that Sheriff Milstead produce for an *in camera* review all of Deputy Zishka's personnel records that contain disciplinary records, reprimands, and complaints for the past five years. R. 30. Thereafter, Sheriff Milstead sought to appeal this decision by submitting both a notice of appeal and alternatively a request for permission to take a discretionary appeal. R. 34. On April 6, 2015, this Court granted Sheriff Milstead's petition for allowance of appeal. R. 97.

STATEMENT OF THE FACTS

The State charged Smith with several counts including multiple counts of Simple Assault against a Law Enforcement Officer, Driving Under the Influence, Resisting Arrest, Obstructing a Law Enforcement Officer, Driving While Suspended, and an Open Container violation. R. 1-4, 14-18. A subpoena duces tecum was issued to Sheriff Milstead on or about October 22, 2014. App. 1. The subpoena duces tecum required Sheriff Milstead to produce "[a]ll disciplinary records/reprimands/complaints in regard to Deputy Adam Zishka from the

Minnehaha County Sheriff['s] Department." App. 1. On January 6, 2015, Sheriff Milstead moved to quash the subpoena on the grounds that it was unreasonable and oppressive. R. 19.

On January 13, 2015, Smith moved to compel production of *Brady* material. R. 21. A hearing was held on January 13, 2015. The Court ultimately denied Smith's *Brady* motion,[1] but ordered Sheriff Milstead to turn over any disciplinary records, reprimands, and/or complaints for the past five years within Deputy Zishka's personnel file for *in camera* review. R. 30. Smith is not asserting that she was acting in self-defense on the date of the alleged incident. HT at 17, 31. Instead, Smith's defense is that no assault took place, but that she kicked Deputy Zishka in the groin in reaction to alleged excessive force he was using on her. HT at 17.

SCOPE OF REVIEW

This Court reviews "the circuit court's rulings on discovery matters under an abuse of discretion standard." *Maynard v. Heeren*, 1997 S.D. 60, ¶ 5, 563 N.W.2d 830, 833 (citing *Weisbeck v. Hess,* 524 N.W.2d 363, 364 (S.D.1994) (additional citations omitted)). "This court has long held that the test utilized in review of matters "involving judicial discretion is *'whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.'" Hess*, 524 N.W.2d at 376 (emphasis original) (quoting *Myron v. Coil,* 82 S.D. 180, 185, 143 N.W.2d 738, 740 (1966); *F.M. Slagle & Co. v. Bushnell,* 70 S.D. 250, 254, 16 N.W.2d 914, 916 (1944)) (additional citations omitted). Questions of statutory interpretation, however, are

[1] Smith has not filed a notice of review on the denial of her *Brady* motion.

reviewed *de novo* by this Court. The first issue presents a mixed question of statutory interpretation and a ruling on a discovery motion. The second issue here is a ruling on a discovery motion.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT SDCL 23A-14-5 ALLOWS THE DISCOVERY OF INFORMATION CONTAINED WITHIN A LAW ENFORCEMENT OFFICER'S PERSONNEL RECORD.

The circuit court erred in holding that the subpoena power under SDCL 23A-14-5 allows discovery of information contained within a law enforcement officer's personnel record.

A. The proper test to be applied to a subpoena under SDCL 23A-14-5 is whether the subpoena seeks information that is relevant and admissible and whether the subpoena is specific.

The State joins Sheriff Milstead and urges this Court to adopt the same rationale used by the federal courts, which if applied to the facts of this case, would lead to a finding that a judicial mind could not reasonably have reached the same conclusion the circuit court reached in this case. Accordingly, the State requests that this Court require Smith to show relevancy, admissibility, and specificity of the information sought in her subpoena before these confidential personnel records are declared discoverable.

i. Deputy Zishka's personnel records are not relevant.

The circuit court erred in holding that Deputy Zishka's personnel records potentially could be admissible and that the defense has a right to try to ascertain whether or not there is relevant evidence within Deputy Zishka's personnel records.

The circuit court questioned the relevance and admissibility of such evidence, but ultimately required an *in camera* review to determine if such relevant and admissible evidence existed within those records.

While the court held that Smith had a right to present a defense, the circuit court failed to recognize this Court's prior holding that the right to present a defense is not absolute:

> It is well settled that the right to cross-examine is not absolute. *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54–5. The ability to cross-examine witnesses does not include the power to compel production of all information that *may* be useful to the defense. "[T]he Confrontation Clause only guarantees an opportunity for *effective* cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54 (emphasis added).

State v. Karlen, 1999 S.D. 12, ¶ 38, 589 N.W.2d 594, 602 (emphasis in original); *see also Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988) ("While the Defendant has a right to present a defense as the circuit court recognized, '[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence'"). The circuit court held, contrary to this Court's prior holdings, that such evidence may be relevant and therefore, an *in camera* review of the personnel files was necessary. Because the information sought by Smith regarding Deputy Zishka is not relevant the circuit court erred in requiring an *in camera* review of this confidential file.[2]

[2] The State has not been provided Deputy Zishka's personnel file and, therefore, has no knowledge of its contents.

SDCL 19-19-402 provides, "[a]ll relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state. Evidence which is not relevant is not admissible." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-19-401.

Here, Smith is not asserting that she was acting in self-defense on the date of the alleged incident. HT at 17, 31. Instead, Smith's defense is that no assault took place, but that she kicked Deputy Zishka in the groin in reaction to alleged excessive force he was using on her. HT at 17.[3] In this case, Smith is charged with three counts of Simple Assault on Law Enforcement. If this case were to be tried to a jury or the court, the State would seek to prove beyond a reasonable doubt that Smith:

> (1) Attempt[ed] to cause bodily injury to [Deputy Zishka] and ha[d] the actual ability to cause the injury;
>
> (2) Recklessly cause[d] bodily injury to [Deputy Zishka]; … or
>
> (5) Intentionally cause[d] bodily injury to [Deputy Zishka] which d[id] not result in serious bodily injury . . . .

SDCL 22-18-1. Because Smith is not asserting a self-defense claim, any evidence relating to Deputy Zishka's conduct on the evening of Smith's arrest would not be relevant to combat any of the elements of Simple Assault on a Law Enforcement

[3] It appears Smith's claim is more appropriately addressed through a civil rights suit under 42 U.S.C. § 1983. See *Swedlund v. Foster*, 2003 S.D. 8, 657 N.W.2d 39.

Officer.[4] Accordingly, any prior documented conduct contained in Deputy Zishka's personnel records also would be irrelevant because those records would not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Thus, the circuit court erred in concluding that Deputy Zishka's personnel records could contain relevant evidence.

ii. Deputy Zishka's personnel records are not admissible.

The circuit court erred in finding that Deputy Zishka's personnel records could contain evidence that would be admissible at a trial in this case. Even if the circuit court were to find that any evidence in Deputy Zishka's personnel record was relevant to an issue in this case, under the South Dakota Rules of Evidence, such evidence would not be admissible.

---

[4] Even if Smith asserted a self-defense claim, she would not be entitled to a jury instruction on such a claim because, "[i]f a suspect's response to [illegal police misconduct], 'is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.' There is a strong policy reason for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent grounds for arrest. As the *Bailey* court recognized, '[a] contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct.' " *United States v. Sprinkle*, 106 F.3d 613, 619 (4th Cir. 1997) (quoting *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir.1982) (internal citation omitted); see also, *State v. Miskimins*, 435 N.W.2d 217, 224 (S.D. 1989).

a. Deputy Zishka's personnel records are not admissible under SDCL 19-19-404(a).

The State joins Sheriff Milstead in his argument and urges the Court to adopt Sheriff Milstead's position regarding the inadmissibility of any evidence potentially contained in Deputy Zishka's personnel file under SDCL 19-19-404(a).

b. Other acts evidence contained within a law enforcement officer's personnel record is not admissible.

The State joins Sheriff Milstead in his argument and urges the Court to adopt Sheriff Milstead's position regarding the inadmissibility of any evidence potentially contained in Deputy Zishka's personnel file under SDCL 19-19-404(b).

c. Prior complaints against a deputy are specific instances of conduct, which are not admissible under SDCL 19-19-405.

The State joins Sheriff Milstead in his argument and urges the Court to adopt Sheriff Milstead's position regarding the inadmissibility of any evidence potentially contained in Deputy Zishka's personnel file under SDCL 19-19-405.

d. Any evidence contained in Deputy Zishka's personnel records would not be admissible because it is overly prejudicial, confusing, misleading, and would result in undue delay.

SDCL 19-19-403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, the probative value of any evidence contained in Deputy Zishka's personnel records related to prior instances of excessive use of force complaints would be substantially

outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay, therefore making such evidence inadmissible.

If any of these instances of prior use of force existed and Smith was allowed to introduce them at a trial, the State would be unfairly prejudiced by being forced into litigating a trial-within-a-trial for each and every instance. Potentially, the State would have to call additional witnesses to fully develop the record as to when, how, and why each instance came out about and how each instance was resolved in order to avoid misleading the jury. Additionally, the State would have to call character witnesses to show Deputy Zishka did not have a propensity for violence. Even if the State were able to do this, this unnecessary delay would detract from and confuse the underlying issues of the trial, namely, whether Smith assaulted Deputy Zishka and was driving under the influence. Accordingly, no evidence from Deputy Zishka's personnel record could be admitted at a trial in this case because the presentation of this evidence would cause unfair prejudice, confusion of the issues, undue delay, and would mislead the jury.

iii. Smith's subpoena lacked specificity.

The State joins Sheriff Milstead's argument and urges the Court to adopt Sheriff Milstead's position regarding the specificity of Smith's subpoena.

CONCLUSION

The circuit court erred in holding that SDCL 23A-14-5 required the release of the contents within a law enforcement officer's confidential personnel record to the circuit court, and potential disclosure of evidence within that record to opposing

counsel. Smith failed to make a showing that such records would contain relevant, admissible information and her subpoena lacked specificity; accordingly, the circuit court erred in ordering Sheriff Milstead to turn over certain records for an *in camera* review.

Based upon the foregoing facts and case law, the State respectfully requests that this Court apply the standard discussed by the federal courts and reverse the circuit court's Order requiring Sheriff Milstead to provide any disciplinary records, reprimands, or complaints for the past five years within Deputy Zishka's personnel file for an *in camera* inspection.

Dated this 10th day of July, 2015.

RESPECTFULLY SUBMITTED:

/s/ Matthew J. Abel
Matthew J. Abel
Deputy State's Attorney
Minnehaha County State's Attorney's Office
415 N. Dakota Avenue
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

Matthew J. Abel, Deputy State's Attorney for Minnehaha County, hereby certifies that a true and correct copy of the foregoing **Appellee's Brief** in the above-entitled matter was served via electronic service upon the following individuals:

Mr. Beau Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
bblouin@minnehahacounty.org

Mr. Kersten Kappmeyer
Ms. Sara Show
Minnehaha County State's Attorney's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104
kkappmeyer@minnehahacounty.org
sshow@minnehahacounty.org

Dated this 10th day of July, 2015.

