IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, THE DEPARTMENT OF PUBLIC SAFETY, Appellant, vs. IBRAHIM NASR IBRAHIM, Appellee.	)	Appeal No. 29344

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas E. Hoffman
Circuit Court Judge

APPELLANT'S BRIEF

Notice of Appeal was filed on June 5, 2020

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PRELIMINARY STATEMENT

For convenience and clarity, Appellant/State of South Dakota, The Department of Public Safety, will be referred to as the "Department." Appellee/Ibrahim Nasr Ibrahim will be referred to as "Ibrahim." References to the Office of Hearing Examiners will be "OHE." References to the Settled Record will be "SR" and to the appropriate page number. References to the Commercial Driver's License will be "CDL."

JURISDICTIONAL STATEMENT

This appeal is taken from the Department's Final Decision dated October 23, 2019 ("*Final Decision*"), which was reversed on May 11, 2020 in the circuit court's Memorandum Opinion and Order. The Department filed a Notice of Appeal on June 5, 2020. This Court has jurisdiction over this appeal pursuant to SDCL Ch. 1-26, including SDCL §§ 1-26-30; 1-26-30.2; and 1-26-37.

STATEMENT OF ISSUES

The broad issues before this Court are:

A. DID THE CIRCUIT COURT ERR BY OVERRIDING THE ISSUES AS FRAMED BY THE PARTIES AND *SUA SPONTE* CALLING INTO QUESTION THE CONSTITUTIONALITY OF SDCL 32-12A-36(4)?

The circuit court erred when it took up for the first time on appeal and *sua sponte* the issue of the constitutionality of SDCL 32-12A-36(4).

Relevant Cases:

Dep't of Homeland Sec. v. Thuraissigiam 591 U.S. ___, ___ S. Ct. ___, 2020 WL 3454809

United States v. Sineneng-Smith, 590 U.S. ___, 140 S. Ct. 1575 (2020)

United States v. Slagg, 651 F.3d 832 (8th Cir. 2011)

Kern v. City of Sioux Falls, 1997 S.D. 19, 560 N.W.2d 236

Relevant Statutes and Rules:

SDCL 32-12A-36(4)

SDCL 15-6-24(c)

Party-Presentation Rule

B. DID THE CIRCUIT COURT ERR BY DECLARING SDCL 32-12A-36(4) UNCONSTITUTIONAL?

The circuit court erred when it declared SDCL 32-12A-36(4) unconstitutional on a void-for-vagueness standard.

Relevant Cases:

State v. Asmussen, 2003 S.D. 102, 668 N.W.2d 725

Kraft v. Meade County ex rel. Bd., 2006 S.D. 113, 726 N.W.2d 237

Revocation of Driver License of Fischer, 395 N.W.2d 598 (S.D. 1986)

Relevant Statutes and Rules:

SDCL 32-12A-36(4)

Void for Vagueness Rule

C. DID THE CIRCUIT COURT ERR WHEN IT DETERMINED THAT THERE WERE NOT SUFFICIENT FACTS TO SUPPORT THE DEPARTMENT'S FINAL DECISION?

The circuit court erred when it dovetailed its unconstitutionality rationale into the conclusion that there were inadequate facts to support the Department's disqualification of Ibrahim. There exist adequate factual findings for the disqualification, and Ibrahim has not shown any other countervailing facts.

Relevant Cases:

Certifiability of Jarman, 2015 S.D. 8, 860 N.W.2d 1

Black v. Div. of Criminal Investigation, 2016 S.D. 82, 887 N.W.2d 731

Relevant Statutes and Rules:

SDCL 1–26–36

STATEMENT OF THE CASE AND FACTS

On August 19, 2017, Ibrahim was operating a noncommercial motor vehicle and was pulled over for an equipment violation. SR 21 and 42. Law enforcement discovered that Ibrahim had felony levels of marijuana in his vehicle, and Ibrahim received a citation. *Id.* On February 20, 2018, Ibrahim pled guilty to his violation of SDCL 22-42-6, "Possession of Marijuana, More than 2 Ounces, Less Than One Pound," a Class 6 felony. *See State v. Ibrahim*, 49 CRI 17-6579. Ibrahim's Abstract of Operating Record indicated that he had been convicted of a felony, that the felony was committed in a vehicle by Ibrahim, and Ibrahim was a CDL holder when the felony was committed. SR 33 and 42. Ibrahim was granted a Suspended Imposition of Sentence. *See State v. Ibrahim*, 49 CRI 17-6579.