/s/ *Matthew J. Abel*
Matthew J. Abel

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,218 words from the Statement of Case through the Conclusion. I have relied upon the word count of a word processing program to prepare this certificate.

Dated this 10th day of July, 2015.

/s/ *Matthew J. Abel*
Matthew J. Abel

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 27321

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

EMILY LOU SMITH,

Defendant and Appellee,

MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD

Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE Robin J Houwman
Circuit Court Judge

APPELLEE'S BRIEF

BEAU J. BLOUIN
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104

Attorney for Defendant/ Appellee

KERSTEN A. KAPPMEYER
SARA E. SHOW
Minnehaha County State's Attorney
415 N. Dakota Ave.
Sioux Falls, SD 57104

Attorney's for Appellant

AARON MCGOWAN
Minnehaha County State's Attorney

MATTHEW ABEL
Deputy State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104

Attorney for Plaintiff/State

Request for Permission to Take Discretionary Appeal Filed: January 20, 2015
Order Granting Permission to Take Discretionary Appeal Filed: April 6, 2015

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

OTHER SOURCES:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff,

vs. No. 27321

EMILY LOU SMITH,

Defendant and Appellee,

MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD,

Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record in this pending case, Minnehaha County Criminal File No. 14-6225, are referred to as "SR." The transcript of the Motions Hearing held January 13, 2015, is referred to as "MH." The brief submitted by the Appellant, Minnehaha County Sheriff Mike Milstead, is referred to as "Appellant's Brief." The brief submitted by the Plaintiff, State of South Dakota, is referred to as "State's Brief." All references are followed by the appropriate page number. Defendant and Appellee, Emily Lou Smith, shall be referred to as "Smith."

JURISDICTIONAL STATEMENT

The Minnehaha County Sheriff Mike Milstead appeals the trial court's Order denying, in part, Sheriff Milstead's motion to quash Smith's subpoena duces tecum, entered by the Honorable Robin J. Houwman, Circuit Court Judge, Second Judicial Circuit. A motions hearing was held on January 13, 2015, and the circuit court's Order was filed on January 14, 2015. SR 30; *see generally* MH. Notice of Appeal and request for permission to take a discretionary appeal were filed with this Court on January 20, 2015. SR 34-38. Sheriff Milstead's request for discretionary appeal was granted on April 6, 2015. SR 109-110. This Court has jurisdiction over the appeal pursuant to SDCL 15-26A-3(2).

STATEMENT OF LEGAL ISSUES

I. **Whether the Trial Court has Inherent Power to Order the Discovery of Police Personnel Records Based upon a Finding that Smith's Fundamental Right to a Fair Trial and an Intelligent Defense Necessitates Production, and Outweighs the Interest of the State and its Agents in Maintaining Confidential Data Related to the Performance and Discipline of Police.**

Circuit Court Judge Houwman ordered the Minnehaha County Sheriff to produce portions of the police personnel records for an *in camera* review.

State v. Karlen, 1999 S.D. 12, 589 N.W.2d 594

State v. Huber, 2010 S.D. 63, 789 N.W.2d 283

Taylor v. Illinois, 484 U.S. 400 (1988)

U.S. v. Reynolds, 345 U.S. 1 (1953)

SDCL 1-27-1.5(7)

II. **Whether the Trial Court Abused its Discretion in Ordering the Production of Portions of Police Personnel Records for *In Camera* Review.**

Circuit Court Judge Houwman ordered the Minnehaha County Sheriff to produce portions of the police personnel records for an *in camera* review.

State v. Wade, 159 N.W.2d 396 (S.D. 1968)

Bowman Dairy Co. v. U.S., 341 U.S. 214 (1954)

City of Santa Cruz v. Municipal Court, 776 P.2d 222 (1989)

Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).

SDCL 23A-14-5

STATEMENT OF CASE

An indictment was returned by the Minnehaha County Grand Jury on October 23, 2014, charging the Defendant and Appellee, Emily Lou Smith, with the crimes of Count 1: Simple Assault on Law Enforcement Officer, in violation of SDCL 22-18-1.05; Count 2: Simple Assault on Law Enforcement Officer, in violation of SDCL 22-18-1.05; Count 3: Simple Assault on Law Enforcement Officer, in violation of SDCL 22-18-1.05; Count 4: Driving While Under the Influence, in violation of SDCL 32-23-1; Count 5: Driving While Over a .08, in violation of SDCL 32-23-1; Count 6: Resisting Arrest, in violation of SDCL 22-11-4; Count 7: Obstructing an Officer, in violation of SDCL 22-11-6; Count 8: Driving While Suspended, in violation of SDCL 32-12-65(2); and Count 9: Open Container, in violation of SDCL 35-1-9.1. SR 14-18. On October 22, 2014, Smith

served a subpoena duces tecum on Sheriff Milstead, commanding the Sheriff to produce "[a]ll use of force documents, write-ups, and other written documentation" in the personnel files of Deputy Zishka with the Minnehaha County Sheriff's Office. MH 14; SR 49, 66. Sheriff Milstead moved to quash the subpoena on January 6, 2015, and a motions hearing was held on January 13, 2015, before the Honorable Robin J. Houwman, Circuit Court Judge, Second Judicial Circuit. SR 53; *See generally* MH. The Circuit Court ordered Sheriff Milstead to produce for *in camera* review "all of Deputy Zishka's personnel records which contain 'disciplinary records, reprimands, and/or complaints' for the past five years . . . ." SR 30. On January 20, 2015, Sheriff Milstead filed both a Notice of Appeal and a request for permission to appeal an intermediate order. SR 34-38. This Court granted Sheriff Milstead's petition for allowance of appeal from an intermediate order on April 6, 2015. SR 97-98.

STATEMENT OF FACTS

On September 30, 2014, Smith was arrested and charged by the State with three counts of simple assault against law enforcement, two counts of DUI, one count of resisting arrest, one count of obstructing a police officer, one count of driving while suspended, and one count of having an open container. SR 14-18. On October 22, 2014, Smith served a subpoena duces tecum on Sheriff Milstead, commanding the Sheriff to produce "[a]ll use of force documents, write-ups, and other written documentation" in the personnel files of Deputy Zishka with the

Minnehaha County Sheriff's Office. MH 14; SR 66. Smith also moved to compel the production of *Brady* material on January 13, 2015. SR 21-23. Smith contends that Deputy Zishka used excessive force against her while arresting Smith on a driving under the influence charge. MH 17; SR 69. Smith refutes the officer's rendition of the facts, and denies intentionally or recklessly assaulting Deputy Zishka. MH 17; SR 69. The alleged victim is an agent of the State, as well as the State's primary witness. SR 14-18.

On January 6, 2015, Sheriff Milstead moved to quash the subpoena, and a motions hearing was held on January 13, 2015. SR 19, 53. Finding that "the defense does have a right to present a defense and a right to try and ascertain whether or not there is evidence that could be relevant and could be admissible," the circuit court denied the motion to quash the subpoena, in part, and ordered the Minnehaha County Sheriff's Office to produce for an *in camera* review "all of Deputy Zishka's personnel records which contain 'disciplinary records, reprimands, and/or complaints' for the past five years . . . ." SR 30, 83; MH 31. Sheriff Milstead appeals the trial court's Order. SR 30.

ARGUMENT

"Matters of a circuit court's actions under discovery statutes are reviewed under an abuse of discretion standard." *State v. Wilson*, 2008 S.D. 13, ¶ 14, 745 N.W.2d 666, 670 (citing *Anderson v. Keller*, 2007 S.D. 89, ¶ 5, 739 N.W.2d 35, 37). "Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *State v. Letcher*, 1996 S.D.

88, ¶ 21, 552 N.W.2d 402, 406 (citing *State v. New*, 536 N.W.2d 714, 718 (S.D. 1995)). In applying the abuse of discretion standard, this Court does not determine whether it "would have made a like decision, only whether a judicial mind, considering the law and the facts, could have reached a similar decision." *State v. Asmussen*, 2006 S.D. 37, ¶ 13, 713 N.W.2d 580, 586 (quoting *State v. Wilkins*, 536 N.W.2d 97, 99 (S.D. 1995). The abuse of discretion standard of review is applicable to the present case.

I. The Trial Court has Inherent Power to Order the Discovery of Police Personnel Records Based upon a Finding that Smith's Fundamental Right to a Fair Trial and an Intelligent Defense Necessitates Production, and Outweighs the Interest of the State and its Agents in Maintaining Confidential Data Related to the Performance and Discipline of Police.

A defendant's right to proffer a defense is fundamental. *State v. Huber*, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294. The right of a defendant to respond to the State's case and present his own theory of defense has been explicitly acknowledged by this Court:

> When a defendant is denied the ability to respond to the State's case against him, he is deprived of his fundamental constitutional right to a fair opportunity to present a defense. We cited in *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988), notions of fundamental fairness require that criminal defendants be afforded a meaningful opportunity to present a complete defense. It is only fair that a defendant in a criminal trial be allowed to present his theory of the case.

State v. Huber, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294-95 (quoting *State v. Lamont*, 2001 SD 92, ¶ 16, 631 N.W.2d 603, 608-09) (internal quotation marks omitted).

A defendant's right to compulsory process is also fundamental. "[C]riminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, (1987)).

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Taylor, 484 U.S. at 409 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)). A full disclosure of all the relevant facts is also important for the defense to conduct an effective cross-examination of the State's witnesses. See *Chambers v. Mississippi*, 410 U.S. 284 (1973).

"Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." *Pitchess v. Superior Court*, 522 P.2d 305, 308 (1974). In order to safeguard these fundamental constitutional rights and facilitate justice, "a trial court has inherent power on behalf of an accused in a criminal proceeding to compel production and to permit inspection of evidence in the possession or under the control of the State's Attorney." *State v. Wade*, 159 N.W.2d

396, 400 (S.D. 1968) (citing *State ex rel. Wagner v. Circuit Court of Minnehaha County*, 244 N.W. 100, 101 (S.D. 1932)). Indeed, this Court has held that "the extent of discovery permitted by either side rests in the discretion of the court." *State v. Catch the Bear*, 352 N.W.2d 640, 644 (S.D. 1984) (citing *State v. Means*, 268 N.W.2d 802 (S.D.1978).