Upon notification of Ibrahim's conviction, the Department began disqualifying Ibrahim's CDL privileges for one year. SR 31. An administrative hearing was held on September 26, 2019. SR 42. At that hearing, Ibrahim was represented by counsel.[1] *Id.* Based upon the record before the OHE and the exhibits submitted, the OHE rendered its proposed decision disqualifying Ibrahim's commercial driving privileges for one year on October 23, 2019. SR 42-44. The Department adopted the OHE's proposed decision in full and issued its Final Decision on October 23, 2019. SR 45.

Ibrahim appealed to the circuit court. SR 1-2. As the Appellant in the circuit court appeal, Ibrahim did not seek to secure a transcript of the OHE hearing. Through

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[1] For the Department's argument on the applicability of the U.S. Supreme Court's recent case of *United States v. Sineneng-Smith*, 590 U.S. ___, 140 S. Ct. 1575 (2020) *infra.*, it is important to note that Ibrahim never undertook the required notification challenging the constitutionality of SDCL 32-12A-36(4). SDCL 15-6-24(c).

agreement of the parties, Ibrahim's time to file his appellate brief was extended until January 20, 2020. SR 48-49. The sole issue Ibrahim's brief raised was whether sufficient evidence existed to support the Department's decision to disqualify Ibrahim's CDL. SR 50-60.

On February 7, 2020, the Department responded and asserted that sufficient evidence was found throughout the record to support disqualification of Ibrahim's commercial driving privileges. SR 61-65. On February 24, 2020, Ibrahim filed his reply brief, again assailing the sufficiency of the evidence. SR 71-76.

For the first time in the entirety of the case or appeal, on March 26, 2020, via email, the circuit court directed the parties to address the following questions:

> "(1) Whether one's having been convicted of felony possession of marijuana arising from a set of facts where the defendant possessed the marijuana inside of a motor vehicle which he was operating, but without any other facts suggesting that the vehicle was an instrumentality of the crime of possession, constitutes 'using… a motor vehicle in the commission of a felony' in violation of SDCL 32-12A-36?
>
> "(2) Whether there is any crime of "using a commercial or noncommercial motor vehicle in the commission of any felony" codified in the state of South Dakota, and if not, whether that renders SDCL 32-12A-36 void for vagueness, or otherwise nugatory?"

SR 93-95.

On February 24, 2020, the parties filed simultaneous briefs per the circuit court's direction. SR 77-86. The circuit court entered its Memorandum Opinion and Order indicating, *inter alia,* that SDCL 32-12A-36(4) requires the vehicle to be instrumental in the underlying felony, that SDCL 32-12A-36(4) is unconstitutionally vague, and – as

SDCL 32-12A-36(4) is vague and inapplicable – that the Department's findings of fact were inadequate to disqualify Ibrahim's commercial driving privileges. SR 87-92.

Notice of Entry of the circuit court's decision was filed on May 15, 2020. SR 96-97. The Department's Notice of Appeal was filed on June 5, 2020. This Brief follows.

STANDARD OF REVIEW

This Court's standard of review is settled law and its review of agency decisions is the same as a circuit court's review. SDCL 1-26-36; *Certifiability of Jarman*, 2015 S.D. 8, ¶ 8, 860 N.W.2d 1, 5. This Court's review of agency findings is unaided by any presumption that the circuit court's decision was correct; great weight is given to the findings made and inferences drawn by an agency on questions of fact; reversal should only occur when those findings are clearly erroneous in light of the entire record; and questions of law are reviewed *de novo*. *Id.* When addressing the constitutionality of statutes, statutes are presumed constitutional, a challenger bears the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision, and constitutional interpretation is a question of law reviewable *de novo*. *Kraft v. Meade County ex rel. Bd.*, 2006 S.D. 113, ¶ 2, 726 N.W.2d 237, 239.

ARGUMENT

A. DID THE CIRCUIT COURT ERR BY OVERRIDING THE ISSUES AS FRAMED BY THE PARTIES AND *SUA SPONTE* CALLING INTO QUESTION THE CONSTITUTIONALITY OF SDCL 32-12A-36(4)?