In the present case, the order for production was reasonable and within the sound discretion of the trial court. Smith contends that Deputy Zishka was the aggressor and used excessive force against Smith while arresting her on a misdemeanor driving under the influence charge. MH 17; SR 69. Smith refutes the deputy's rendition of the facts, and denies intentionally or recklessly assaulting the deputy. MH 17; SR 69. At issue in this case is whether Deputy Zishka, or Smith, was the true aggressor. The alleged victim is an agent of the State[1], and also the State's primary witness. *See* SR 14-18. Noting that "the defense does have a right to present a defense and a right to try and ascertain whether or not there is evidence that could be relevant and could be admissible,"

[1] Counsel for Appellant contends that the Minnehaha County Sheriff's Office and the State are "two very distinct parties here." MH 5-6. However, both the State of South Dakota in the underlying pending criminal case, as well as the Minnehaha County Sheriff's Office in this appeal, are represented by the Minnehaha County State's Attorney's Office. See MH 5-6, SR 57-58. The State also takes the same position as the Minnehaha County Sheriff's Office in this appeal. State's Brief 5-10. Further, the Deputy Sheriff is the State's key witnesses. For the purposes of this appeal, the Minnehaha County Sheriff's Office is an extension of the State, and should be treated as such. *See Kyles v Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

the circuit court ordered the Minnehaha County Sheriff's Office to produce for an *in camera* review "all of Deputy Zishka's personnel records which contain 'disciplinary records, reprimands, and/or complaints' for the past five years . . . ." SR 30, 83; MH 31. These materials are relevant to the primary issues in this case—whether Deputy Zishka or Smith was the true aggressor, as well as the deputy's credibility—and may be necessary to afford Smith the opportunity to present her theory of defense, and conduct a full cross-examination of the State's key witnesses. The trial court has not determined that the requested materials shall be turned over to the defense, but rather that the ordered materials are subject to *in camera* review so the trial court may make a proper determination about whether they are discoverable and potentially admissible. The trial court has inherent power to order the production of the materials for that purpose.

It is conceded that police disciplinary records, complaints by citizens against officers, and other personnel information are not open to the general public for inspection pursuant to SDCL 1-27-1.5. However, those records are not shielded from a criminal circuit court order demanding their production for *in camera* review on the basis that the information is relevant to a material issue in the case. As the United States Supreme Court has noted, "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *U.S. v. Reynolds*, 345 U.S. 1, 12 (1953); *see U.S. v.*

Andolschek, 142 F.2d 503, 506 (2d Cir. 1944); *U.S. v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946). "[T]he Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Jencks v. United States*, 353 U.S. 657, 671 (1957). The burden is on the Government "to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of . . . confidential information in the Governments possession." *Id.* at 672.

In *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594, this Court noted that the State was trying to use the victim's counselor-patient privilege as a sword in their prosecution, rather than a shield to protect itself and its citizens from an action by the defendant against them, a privilege which could be waived. The Court went on to state:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense. . . . Whatever [the privileges'] origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Karlen, ¶ 34, 589 N.W.2d at 602 (citing *U.S. v. Nixon*, 418 U.S. 683, 709-10 (1974)).

Likewise, here the State has initiated criminal proceedings against Smith, and the alleged victim is not only an agent of the State but also the prosecution's primary witness. Thus, the State may not withhold information on grounds that the records are confidential at the expense of depriving Smith of information which might be material to her defense. As even the Appellant concedes, "[t]he Court should balance the confidentiality of information contained within a personnel record with the need to use such information to defend against the criminal charges." Appellant's Brief 7. On one hand, the trial court must consider the constitutionally based rights of an accused to proffer a defense, to develop and disclose all relevant facts, and confront and cross-examine adverse witnesses. *See People v. Gissendanner*, 48 N.Y.2d 543, 547-48 (1979) (citing *Davis v. Alaska*, 415 U.S. 308, 315-17 (1974)). On the other hand, the trial court considers the interest of "the State and its agents in maintaining confidential data relating to performance and discipline of police on the other." *Id.* Striking the balance between these interests is within the sound discretion of the circuit court. An *in camera* review of the materials helps the court weigh these interests in order to make a proper ruling as to their discoverability and potential admissibility at trial.

II. The Trial Court Did Not Abuse its Discretion in Ordering the Production of Portions of Police Personnel Records for *In Camera* Review Because the Documents are Relevant to a Material Issue in the Case and the Request for the Information was Made in Good Faith.

SDCL 23A-14-5 states:

> A subpoena may also command the person to whom it is directed to produce books, papers documents, or other objects designated therein. A court on motion made promptly may quash or modify a subpoena if compliance would be unreasonable or oppressive. A court may direct that books, papers, documents, or objects designated in a subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, or documents, or objects or portions thereof to be inspected by the parties and their attorneys.

In *State v. Wade*, this Court discussed the factors a trial court should weigh in determining whether to grant an accused's request to inspect certain evidence:

> An accused's application for inspection or disclosure is a matter addressed to the sound discretion of the trial court which may be granted as an aid to the ascertainment of the truth or as a matter of fundamental fairness. A general hunting or fishing license should ordinarily not be granted and the time, place, and manner of making the inspection permitted or discovery allowed should be specified. It should ordinarily be confined to relevant, tangible or written evidential matters and should be denied whenever (1) there is danger or likelihood of witnesses being coerced, intimidated, or bribed; (2) the State may be unduly hampered in its investigation, preparation, and trial of defendant's case or of other related criminal cases; or (3) other evil or danger to the public interest may result from inspection or disclosure.

159 N.W.2d 396, 400 (S.D. 1968).

The Minnehaha County Sheriff's Department challenges the subpoena on grounds that Smith failed to satisfy the requirements laid forth in Federal Rule of Criminal Procedure 17(c) and cited in *U.S. v. Nixon*, 418 U.S. 683 (1974). The Court in *Nixon* looked to *Bowman Dairy Co. v. U.S.*, 341 U.S. 214 (1954) to interpret these requirements, and acknowledged that cases subsequently decided after *Bowman* had generally followed Judge Weinfeld's formation in *U.S. v. Iozia*,

13 F.R.D. 335, 338 (S.D.N.Y. 1952). 418 U.S. at 699. In *Ioza,* the Federal District Court noted that "Rule 17(c), unlike Rule 16, does not in express terms cast upon a defendant the burden of a 'showing that the items sought may be material to the preparation of his defense and that the request is reasonable.'" 13 F.R.D at 338. Nevertheless, inspection under Rule 17(c) does not "authorize a rummaging through the prosecutions files at will." *Id.* Because Rule 17 was "not intended to provide an additional means of discovery. . . . there must be a showing of good cause to entitle the defendant to production and inspection under Rule 17(c)." *Id.* Good cause requires the defendant to make a showing of the following:

1. That the documents are evidentiary and relevant;
2. That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
3. That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;
4. That the application is made in good faith and is not intended as a general fishing expedition.

Nixon, 418 U.S. at 699-700 (1974) (citing *Ioza,* 13 F.R.D. at 338); *see U.S. v. Messercola,* F. Supp. 482, 485 (D.N.J. 1988) ("If these criteria are met, the subpoena process is not abused as a form of pretrial discovery, but is utilized for the permissible scope of compelling the production of physical evidence before trial"); *Bowman Dairy Co. v. U.S.,* 341 U.S. 214, 219 (1951) ("No good reason appears to us why evidentiary materials may not be reached by subpoena under

Rule 17(c) as long as they are evidentiary. That is not to say that the materials subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence"). "Without a determination of arbitrariness or that the trial court was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c)." *Nixon*, 418 U.S. at 702.

In this case, Smith has fulfilled these four requirements. Smith contends that she did not intentionally or recklessly assault Deputy Zishka, but rather Deputy Zishka used unreasonable and excessive force while arresting Smith on a driving under the influence charge. MH 17; SR 69. Smith also disputes the accuracy of the deputy's rendition of the facts, and challenges the truthfulness of the deputy's allegations which serve as the basis for the assault charges against her. MH 17; SR 69. Thus, Deputy Zishka's personnel documents, including "[a]ll use of force documents, write-ups, and other written documentation," are relevant to Deputy's Zishka's propensity for aggression or violence and may bear on his credibility at trial.

Further, these materials are not otherwise procurable by the defense. The State does not appear to dispute this. Appellant's Brief 6-8; see generally State's Brief. Rather, the State, and Sheriff Milstead, contend that the personnel files are confidential and oppose the trial courts *in camera* review. *See generally* Appellant's Brief; State's Brief. The production of the documents in advance of trial is necessary to ensure a full disclosure of all the relevant facts to allow Smith

to adequately prepare her defense, and identify any inconsistencies in the discovery which may be used to conduct a full cross-examination of the deputy.

Finally, a good faith effort is being made to obtain relevant evidence in light of the disputed issues in this case. The California Supreme Court has reviewed several cases concerning the rules and procedures by which a defendant may discover relevant evidence in confidential police personnel records. In *Pitchess v. Superior Court*, 522 P.2d 305, 309 (1974), the California Supreme Court held that evidence of police officers' tendencies for violence was relevant and admissible in a case alleging the defendant assaulted the officers, where the defendant contended that he had acted in self-defense in response to excessive force used by the officers. The Court noted that "an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial." *Id.* Upon "a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant." *People v. Gaines*, 205 P.3d 1074, 1079 (2009).[2]

---

[2] In *People v. Hobley*, 159 Ill.2d 272, 202 Ill.Dec. 256, 637 N.E.2d 992 (1994), the Illinois Supreme Court identified four factors the court should consider in determining the admissibility of evidence of prior allegations of police brutality: (1) whether the prior allegations of police brutality were unduly remote in time from the defendant's allegations; (2) whether the prior allegations of police brutality were against the same officer; (3) whether the prior allegations of police brutality were similar to the allegations put forth by the defendant; and (4)

In order to demonstrate good cause for discovery, the California Court held that a defendant must show: "(1) the 'materiality' of the information or records sought to the 'subject matter involved in the pending litigation,' and (2) a 'reasonable belief' that the governmental agency has the 'type' of information or records sought to be disclosed." *City of Santa Cruz v. Municipal Court*, 776 P.2d 222, 227 (1989) (citing Cal. Evid. Code § 1043, subd. (b) (West 2003)). "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.'" *Gaines*, 205 P.3d at 1079 (citing *City of Santa Cruz*, 776 P.2d at 227). If good cause is established by the defendant, "the court must review the requested records in camera to determine what information, if any, should be disclosed." *Gaines*, 205 P.3d at 1079.

In *City of Santa Cruz v. Municipal Court*, 776 P.2d 222, 232 (1989), the California Supreme Court found that in order to show a reasonable belief that the agency has the type of records sought and justify disclosure, the defendant is not required to demonstrate personal knowledge of particular items. In *City of Santa Cruz*, the defendant was charged with resisting arrest and exhibiting a knife. 776 P.2d at 224. The defendant filed a motion seeking all prior complaints of excessive force or violence pertaining to the arresting officers. *Id.* The defendant

---

whether, in both the prior allegations of abuse and the case before the court, there was evidence of injury consistent with police brutality.

disputed the allegations and contended the arresting officers used excessive and unnecessary force while arresting him. *Id.* Defense counsel contended that "[a] material and substantial issue in the trial of this matter will be the character, habits, customs and credibility of the officers." *Id.* The officers were alleged to have grabbed him by the hair, thrown him to the ground, stepped on his head, and twisted his arm behind his back. *Id.*

On appeal, the Court held that the defendant was not required to "prove the existence of *particular* records" to establish good cause for discovery. *Id.* at 232. The Court quoted a similar California Court of Appeals decision, finding its reasoning "particularly pertinent to the question before us . . . ."