The circuit court erred when it took up for the first time on appeal and *sua sponte* the issue of the constitutionality of SDCL 32-12A-36(4). In South Dakota, it is settled law that statutes are presumed constitutional, a challenger bears the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision, and one who

would undertake to show a statute to be unconstitutional carries a heavy burden. *Kraft v. Meade County ex rel. Bd.*, 2006 S.D. 113, ¶ 2, 726 N.W.2d 237, 239; *Revocation of Driver License of Fischer*, 395 N.W.2d 598, 603 (S.D. 1986). The constitutionality of a statute cannot be raised for the first time on appeal. *Kern v. City of Sioux Falls*, 1997 S.D. 19, ¶ 12, 560 N.W.2d 236, 239. This is a rule of procedure, not jurisdiction, and this Court may consider a matter for the first time on appeal if faced with a compelling case, the attorney general must be allowed to participate, and the person challenging the constitutionality of a statute must give notice to the attorney general of the pendency of the action. *Id.;* SDCL 15-6-24(c). A court should decline to rule on the constitutionality of a statute unless 1) it is of considerable public importance which 2) requires prompt resolution. *Kern, supra.; see also Sharp v. Sharp*, 422 N.W.2d 443, 446 (S.D. 1988).

Binding precedent on the principle of Party Presentation was recently reaffirmed by the U.S. Supreme Court. Justice Ginsburg's opinion stands as a guidepost for reliance upon the parties' presentation when the U.S. Supreme Court unanimously held:

> "In our adversarial system of adjudication, we follow the principle of party presentation…in both civil and criminal cases, in the first instance and on appeal…we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present…as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief…in short, courts are essentially passive instruments of government…they do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties."

United States v. Sineneng-Smith, 590 U.S. ___, 140 S. Ct. 1575, 1578-1579 (2020) (slip op. 5-6), *internal citations, annotations, and quotations omitted*; (*reaffirmed in Dep't of Homeland Sec. v. Thuraissigiam* 591 U.S. ___, ___ S. Ct. ___, 2020 WL

3454809 (2020)); *see also U.S. v. Slagg* 651 F.3d 832, 850 (8th Cir. 2011), (*see* ft.nt. 10, adopting the Party Presentation rule outlined in the case of *Greenlaw v. United States,* 554 U.S. 237, 243 (2008)). Justice Thomas' concurrence reinforces that Party Presentation is akin to judicial restraint. *Sineneng-Smith, supra.* (slip op. 18). In other words, the U.S. Supreme Court and this Court have cautioned circuit courts 1) to rely upon the parties' presentation and 2) exercise judicial restraint against engaging in unsolicited constitutional analysis of the Legislature's enactments. *Sineneng-Smith, supra.; Kern, supra.*

Applied here, the circuit court *sua sponte* interjected a preferred theory of the case and engaged in unsolicited constitutional analysis of a Legislative enactment. The circuit court required answers to questions neither framed nor presented by the parties. SR 93-95. Factually, Ibrahim was represented by an attorney at the administrative level and on appeal to the circuit court. SR 42 and 47. It is undisputed that Ibrahim never provided notice to the Attorney General as required by SDCL 15-6-24(c). Such notification is a condition-precedent to a constitutional challenge. *Kern, supra.*, ¶ 12, 560 N.W.2d at 239. Further, the record before the OHE is void of any constitutional questions. It was only addressed on appeal *after* the parties had submitted their briefs to the circuit court. SR 93-95.

Little wonder then that only after the circuit court emailed its preferred analysis, Ibrahim even brought the argument forward. SR 93-94; 82-86. Much like Justice Ginsburg's rhetorical question posed in *Sineneng-Smith,* how could Ibrahim do otherwise? *Sineneng-Smith, supra.,* 140 S. Ct. at 1581-82. After learning the circuit court's preferred analysis, Ibrahim rode the argument suggested. Ibrahim's prior

arguments fell by the wayside as they did not mesh with the circuit court's theory of the case, and his altered presentation remains patently tied to the circuit court's direction.