> In the present case, defendant did not have the names of any prior citizen complainants and was not aware of any complaints made against the police officers involved herein. However, proof of the existence of the sought material is not a prerequisite to the granting of a discovery motion. A requirement of such proof would, in many cases, deny the accused the benefit of relevant and material evidence. Defendant should not be required to produce the names of specific citizen complainants. Ordinarily, an accused would never be in a position to know what complaints, if any, had been filed against certain police officers in the community. To make such a showing a condition precedent to production would make an accused's rights dependent on a fortuitous circumstance of the accused's detailed knowledge as to the contents of the police officers' personnel files. In the present case defendant showed more than a mere desire for the benefit of all information; she clearly specified the exact material sought, i.e. all information regarding citizen complaints for excessive force against the two police officers involved in her arrest. This was sufficient to justify discovery.

City of Santa Cruz, 776 P.2d at 232-33 (quoting *In re Valerie E.*, 50 Cal.App.3d 213, 218-19 (1975)). The Court concluded that defense counsel's belief that the

government may have "other complaints of excessive force against the officers in question constitutes a rational inference from the facts of the pending litigation." *City of Santa Cruz*, 776 P.2d at 234.

Likewise, here Smith's request for discovery is sufficient to establish good cause. First, the records are relevant to the issues being litigated in this case. Smith is charged with assault against law enforcement. SR 2-4. Smith denies the allegations, and contends that the officer used excessive and unnecessary force while arresting her. MH 17; SR 69. She also challenges the truthfulness of the officer's allegations which serve as the basis of his charge. MH 17; SR 69. The two primary issues in this case will be whether Deputy Zishka or Smith was the true aggressor, and whether the deputy is telling the truth regarding the circumstances of Smith's arrest. As such, information bearing on Deputy Zishka's propensity for violence and his credibility is relevant to the material issues being litigated.

Second, Smith's request for these records is not based upon a mere fishing expedition, but a good faith attempt to obtain relevant information. *See* Appellant's Brief 16-17. The subpoena issued in this case was aimed toward the disclosure of all relevant facts in light of the disputed issues. Smith is not required to demonstrate personal knowledge of prior incidents or complaints to justify disclosure. Smith's belief that these records may reflect the deputy's propensity for violence, as well as bear on the deputy's credibility regarding his version of the events, is inferred from the facts being litigated. Moreover, the trial

court employed its discretion and modified the subpoena pursuant to its authority under SDCL 23A-14-5. At this point, the trial court has not found that the materials are discoverable or admissible, but rather that they are merely subject to *in camera* review. Thus, the trial court's order to produce these materials for *in camera* review is reasonable and provides a mechanism to not only respect the confidentiality of police personnel files, but to safeguard Smith's constitutionally based rights to a full disclosure of all relevant facts, the presentment of her own theory of defense, and a full cross-examination of the State's key witnesses.

A. The Court-Ordered Documents are Relevant and May be Used at Trial to Elicit Testimony of the Detective's Propensity for Violence under SDCL 19-19-404(a)(2).

The materials requested by Smith are relevant and potentially admissible at trial under numerous South Dakota Rules of Evidence. Thus, the trial court did not abuse its discretion in ordering the production of these particular police personnel files.

In all Federal courts, and most State jurisdictions, an accused may introduce some form of "evidence of the victim's violent character to support a defendant's self-defense claim that the victim was the first aggressor. . . . regardless whether the victim's violent character was known to the defendant at the time of the assault." *Commonwealth v. Adjutant*, 824 N.E.2d 1, 6-7 (2005) (footnotes omitted); *see Adjutant*, 824 N.E.2d at 22 nn.7-8; *U.S v. Emeron Taken Alive*, 262 F.3d 711, 714 (8th Cir. 2001) ("[R]eputation evidence of the victim's

violent character is relevant to show the victim as the proposed aggressor"). "The basis of the overwhelming trend toward admitting some form of this evidence can be found in the view that evidence reflecting the victim's propensity for violence has substantial probative value and will help the jury identify the first aggressor when the circumstances of the altercation are in dispute." *Adjutant*, 824 N.E.2d at 8 (citing *People v. Lynch*, 104 Ill.2d 432, 434-435 (D.C. Cir. 1972); *see U.S. v. Greschner*, 647 F.2d 740, 741 (7th Cir. 1981) ("[T]he 'violent character' line of proof is relevant to the defendant's theory of self-defense in that it makes his version that the victim attacked him 'more probable'"); *U.S. v. Burks*, 470 F.2d 432, 434-35 (D.C. Cir. 1972) (evidence of deceased's violent character relevant and admissible on identity of aggressor "[i]n order to corroborate" defendant's account). A defendant is not required to show that he was aware of the alleged victim's violent character or prior bad acts when the issue of who was the aggressor is disputed. *State v. Basque*, 666 P.2d 599, 602 (1983). This is true because evidence of the victim's "violent and turbulent character in this situation is circumstantial evidence of the likelihood of his being the aggressor and of the absence of provocation on the part of the defendant." *Id.* (quoting *State v. Lui*, 603 P.2d 151, 154 (1979); *see U.S. v. Keiser*, 57 F.3d 847, 853 (9th Cir. 1995), cert. denied, 516 U.S. 1029, 116 S.Ct. 676, 133 L.Ed.2d 525 (1995) ("[W]hether the defendant knew of the victim's character at the time of the crime has no bearing on whether victim character evidence should come in under section 404(a)(2)").

A number of other State Courts have treated specific prior bad act evidence the same as general character evidence in cases in which the defendant disputed who was the aggressor. *See Commonwealth v. Adjutant*, 443 Mass. 649, 824 N.E.2d 1 (2005); *State v. Basque*, 66 Haw. 510, 666 P.2d 599 (1983); *State v. Miranda*, 176 Conn. 107, 405 A.2d 622 (1978); *Commonwealth v. Beck*, 485 Pa. 475, 402 A.2d 1371 (1979); *Jordan v. Commonwealth*, 219 Va. 852, 252 S.E.2d 323 (1979). "Testimony about the victim's prior acts of violence can be convincing and reliable evidence of the victim's propensity for violence." *Adjutant*, 824 N.E.2d at 12. As Dean Wigmore has stated:

> [T]here is no substantial reason against evidencing the character (of a deceased victim) by *particular instances of* violent or quarrelsome *conduct*. Such instances may be very significant; their number can be controlled by the trial court's discretion; and the prohibitory considerations applicable to an accused's character have here little or no force.

1 Wigmore on Evidence § 198 (3d ed. 1940) (emphasis in original).

Under SDCL 19-19-404(a)(2), an accused may offer "[e]vidence of a pertinent trait of character of the victim of the crime . . . ." In an assault case, this rule "permits evidence of a victim's violent propensities through reputation and opinion evidence. '[T]he purpose of introducing victim character evidence is to show that the victim had a propensity for violence and thus is more likely to have been using unlawful force at the time of the crime.'"[3] *State v. Cottier*, 2008

[3] The purpose for introducing victim character evidence applies to this case just as it would if Smith claimed self-defense. In either scenario, the victim's character evidence is relevant to show the victim's propensity for violence. Whether Smith

S.D. 79, ¶ 33, 755 N.W.2d 120, 133 (quoting 2 Weinstein's Federal Evidence § 404.11(3)(a) (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2007); *see* SDCL 19-19-405(a). Additionally, if the accused knew about the victim's violent character prior to the incident, the accused may offer evidence of prior acts of violence "to establish the accused's justifiable apprehension and the reasonableness of his or her defensive measure." *Cottier*, 2008 S.D. at ¶ 33, 755 N.W.2d at 133. However, evidence of the victim's prior violent acts "are not admissible to prove the victim acted in conformity therewith." *Id.*

In this case, Smith does not contend that she had prior knowledge of the officer's propensity for violence. Therefore, it is conceded that, under SDCL 19-19-404(a)(2) and current South Dakota case law, Smith may not offer evidence of the alleged victim's prior specific acts of violence for the purpose of proving the officer had a character for violence. Rather, Smith is limited under this rule to offering reputation or opinion evidence to show the officer's propensity for violence.[4] Nevertheless, civilian complaints against the officer for violence or

---

alleges that she intentionally struck the officer in self-defense, or resisted arrest due to the officer's excessive force and violence and accidently made contact with the deputy during the struggle, or merely submitted to the deputy's assault upon her, the deputy's propensity for violence remains relevant to a material issue. *See City of Santa Cruz v. Municipal Court*, 776 P.2d 222, 224 (1989).

[4] The more sound approach, in cases in which the identity of the aggressor is disputed, would be not to require a bright line rule excluding all of the victim's specific acts of violence. Determinations of the admissibility of specific acts evidence used to prove a pertinent trait of character—especially in light of the highly probative value of relevant prior acts of violence— should be left to the sound discretion of the trial court. *See supra*, pages 10-11. There may be

aggression, as well as disciplinary reports or other personnel records pertaining to the current incident, may contain information about individuals with the knowledge to testify to the officer's propensity for violence. Thus, the materials are discoverable under SDCL 19-19-404(a)(2).

B. The Court-Ordered Documents May Be Admissible as Other Act Evidence under SDCL 19-19-404(b) to Show the Officer's Common Plan or Scheme, Modus Operandi, or an Absence of Mistake or Accident.

Under SDCL 19-19-404(b), Smith may offer evidence of the officer's prior bad acts if those acts are admissible to show, for example, the officer's plan, modus operandi, or an absence of mistake or accident. SDCL 19-19-404(b) (transferred from SDCL 19-12-5) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has outlined a two-step analysis the trial court must follow in determining the admissibility of other acts evidence under SDCL 19-19-404(b):

1. Is the intended purpose for offering the other acts evidence relevant to some material issue in the case (factual relevancy), and

2. Is the probative value of the evidence substantially outweighed by its prejudicial effect (logical relevancy).

---

numerous instances in which a trial court could reasonably find that the probative value of a prior specific violent act of the victim greatly exceeds any potential prejudice or confusion among the jury members.

State v. Moeller, 1996 SD 60, ¶ 13, 548 N.W.2d 465, 472 (citing *State v. Steele*, 510 N.W.2d 661, 667 (S.D. 1994)). Federal Rules of Evidence 404(b) is a rule of inclusion, as opposed to an exclusionary rule. *State v. Wright*, 1999 S.D. 50, ¶ 13, 593 N.W.2d 792, 798 (citing John W. Larson, South Dakota Evidence § 404.2(1) (1991). Rule 404(b)'s list of potential purposes to admit other act evidence is nonexclusive, and therefore "the possible uses for other act evidence are limitless . . . ." *Id.* "[O]nce a circuit court finds other acts evidence relevant, 'the balance tips emphatically in favor of admission.'" *State v. Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d 283, 302 (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 38, 693 N.W.2d 685, 698). Other act evidence "is only inadmissible if offered to prove character," and such evidence may not be excluded merely because it is damaging to the State's case. *Wright*, 1999 S.D. 60, ¶ 13, 593 N.W.2d at 798 (quoting John W. Larson, South Dakota Evidence § 404.2(1) (1991); *State v. Holland*, 346 N.W.2d 302, 309 (S.D. 1984). "[S]hould the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403." *Wright*, 1999 S.D. 60, ¶ 16, 593 N.W.2d at 799 (quoting *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984). "In summary, under § 404(b) other act evidence may not be admitted if its sole purpose is to establish an inference from bad character to criminal conduct. It is admissible when similar in nature and relevant to a material issue, and not substantially outweighed by its prejudicial impact." *Id.* at 799-800.

"The term plan encompasses both common plan, design or scheme, and modus operandi situations." *Wright*, 1999 S.D. 60, ¶ 18, 593 N.W.2d at 800 (internal quotations omitted). This Court has acknowledged "that evidence of other acts can be admitted under the plan exception 'not only where the charged and uncharged acts are part of a single continuing conception or plot, but also where the uncharged misconduct is sufficiently similar to support the inference that they are manifestations of a common plan, design, or scheme. . . ." *State v. Medicine Eagle*, 2013 SD 60, ¶ 18, 835 N.W.2d 886, 893 (quoting *State v. Big Crow*, 2009 S.D. 87, ¶ 8, 773 N.W.2d 810, 812). "[O]ther acts evidence 'must demonstrate not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" *Medicine Eagle*, 2013 S.D. 60, ¶ 19, 835 N.W.2d at 893 (quoting *Wright*, 1999 S.D. 60, ¶ 19, 593 N.W.2d at 801). While modus operandi evidence used to prove identity "requires a high degree of similarity," close similarity is not required to admit common plan or scheme evidence. *Wright*, 1999 S.D. 60, ¶ 18, 593 N.W.2d at 800. "'Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.'" *Id.* (quoting *People v. Ewoldt*, 7 Cal. 4th 380, 867 P.2d 757, 770 (1994). The existence of a plan may be "shown circumstantially with evidence that the defendant committed a series of similar but 'unconnected acts.'" *Wright*, 1999 S.D. 60, ¶ 19, 593 N.W.2d at 801

(citing *People v. Ewoldt*, 7 Cal.4th 380, 867 P.2d 757, 768-69 (1994)). "Essentially, all that is required to show a common plan is that the charged and uncharged events have sufficient points in common." *Medicine Eagle*, ¶ 19, 835 N.W.2d at 893 (quoting *Wright*, 1999 S.D. 60, ¶ 19, 593 N.W.2d at 800).

Here, the production of complaints against Deputy Zishka for excessive force or aggression may reveal a series of similar prior acts of violence or aggression which could be admissible to support an inference that the detective's actions are manifestations of a common plan or scheme, modus operandi, or an absence of mistake. *See Wright*, 1999 SD 60, ¶19, 593 N.W.2d at 800-01 (trial court did not abuse its discretion in finding evidence of prior child abuse was admissible to show plan or design and absence of mistake or accident); *Medicine Eagle*, 2003 S.D. 60, ¶¶ 20, 23, 835 N.W.2d 886, 893-895 (trial court did not abuse its discretion in finding other acts evidence concerning defendant's prior sexual assault against a separate victim was admissible to show defendant "had a common plan or scheme to kidnap, rape, and assault young girl victims he could take advantage of after isolating them by use of his deception, physical threats, and intimidation"). Evidence of similar prior acts may also be admissible to show that the officer's actions in this particular case conformed to a habit or routine practice. SDCL 19-19-406. After conducting an *in camera* review, if the trial court finds that these materials contain evidence of prior similar acts sufficient to show, for example, a common plan or scheme, the materials are admissible, "subject only to the rarely invoked limitations of Rule 403." *Wright*, 1999 S.D. 60,

¶ 16, 593 N.W.2d at 799 (quoting *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984). Thus, the circuit court did not abuse its discretion by ordering the State to produce these materials for *in camera* review.

C. *Information in the Court-Ordered Documents May be Used at Trial under SDCL 19-19-405(a), 19-19-607 and 19-19-608(b) to Develop All the Relevant Facts and Conduct a Full Cross-Examination of the State's Witnesses.*

The court-ordered documents may contain information pertinent to the material issues in this case: the determination of the true aggressor, and the truthfulness of the deputy's accusations. Prior complaints of violence or aggression, use of force documents, and disciplinary reports regarding Deputy Zishka are relevant to his propensity for violence, and may shed light on the consistency or inconsistency of the deputy's rendition of the facts. Thus, the information may be necessary for the defense to fully develop all the relevant facts and conduct a full cross-examination of the State's witnesses.

A full disclosure of all the relevant facts is important for the defense to conduct an effective cross-examination of the State's witnesses. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284 (1973). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Further, "[w]here the witness the defendant seeks to cross-examine is the chief government witness providing the crucial link in the

prosecution's case, the importance of full cross-examination is necessarily increased." *U.S. v. Rubin*, 836 F.2d 1096, 1099 (1988).

Pursuant to SDCL 19-19-405(a) (transferred from SDCL 19-12-6), proof of "evidence of character or a trait of character of a person . . . may be made by testimony as to reputation or by testimony in the form of an opinion." However, "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct." *Id.* As the Federal Rules advisory committee notes:

> According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting.

Advisory Committee's Note, Fed. R. Evid. 405. Therefore, if the State "opens the door" by offering evidence of the officer's reputation for peacefulness under SDCL 19-19-404(a)(2) to rebut evidence that the victim has a propensity for violence, Smith may cross-examine the character witness with regard to prior specific instances of violent or aggressive conduct which may be revealed in the police personnel files. *See* SDCL 19-19-405(a).

Further, specific instances of conduct that are probative of the truthfulness or untruthfulness of the witness may also be inquired about on cross-examination for impeachment purposes. *See* SDCL 19-19-608(b) (transferred from SDCL 19-14-10). If an officer testifies to facts that are inconsistent with the information in the court-ordered documents, this information would be

necessary to allow the defense to conduct a full-cross-examination of the State's witnesses. Moreover, even though specific act evidence is not admissible to prove the witnesses character for truthfulness, information contained in these records may be admissible as extrinsic evidence under SDCL 19-19-607 (transferred from SDCL 19-12-8), in order to contradict the testimony of one of the officers. *See State v. Byrum*, 399 N.W.2d 334, 337 (S.D. 1987) (Evidence of the defendant's other drug sales was admissible as a result of the defendant's representation to the court and jury that he would not participate in the distribution of drugs). For example, if Deputy Zishka testifies that he would never use excessive force or violence in arresting an individual, but information in the records contradicts that testimony, this information may be admissible as extrinsic evidence for impeachment by contradiction.

Thus, the discovery of these materials may be essential to develop all the relevant facts, allow the Defense to conduct a full cross-examination of the State's witnesses, and satisfy Smith's right to due process.

D. Brady and its Progeny Supports the Trial Court's Review of the Records.

Smith is entitled to those court-ordered documents which may be used to impeach the State's witnesses and attack the credibility of officers under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its line of cases.[5] In *Brady*, the Supreme Court

[5] Smith did not file Notice of Review to challenge, under *Brady*, the scope of the materials that should have been ordered for production by the trial court. SR 30, 77-80. However, Smith contends that *Brady* and its progeny support the

stated that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Favorable *Brady* evidence "encompasses not only exculpatory evidence, but also impeachment evidence." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *see U.S. v. Bagley*, 473 U.S. 667, 676 (1985); *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) "[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v Whitley*, 514 U.S. 419, 437 (1995). Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). Evidence of an officer's misconduct in prior cases is admissible for impeachment of that officer's credibility, especially "where credibility is the central issue in the case and the evidence presented at trial consists of opposing stories presented by the defendant and government agents." *Milke v. Ryan*, 711 F.3d 998, 1000 (9th Cir. 2013) (quoting *United States v. Kiszewski*, 877 F.2d 210, 216 (2nd Cir. 1989)).

---

production of the documents that were in fact ordered for *in camera* review by the trial court.

In *Milke v. Ryan*, 711 F.3d 998, 1000 (9th Cir. 2013) the defendant was convicted and sentenced to death for the murder of her four-year-old son. At trial, the State's primary witness was Pheonix Police Detective Armando Saldate, Jr., who testified that the defendant had confessed to the murder while he interviewed her shortly after the boy's death. *Id.* The defendant denied confessing and protested her innocence. *Id.* At trial, the defendant issued a subpoena duces tecum, requesting "Saldate's 'entire personnel file,' including 'all records of any Internal Affairs investigations . . . relating to his technique or methods of interrogation, violations of Miranda right and/or improprieties during the course of interrogation, if any.'" *Id.* at 1004 (alteration in original). The trial court quashed the subpoena "except for some records of Saldate's training and documents describing police department policies, which were submitted for in camera review." *Id.* Detective Saldate had a long history of lying under oath and violating *Miranda* during interrogations, which the State knew about, but none of this information was disclosed by the prosecution before or during trial. *Id.* at 1003-1004. On her petition for federal habeas relief, the defendant contended that "*Brady v. Maryland* and its progeny require the State to disclose material impeachment evidence . . . . " *Id.* at 1012 (internal quotations omitted). The defendant argued that "[s]he couldn't effectively cross-examine Saldate because the state had failed to disclose significant impeachment evidence." *Id.* at 1006.

The Federal Ninth Circuit Court of Appeals granted the writ, finding that the prosecutor committed a *Brady* violation by failing to disclose evidence of the detective's lies under oath, as well as evidence that he had been investigated and suspended for taking sexual liberties with a female motorist. *Id.* at 1016-1019. The Court found such evidence relevant to the detective's willingness to lie under oath and abuse his authority to get what he wanted. *Id.* Noting that in order to find prejudice under *Brady* and *Giglio*, "[i]t suffices that there be 'a reasonable probability of a different result' as to either guilt or penalty, the Court reasoned:

> Saldate's credibility was crucial to the state's case against Milke. It's hard to imagine anything more relevant to the jury's—or the judge's—determination whether to believe Saldate than evidence that Saldate lied under oath and trampled the constitutional right of suspects in discharging his official duties. If even a single juror had found Saldate untrustworthy based on the documentation that he habitually lied under oath or that he took advantage of women he had in his power, there would have been at least a hung jury. Likewise, if this evidence had been disclosed, it may well have led the judge to order a new trial, enter judgment notwithstanding the verdict or, at least, impose a sentence less than death. The prosecution did its best to impugn Milke's credibility. It wasn't entitled, at the same time, to hide the evidence that undermined Saldate's credibility.

Milke, 711 F.3d 998, 1018-19 (9th Cir. 2013).

The Court reversed and remanded the case to the district court, and ordered the state to provide the defendant's counsel with "Saldate's police personnel records covering all of his years of service, including records pertaining to any disciplinary or Internal Affairs investigations and records pertaining to performance evaluations." *Id.* at 1019. The Court further ordered

that "Defense Counsel shall be allowed to see the documents and to argue why each might be *Brady* or *Giglio* material," and approved the district court entering a protective order requiring the materials to be sealed and designated "For Attorney's Eyes Only." *Id.*

Here, the court-ordered materials may contain *Brady* or *Giglio* evidence which could be used to impeach the State's key witnesses. The credibility of the deputy is a key issue in this case. Any evidence contained within the materials that is favorable to Smith and relevant to the officer's credibility implicates *Brady* and its progeny. Such evidence may include, for example, information which tends to show an officer's willingness to lie, misrepresent facts, or charge an individual in order to avoid reprimand by his agency. Moreover, disciplinary reports related to how the present matter was handled by the officer may be directly relevant to Smith's guilt or innocence, and could show the manner in which the officer carried out Smith's arrest. The disclosure of such evidence would be necessary to satisfy Smith's rights to due process and allow her to conduct a full cross-examination of the officers involved in this case.

The Appellant argues that the court-ordered documents "are not impeachment evidence and thus, are not discoverable." *See* Appellant's Brief 18. The Appellant cites *U.S. v. Akers*, 374 A.2d 874, 878 (D.C. 1977), which found that evidence of an officer's prior assault could not be used to impeach the officer because "the crime of assault does not involve dishonesty or a false statement." However, the court-ordered documents may reveal more than merely the fact of

a prior assault. Moreover, depending upon the officer's testimony at trial, certain information may become admissible or properly inquired about on cross-examination for impeachment purposes as the trial develops. "Evidence need not have been independently admissible to have been material." *Carringer v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997). "Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Id* (quoting *U.S. v. Bagley*, 473 U.S. 667, 676 (1985)).

For example, information in the records tending to show the officer's willingness to lie, misrepresent the facts, or charge an individual in order to avoid reprimand would bear directly on the veracity of the officer. *See* SDCL 19-19-608(b). The State may also open the door during the officer's direct examination, so that extrinsic evidence of the officer's prior assault may be admissible under SDCL 19-19-607 in order to contradict the officer's testimony. *See State v. Byrum*, 399 N.W.2d 334, 337 (S.D. 1987) (Evidence of the defendant's other drug sales was admissible as a result of the defendant's representation to the court and jury that he would not participate in the distribution of drugs). Furthermore, the State may call a character witness on behalf of the officer under SDCL 19-19-404(a). If so, Smith may cross-examine the character witness with regard to prior specific instances of violent or aggressive conduct. *See* SDCL 19-19-405(a).

Thus, *Brady* and its progeny support the production of the court-ordered documents because this information may be necessary to impeach the State's key witnesses and conduct a full cross-examination.

E. The Trial Court's Order for In-Camera Review of the Documents is Appropriate.

Finally, the circuit court's review of these materials *in camera* is reasonable and appropriate. This Court has held that "the preferred procedure for handling privilege issues is to allow for an in camera review of the documents . . . ." *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 49, 771 N.W.2d 623, 637 (citing *State v. Cates*, 2001 S.D. 99, ¶ 17, 632 N.W.2d 28, 35-36. In *State v. Karlen*, on the issue of whether confidential material had to be turned over to the defendant, this Court held that "[a] just compromise is an in camera inspection of all relevant records, performed by the trial court." 1999 SD 12, ¶ 45, 589 N.W.2d 594, 605. Other federal and state courts have found that in camera review of police personnel records by a trial court is appropriate to determine the extent of permissible discovery by the defendant. See *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013); *People v. Gaines*, 205 P.3d 1074, 1079 (2009); *People v. Walker*, 666 P.2d 113, 122 (Colo. 1983); *State v. Pohl*, 554 P.2d 984, 985 (Ct.App. 1976).

The trial court's order to produce these materials for *in camera* review provides a mechanism to not only respect the confidentiality of police personnel files, but to safeguard Smith's constitutionally based rights to full disclosure of all relevant facts, the presentment of his own theory of defense, and a full cross-

examination of the State's key witnesses. Moreover, to further ensure the privacy of these documents, the trial court may enter a protective order requiring the materials to be sealed and designated "For Attorney's Eyes Only." Thus, the trial court did not abuse its discretion by ordering the Sheriff to produce these materials for in camera review.

CONCLUSION

The trial court has inherent power to order the discovery of police personnel records in this case because Smith's fundamental right to a fair trial and an intelligent defense outweighs the interest of the State in maintaining confidential data related to the performance and discipline of police. The court-ordered documents are relevant to Deputy Zishka's propensity for violence, and may bear on his credibility, and Smith's request for the records is based upon a good faith effort to obtain evidence relevant to the material issues being litigated. Thus, the trial court did not abuse its discretion in ordering these materials for *in camera* review.

For the aforementioned reasons, authorities cited, and upon the settled record, Smith respectfully requests this Court to affirm the trial court's order.

Respectfully submitted this 13th day of July, 2015.

/s/Beau J. Blouin

Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242

ATTORNEY for APPELLEE

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellee's Brief contains 9,620 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 13th day of July, 2015.

/s/Beau J. Blouin

Beau J. Blouin
Attorney for Appellee

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27321

STATE OF SOUTH DAKOTA

Plaintiff and Appellee,

v.

EMILY LOU SMITH,

Defendant and Appellee,

MINNEHAHA COUNTY SHERIFF MIKE MILSTEAD,

Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN J. HOUWMAN
CIRCUIT COURT JUDGE

REPLY BRIEF OF THE APPELLANT

ATTORNEYS FOR THE APPELLANT:

MINNEHAHA COUNTY STATE'S
ATTORNEY'S OFFICE

Mr. Kersten A. Kappmeyer
Ms. Sara E. Show
Deputy State's Attorneys
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: sshow@minnehahacounty.org

ATTORNEY FOR PLAINTIFF AND APPELLEE:

Mr. Matthew J. Abel
Minnehaha County State's Attorney's Office
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: mabel@minnehahacounty.org

ATTORNEY FOR DEFENDANT AND APPELLEE

Mr. Beau J. Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
Tel.: (605) 367-4242
E-mail: bblouin@minnehahacounty.org

REQUEST FOR PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: JANUARY 19, 2015
ORDER GRANTING PERMISSION TO TAKE DISCRETIONARY APPEAL FILED: APRIL 6, 2015

Table of Authorities

FEDERAL CASES

SOUTH DAKOTA STATE CASES

STATUTES

OTHER STATE CASES

OTHER AUTHORITIES

Table of Contents

ARGUMENT

I. DEPUTY ZISHKA'S PERSONNEL FILE IS NOT DISCOVERABLE UNDER SDCL 23A-14-5.

Smith has not demonstrated that any materials that could be found within Deputy Zishka's personnel file would be relevant or admissible in the criminal case. Smith cites several rules of evidence for the proposition that citizen complaints or supervisor evaluations are admissible. None of these rules of evidence actually allow such evidence to be admitted at trial. Thus, the trial court erred in finding that such evidence might be admissible.

A. Issues presented in the criminal case.

The underlying criminal case involves an alleged assault on a law enforcement officer. Deputy Zishka's account of the assault is that Smith kicked him in the groin after he used minimal force to make the arrest. Smith's claims she never assaulted him, and Deputy Zishka is lying about the assault.

Regardless of the facts, the parties agree that this case comes down to credibility between Deputy Zishka and Smith. (Smith's Brief hereinafter "SB" at 18). The jury will be asked to determine whether Smith assaulted Deputy Zishka and resisted arrest. The jury will be instructed that law enforcement has the right to use force to effect an arrest. *See* SDCL 22-11-5 ("It is no defense to a prosecution under § 22-11-4 that the law enforcement officer was attempting to make an arrest which in fact was unlawful, if the law enforcement officer was acting under color of authority and, in attempting to make the arrest, the law enforcement officer was not resorting to unreasonable or excessive force giving rise to the right of self-defense"); *see also*

SDCL 22-11-7 ("It is no defense to a prosecution under § 22-11-6 that the law enforcement officer, firefighter, or emergency medical technician was acting in an illegal manner, if the law enforcement officer, firefighter, or emergency medical technician was acting under the color of authority as defined in § 22-11-5"). Smith is not raising self-defense as a defense to these charges. HT at 17, 31.

Nevertheless, even if Smith were to raise self-defense, some courts have held that a person may only act in self-defense where the person actually, as opposed to apparently, faces imminent danger of serious injury or death. *See State v. Bradley*, 10 P.3d 358, 361 (Wash. 2000); *see also State v. Miskimins*, 435 N.W.2d 217, 224 (S.D. 1989) (South Dakota law "authorizes the use of force necessary to defend one's self only from *unlawful* force in situations of imminent necessity"). This makes sense as an officer has the right when fearing for his safety to approach a vehicle or enter a home upon warrant with a firearm drawn. A defendant would not have the right to fire upon the officer in such circumstance, whereas, if a private citizen approached a vehicle or came into a home with a firearm drawn, a different standard would certainly apply. Thus, whether Deputy Zishka used "excessive force" or was the "true aggressor" is not a proper inquiry in the criminal case; but instead, the only issue is whether Smith assaulted Deputy Zishka.

Furthermore, Smith misinterprets what information within Deputy Zishka's personnel file Sheriff Milstead seeks to protect. Smith argues that information such as prior perjury convictions or instances of an officer lying are relevant and *Brady* materials. Sheriff Milstead agrees that a prior perjury conviction or instances of an

officer lying would be *Brady* materials and if such information existed, Sheriff Milstead would have provided it to counsel as *Brady*[1] materials. HT at 4-5 (noting that materials such as perjury charges, dishonesty, etc. would be turned over by Sheriff Milstead).

Thus, the *Milke v. Ryan,* 711 F.3d 998 (9th Cir. 2013) case cited by Smith is distinguishable. In *Milke*, the evidence sought was prior perjury information and evidence of untruthfulness of the law enforcement officer. Such information would certainly be discoverable as *Brady* evidence. Evidence of prior instances of lying or perjury, however, is not the subject of this motion.[2]

The subpoena duces tecum sought ""[a]ll disciplinary records/reprimands/complaints in regard to Deputy Adam Zishka from the Minnehaha County Sheriff['s] Department." App. 1. The subject of this motion is citizen complaints, disciplinary records, including supervisor reviews and comments, and use of force forms.

---

[1] While Smith argues that the materials sought in this motion are *Brady* materials, the trial court denied the motion for *Brady* materials, which she did not notice for review. Therefore, such issue is not properly before the Court. *See City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 131 (S.D. 1994); SDCL 15–26A–22.

[2] The trial court properly held that such information was not *Brady* evidence. HT at 31. In support of his position, Sheriff Milstead provided several citations to the trial court where courts have held such requests are not within the scope of *Brady*. *See People v. Torres*, 352 N.Y.S.2d 101(N.Y. Crim. Ct. 1973), *State ex rel. Smith v Schwartz*, 552 P.2d 571 (Or. Ct. App. 1976); *Minor v. State*, 780 So.2d 707 (Ala. Crim. App. 1999), *rev'd on other grounds*, 780 So.2d 796 (Ala. 2000); *State v. Cano*, 743 P.2d 956 (Ariz. Ct. App. 1987); *State v. Jones*, 59 A.3d 320 (Conn. App. Ct. 2013); *Vaughn v. State*, 378 N.E.2d 859 (Ind. 1978); *Com. v. Rodriguez*, 692 N.E.2d 1 (Mass. 1998).

B. The proper test under SDCL 23A-14-5 is whether the subpoena seeks information that is relevant and admissible and whether the subpoena is specific.

Sheriff Milstead is respectfully asking that the Court adopt the test espoused by the United States Supreme Court in *United States v. Nixon,* 418 U.S. 683, 698, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) and accepted by the Eighth Circuit as stated in *United States v. Hardy,* 224 F.3d 752,754 (8th Cir. 2000). While Smith cites the four factors that courts generally follow from *United States v. Iozia*, 13 F.R.D. 335, 338 (SDNY 1952), the United States Supreme Court in *Nixon*, stated that "[a]gainst this background, the [party seeking discovery of documents], in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 700, 94 S. Ct. at 3103, 41 L. Ed. 2d 1039.

Smith also cites *State v. Wade*, 159 N.W.2d 396, 400 (S.D. 1968) for the standard in determining when evidentiary matters should be denied. This Court in *Wade* took into consideration the danger to the public interest by disclosure. *Id.* It should be noted, however, that *Wade* was decided ten years before Rule 17(c) was adopted. *See* SDCL 23A-14-5 (Rule 17c) (adopted 1978). Thus, while this Court has not expressly abrogated *Wade*, its validity can be questioned in light of the adoption of Rule 17(c). Based upon this case law, Sheriff Milstead respectfully requests that this Court adopt the test employed by the United States Supreme Court in *Nixon* and require the party seeking the records to demonstrate specificity, admissibility, and relevancy.

C. The information Smith seeks is not relevant or admissible.

Smith seeks information in the personnel record that is propensity information and specific instances of conduct to attack Deputy Zishka's credibility. The trial court erred in finding that an *in camera* review should be conducted because "the defense [has] a right to present a defense and a right to try and ascertain whether or not there is evidence that could be relevant and could be admissible." HT at 31. Smith failed to demonstrate how such information was admissible. Thus, the trial court erred in allowing Smith to go on a fishing expedition through personnel records.

i. Propensity evidence is not admissible.

While Smith asserts that propensity evidence should be admissible to allege that the deputy the initial aggressor, this argument would require this Court to overturn over twenty years of precedent. *See State v. Cottier*, 2008 S.D. 79, ¶ 32, 755 N.W.2d 120, 133; *State v. Knecht,* 1997 SD 53, ¶ 15, 563 N.W.2d 413, 419; *State v. Latham,* 519 N.W.2d 68, 71 (S.D. 1994) (noting that specific instances of the victim's violent conduct are relevant only if "known to [defendant] at the time of the incident")); *2 Weinstein's Federal Evidence* §§ 404.11[3][a], 405.05 [4] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed 2007) (noting that although specific acts of violence may not be used to prove the victim's violent propensities, "specific acts ... known to the defendant at the time of the offense may be admissible to prove the defendant's state of mind").

As this Court recognized in *Cottier*, even where a defendant seeks to admit information to corroborate his story that the victim was the aggressor, such specific instances of conduct are not admissible unless the defendant knew of them before the crime. *Cottier*, 2008 S.D. 79, at ¶ 32, 755 N.W.2d at 133. Furthermore, this Court expressly prohibited offering specific instances of conduct to demonstrate that one's actions on a certain date conformed to prior actions:

> Cottier attempted to argue Red Star's actions on the night of the attack conformed to previous specific behavior. This purpose is expressly prohibited under SDCL 19–12–5 (Rule 404(b)) (stating "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith").

Id. at ¶ 32, 755 N.W.2d at 133. Smith has not shown awareness before the date of the assault of any specific instances of conduct potentially within Deputy Zishka's personnel file.

Smith seeks to have this Court overturn its prior precedent, however, the Arizona Supreme Court recently recognized that there is no trend to move away from such prohibition. *See State v. Fish*, 213 P.3d 258, 269 (Ariz. Ct. App. 2009) ("Contrary to Defendant's assertions, we see no 'trend' in admitting previously unknown specific act evidence in self-defense cases as proof of who was the first aggressor"). The Arizona court further stated, "[i]n Arizona, as well as the majority of jurisdictions with similar evidentiary rules, a defendant may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor." *Id.* at 270.

The information Smith seeks also cannot be admitted for habit evidence. This Court has stated, "[a]n individual's disposition relative to peacefulness, drunkenness, or observance of religious mandates is too general to be a habit, these matters relating more to character." *Darrow v. Schumacher*, 495 N.W.2d 511, 521 (S.D. 1993). The same is true for a general character of aggressiveness.

Regardless of how Smith attempts to characterize the information within a personnel record, in the end, the information within the personnel file still consists of specific instances of conduct that she is attempting to use as propensity evidence. Smith's attempt to admit prior citizen complaints, prior uses of force, or supervisors' comments is only being proffered in this case to demonstrate propensity for aggression. A victim's aggression is only an issue outside of credibility if Smith was alleging self-defense, and such instances would only be relevant if Smith was aware of them before the alleged crime occurred.

Instead, Smith's theory of the case is that the assault never took place. Thus, the only possible reason for admitting such information would be to try to show that Deputy Zishka is lying about the incident. Based upon the decision in *Cottier*, the trial court erred in finding that information contained within the personnel files might be relevant or admissible.

ii. Information within the personnel files is not admissible under SDCL 19-19-404(b).

Information within the personnel records including prior complaints, supervisor evaluations, or use of force forms is not admissible under SDCL 19-19-404(b). Smith is seeking to attack Deputy Zishka's credibility under the guise of

404(b). SB at 23-27. She argues that the information she seeks is admissible under SDCL 19-19-404(b) to show the officer's motive, plan, modus operandi, or absence of mistake or accident. SB at 23-27.

As this Court has held, "[i]n accord with SDCL 19–12–5 (Rule 404(b)), the admissibility of other acts evidence depends on a two-step analysis: (1) whether the evidence is relevant to an *issue other than character*, and (2) whether 'the probative value of the evidence is substantially outweighed by its prejudicial effect....'" *State v. Lassiter*, 2005 S.D. 8, ¶ 15, 692 N.W.2d 171, 176 (emphasis supplied) (quoting *State v. Ondricek,* 535 N.W.2d 872, 873 (S.D.1995); *see* SDCL 19–12–3 (Rule 403)). "In determining whether to admit the evidence of other acts, a trial court must decide whether the proffered evidence is relevant to some material fact." *Id.* at ¶ 15, 692 N.W.2d at 176.

Smith cleverly attempts to disguise character evidence as evidence of motive, plan, modus operandi, or absence of mistake or accident. The jury in the criminal case, however, will be asked to decide whether Smith assaulted Deputy Zishka. Either the jurors will believe Deputy Zishka that Smith assaulted him or they will not. Deputy Zishka's conduct is irrelevant because Smith is not asserting self-defense as an excuse for her actions. HT 17, 31. Thus, Smith, by her own admission, is not offering the information within the personnel files for any other purpose than to impugn Deputy Zishka's character.

Smith has not cited a single case where evidence of the *victim's* motive, intent, plan, modus operandi was admissible under 404(b). Unlike the defendant's motive to commit a crime, a victim's motive is not relevant to the underlying case. Smith

confuses motive to commit a crime, which is admissible under 404(b) with motive to lie, which is inadmissible character evidence under 404:

> The motive exception in Rule 11-404(B) is intended to allow evidence of *a defendant's* prior bad acts to be admitted to show that the defendant had a motive to commit a crime, not, as Defendant argues, to show that a witness has a motive to lie. *See State v. Allen,* 2000-NMSC-002, ¶ 41, 128 N.M. 482, 994 P.2d 728 (filed 1999) (holding that evidence of a defendants prior bad acts was admissible because it showed that he had a motive to murder his victim so that she could not report the crime). Where, as here, the motive to be shown is a motive to lie, not a motive to commit a crime, Rule 11-404(B) is inapplicable. The evidence is being used to attack the credibility of the witness and is therefore governed by Rule 11-608 NMRA. *State v. Lovato,* 91 N.M. 712, 715, 580 P.2d 138, 141 (Ct.App.1978) (noting that "evidence of character and conduct attacking the credibility of [a] witness" is governed by Rule 11-608, not Rule 11-404).

State v. Osborne, 2009 WL 6547635, *2 (N.M. Ct. App. 2009) (emphasis in original). Smith's only purpose for discovery and use of the information contained within the personnel records is to attack Deputy Zishka's credibility. Such use is not authorized under SDCL 19-19-404(b), which Smith recognizes. SB at 24 (citing *State v. Wright*, 1999 S.D. 50, 593 N.W.2d 792, 798 (evidence of other acts is inadmissible to prove character)). The same logic applies to the other exceptions under 404(b). Based upon this case law and the facts of the underlying case, none of the 404(b) exceptions applies in this case. Thus, Smith failed to demonstrate that information found within the personnel file is relevant or admissible.

iii. <u>SDCL 19-19-404(a) does not allow the introduction of information within the personnel files.</u>

The information contained within the personnel files would not be admissible under SDCL 19-19-404(a). Rule 404(a) only allows reputation evidence and specific

instances of conduct known to the victim at the time of the incident. *State v. Hart*, 1998 S.D. 93, ¶ 27, 584 N.W.2d 863, 868 ("An accused may offer a pertinent trait of character of a victim under SDCL 19–12–4(2), and this is generally done through testimony about the victim's reputation."); *Latham,* 519 N.W.2d at 71 (specific instances of the victim's violent conduct are relevant only if "known to [defendant] at the time of the incident"). *Cottier*, 2008 S.D. 79, at ¶ 33, 755 N.W.2d at 133. Here, Smith is seeking records of specific instances of conduct, which would only be used to attack Deputy Zishka's credibility.

Additionally, Smith's argument that she would need such records to rebut testimony by the State as to the deputy's peacefulness is unconvincing. SDCL 19-9-404(a)(2) does not allow the prosecution to introduce character evidence of a victim in its case-in-chief to bolster the witnesses testimony, but only allows such evidence to rebut the defendant's evidence that the victim was not peaceful. *See* SDCL 19-19-404(a)(2) ("Evidence of a pertinent trait of character of the victim of the crime offered *by an accused*, or by the prosecution *to rebut the same*, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor"). Thus, the State cannot introduce evidence of the officer's character without Smith first presenting evidence of the victim's *reputation* for alleged violence, which is only potentially relevant in a case where the defendant is claiming self-defense. Either way, specific instances are conduct are not admissible under these circumstances. Thus, the personnel records would not be admissible under SDCL 19-19-404.

SDCL 19-19-608 is applicable here but specifically states that specific instances of conduct relating to credibility is not admissible:

> Specific instances of the conduct of a witness, *for the purpose of attacking or supporting his credibility*, other than conviction of crime as provided in § 19-19-609, *may not be proved by extrinsic evidence*. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:
>
> (1) Concerning his character for truthfulness or untruthfulness; or
>
> (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(emphasis supplied). Specific instances of conduct are not admissible to prove character of the witness. The only reason to introduce such evidence would be to attack Deputy Zishka's credibility. Smith has failed to prove that the information his personnel file is relevant or admissible under any circumstances.

iv. <u>Smith has not demonstrated that peer review information from supervisors, including disciplinary procedures, is relevant or admissible.</u>

Smith does not appear to present any case law or argument that peer review information from supervisors, including disciplinary procedures, is relevant or admissible. Sheriff Milstead, therefore, relies upon his previous arguments that such information is not relevant or admissible.

II. SMITH'S RIGHT TO PRESENT A DEFENSE IS NOT IMPEDED SIMPLY BECAUSE THE COURT REFUSES TO ALLOW HER *CARTE BLANCHE* ON ALL RECORDS AND DISCOVERY.

i. Smith's right to present a defense does not mean she can disregard the rules of evidence and rules of discovery.

The right to present a defense does not give a defendant *carte blanche* on all records and discovery. As this Court has recognized, the right to present a defense still requires application of the rules of evidence and discovery:

> It is well settled that the right to cross-examine is not absolute. *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54–5. The ability to cross-examine witnesses does not include the power to compel production of all information that *may* be useful to the defense. "[T]he Confrontation Clause only guarantees an opportunity for *effective* cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 53, 107 S.Ct. at 999, 94 L.Ed.2d at 54 (emphasis added).

State v. Karlen, 1999 S.D. 12, ¶ 38, 589 N.W.2d 594, 602 (emphasis in original); *see also Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988) ("While the Defendant has a right to present a defense as the circuit court recognized, '[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence'").

Smith implores this Court to disregard the rules of discovery and the rules of evidence in the name of the "right to a fair trial." SB at 6-19. Sheriff Milstead is not seeking to prevent Smith from asserting a defense in the criminal case. Smith will still be provided every opportunity to present her defense and cross-examine witnesses;

however, this does not mean that the Court should ignore rules of discovery or rules of evidence in the name of allowing Smith to present a defense.

Furthermore, while Smith claims that it is unconscionable to allow the prosecution to invoke privileges while prosecuting the defendant, this argument is unpersuasive. Here, the State does not have access to Deputy Zishka's personnel records and the government is not claiming a privilege. Instead, a separate party, Sheriff Milstead,[3] is seeking to protect confidential information from discovery.

Sheriff Milstead recognizes that in deciding whether disclosure is appropriate under the Confrontation Clause, the United States Supreme Court and this Court have weighed the state's interest in protecting disclosure of the records against the defendant's right to use such information to cross-examine the witness. *Id.* at ¶ 43. The facts in *Karlen*, however, are distinguishable from the issues presented here.

The Court in *Karlen* did not analyze, and the State did not challenge, whether the documents sought by Karlen would be admissible in the criminal case. The statements sought by Karlen were potentially prior inconsistent statements. Such evidence would likely be admissible under SDCL 19-19-613(b) as long as the victim was given the opportunity to explain or deny the statements. That situation is clearly distinguishable from the facts presented here. In this case, Smith is seeking records but she has not shown how such records would be admissible.

---

[3] While Smith argues that Sheriff Milstead and the State are the same party, this argument is misplaced. The Minnehaha County State's Attorney's Office has a statutory duty to defend all department heads, including the Sheriff. *See* SDCL 7-16-8. As required by this statute, the civil section of the State's Attorney's Office represents Sheriff Milstead in his official capacity. Deputy State's Attorney Matthew Abel separately represents the State in this matter.

The Court must weigh the public policy of allowing candid supervisor evaluations, correction of errors, performance evaluations, and investigation of citizen complaints with Smith's right to cross-examine Deputy Zishka concerning his personnel record. Sheriff Milstead submits that the public policy of keeping this information private and encouraging evaluations and corrections of mistakes outweighs Smith's right to discover information that is not admissible or relevant to the underlying case. Thus, Sheriff Milstead submits that this Court find that the trial court erred in finding Deputy Zishka's personnel record was potentially admissible and potentially discoverable.

ii. Smith should not have access to private personnel records to fish for information.

Smith should not have access to private personnel records to fish for information for cross-examination inquiry purposes. This Court has recognized that the right to cross-examine a witness does not give a defendant an absolute right to conduct discovery of files for items he thinks may be useful at some point during trial. *See Karlen*, 1999 S.D. 12, at ¶ 38, 589 N.W.2d at 602.

Likewise, the New York courts noted that to be discoverable, the documents must themselves be evidence:

> It has been firmly established in our law of discovery as far back as 1927 in *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24 at page 29, 156 N.E. 84 at page 85 that, 'Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. *Documents to be subject to inspection must be evidence themselves.*

People v. Fraiser, 348 N.Y.S.2d 529, 532 (N.Y. Co. Ct. 1973) (emphasis supplied) (citations omitted); *see also People v. Norman*, 350 N.Y.S.2d 52, 58 (N.Y. Sup. Ct. 1973).

The *Fraiser* court went on to note that the purpose of the subpoena duces tecum was not to permit a fishing expedition into police personnel records:

> The subpoena duces tecum presented herein to obtain the departmental personnel records of the police witnesses is merely a device to carry on a 'fishing expedition' to seek out Possible [sic] evidence which may be useful to the defendant. Such was never, and is not now, the function of the process of subpoena duces tecum. *See also, Peters v. Marquez*, 21 Misc.2d 720, 196 N.Y.S.2d 840, and cases therein cited. *Hoffman v. Consolidated Avionics Corp.*, 20 Misc.2d 84, 85, 197 N.Y.S.2d 516, 518.

Id. at 533. The *Fraiser* court noted the pitfall of allowing a defendant to go searching for reputation or bad act evidence, "the court can envision an extension of the *Sumpter* decision to enable the discovery of a witness' social club records, service records, church records, school records, employment records, and *Ad infinitum*, all to the end of hunting for the elusive 'bad acts.'" *Id.* at 537. Additionally, one can envision motions and arguments as to whether the defendant has the right to dig into a victim's finances, juror personnel files, or the judge's personnel files all so the defendant can be assured he is receiving a "fair" trial.

Several courts have held that a defendant does not have a license to conduct a fishing expedition into personnel records and rejected the defendant's request to review such records. *See Minor v. State*, 780 So. 2d 707 (Ala. Crim. App. 1999), *rev'd on other grounds*, 780 So. 2d 796 (Ala. 2000); *State v Cano* 743 P2d 956 (Ariz. App. 1987); *Sisson v. Superior Court*, 156 Cal.Rptr.3d 533 (Cal. Ct. App. 2013); *State v. Jones*, 59 A.3d 320 (Conn. App. Ct. 2013); *State v. Henry*, 805 A.2d 823 (Conn. App. Ct. 2002);

Vaughn v State, 378 N.E.2d 859 (Ind. 1978); *McKinley v. State*, 465 NE2d 742. (Ind. App. 1984); *State v. Deavers*, 843 P.2d 695, (Kan. 1992) *cert den* (US) 125 L Ed 2d 676, 113 S Ct 2979; *State v Roy*, 557 A.2d 884 (Vt. 1989).

Smith should not be allowed to conduct a fishing expedition into confidential personnel files without showing such records are relevant and admissible. Smith has failed to make such a showing. Because she has failed to show relevance, admissibility, and specificity, Sheriff Milstead respectfully requests that this Court find the trial court erred in holding such records were potentially admissible. Sheriff Milstead further respectfully asks that the Court overturn the trial court's order requiring the personnel files to be disclosed for an *in camera* review.

III. THE CIRCUIT COURT ERRED IN REQUIRING AN *IN CAMERA* INSPECTION OF THE DEPUTY'S PERSONNEL RECORDS.

The circuit court erred in requiring an *in camera* inspection of Deputy Zishka's personnel records where relevance, admissibility, and specificity were not demonstrated. While Sheriff Milstead recognizes that *in camera* review of documents is the preferred method for resolving discovery disputes, where, as here, the defendant makes no showing of relevance or admissibility, the trial court should not conduct an *in camera* review of such documents.

In order for Sheriff Milstead to have review of the trial court's decision, documents cannot be turned over to the trial court for an *in camera* review. If Sheriff Milstead turns the documents over to the trial court, there is nothing to prevent the trial court from providing the documents to opposing counsel without review. In

order to prevent a fishing expedition and provide safeguards to a third party that is subpoenaed for records, it is appropriate for the Court to require a threshold showing of relevance, admissibility, and specificity. Here, the trial court made a finding that such documents may be relevant or admissible and that Smith has a right to present a defense. Because Smith cannot provide a path to admissibility for these documents, the trial court erred in granting an *in camera* review of inadmissible documents.

Furthermore, marking documents "For Attorney's Eyes Only" is not a valid safeguard to prevent use of the information contained within the documents. In South Dakota, an attorney may cross-examine a deputy hundreds of times over the span of that attorney's and deputy's careers. It is illogical to think that attorneys would have seen such information and not use it in the next case in cross-examination of the deputy.

To allow discovery of such information would lead to Deputy Zishka having to answer for every citizen complaint, supervisor comment, or performance review every time he testifies.[4] Such a standard would surely lead to law enforcement discontinuing retraining or performance evaluations and refusal to provide reviews and decisions regarding citizen complaints. The public is best served when officers are reviewed, provided guidance, and retrained when necessary. Based upon the fact that Smith cannot demonstrate relevance, admissibility, or specificity, Sheriff Milstead

[4] The statements made herein are for illustrative purposes and nothing within this brief should be construed to mean that any documents, complaints, or other information exists within Deputy Zishka's personnel file.

respectfully requests that this Court reverse the circuit court's order requiring him to turn over these records for an *in camera* review.

CONCLUSION

Smith did not show the trial court and has not demonstrated to this Court how the information she seeks would ever be admissible. The only issue for the jury to decide is one of credibility between Deputy Zishka and Smith. Thus, the information Smith seeks is solely specific instances of conduct bearing on credibility, which is not admissible under the rules of evidence. The circuit court erred in holding that SDCL 23A-14-5 required the release of the contents within a law enforcement officer's confidential personnel record to the circuit court.

Based upon the foregoing facts and case law, Sheriff Milstead respectfully requests that the Court apply the standard for discovery under SDCL 23A-14-5 (Rule 17(c)) as adopted by the federal courts and reverse the circuit court's order requiring him to provide certain records within Deputy Zishka's personnel file to the circuit court for an *in camera* inspection.

Dated this 29th day of July, 2015.

RESPECTFULLY SUBMITTED:

/s/ Sara E. Show

Kersten A. Kappmeyer
Sara E. Show
Counsel for Minnehaha County Sheriff Mike Milstead
415 N. Dakota Avenue
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

Sara Show, Deputy State's Attorney for Minnehaha County, hereby certifies that a true and correct copy of the foregoing **Appellant's Reply Brief** in the above-entitled matter was served via electronic service upon the following individuals:

Mr. Beau J. Blouin
Minnehaha County Public Defender's Office
413 N. Main Ave.
Sioux Falls, SD 57104
bblouin@minnehahacounty.org

Mr. Matthew J. Abel
Minnehaha County State's Attorney's Office
415 N. Dakota Avenue
Sioux Falls, SD 57104
mabel@minnehahacounty.org

Dated this 29th day of July, 2015.

/s/ Sara E. Show
Sara E. Show

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4,958 words from the Argument through the Conclusion. I have relied upon the word count of a word processing program to prepare this certificate.

Dated this 29th day of July, 2015.

/s/ Sara E. Show
Sara E. Show