Further, Ibrahim fails the *Sharp* two-part test. *Sharp, supra.,* 422 N.W.2d at 446. While the Department recognizes that this issue is of importance to Ibrahim alone, it is not of considerable public interest nor is it an existing emergency. *Id.* Much like this Court's analysis in *Sharp,* the Department asserts that, "the people have a right to present their arguments, and that opportunity is waiting." *Id.*

Accordingly, based upon the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

B. DID THE CIRCUIT COURT ERR BY DECLARING SDCL 32-12A-36(4) UNCONSTITUTIONAL?

The circuit court erred when it declared SDCL 32-12A-36(4) void for vagueness and thereby unconstitutional. In review, a circuit court's constitutional interpretation is a question of law reviewable *de novo*. *Kraft, supra.* On a vagueness challenge, the challenged statute is presumed constitutional, that presumption disappears when the unconstitutionality of the act is clearly and unmistakably shown, and there must be no reasonable doubt that it violates constitutional principles. *State v. Asmussen,* 2003 S.D. 102, ¶ 2, 668 N.W.2d 725, 728. As further held in *Asmussen*:

> "…the void for vagueness doctrine is based on the due process protection of the Fifth and Fourteenth Amendment of the United States Constitution and Article VI § 2 of the South Dakota Constitution. As a general rule, a void for vagueness review is limited to the specific facts of the case…[t]he standard for a void for vagueness claim in violation of due process is whether 'the prohibited act or omission is expressed in terms so vague that reasonable people of ordinary intelligence might

> apply it differently… [a] statute will be held unconstitutional for vagueness where the forbidden conduct is so poorly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

Asmussen, supra., ¶ 2, 668 N.W.2d 728 (*internal citations and quotations omitted).* Additionally, in matters of statutory interpretation, this Court begins with the plain language and structure of the statute. *In re Certification of a Question of Law from the U.S. Dist. Court, Dist. of South Dakota, S. Div.*, 2014 S.D. 57, ¶ 8, 851 N.W.2d 924, 927. Words and phrases in a statute must be given their plain meaning and effect, it is fundamental that the words of a statute must be read in their context, and it must be done with a view to their place in the overall statutory scheme. *Id.* A judicial construction that renders a statute as mere surplusage is met with disfavor by this Court. *Goin v. Houdashelt*, 2020 S.D. 32, ¶ 13, ___ N.W.2d ___. Finally, this type of an administratively coercive statute of general applicability was held constitutional in the seminal case of *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552. There, the U.S. Supreme Court directly acknowledged – but specifically did not challenge – the viability of administrative statutes which are tailored to coerce drivers into compliance with the law. *McNeely, supra.*, 569 U.S. at 160-161, 133 S. Ct. at 1566; see also, *City of Wichita v. Jones*, 353 P.3d 472 (Kan. App. 2015).

SDCL 32-12A-36(4) is the challenged statute. In relevant part, that statute provides, "[a]ny person is disqualified from driving a commercial motor vehicle for a period of not less than one year…(4) [i]f convicted of a first violation of using a…noncommercial motor vehicle in the commission of any felony other than a felony described in § 32-12A-38. . . ." SDCL 32-12A-36(4). Within that chapter, felony has its customary definition as, "any offense under state or federal law that is punishable by

death or imprisonment for a term exceeding one year." SDCL 32-12A-1(16). In both statutes, the term "any" should be given its plain and ordinary meaning of, "used to indicate one selected without restriction." *Merriam Webster's Collegiate Dictionary,* 10th Ed. 1993; SDCL 2-14-1. Of note, within SDCL 32-12A-36, the Legislature delineated between the following:

- SDCL 32-12A-36(1): violations of SDCL 32-23-1, the "Driving Under the Influence" statute;
- SDCL 32-12A-36(2): violations of SDCL 32-12A-44, the Commercial Driving Under the Influence statute;
- SDCL 32-12A-36(3): SDCL §§ 32-34-5 and 32-34-6, the "Hit and Run" statute as well as the "Failure to Furnish Information" statute, respectively;
- SDCL 32-12A-36(5): violations of SDCL §§ 32-12A-43 and 32-12A-46, the 24-hour disqualification statute as well as the implied consent statute, respectively;
- SDCL 32-12A-36(6): violations of SDCL 32-12A-8, the Driving a Commercial Motor Vehicle while suspended/revoked statute; and
- SDCL 32-12A-36(7): violations of SDCL 22-16-41, the Vehicular Homicide statute.

SDCL 32-12A-36(1)-(3), (5)-(7), inclusive.

The Legislature defined which crimes fall under particular subsections of SDCL 32-12-36, and the Legislature saw fit to provide a "catchall" statute at SDCL 32-12A-36(4). If SDCL 32-12A-36(4) were not included within the statute, the only reason a person could be disqualified under SDCL 32-12A-36 would be for a violation of the differing subsections and their specifically identified crimes. Yet, SDCL 32-12A-36(4) acts as the catchall when it plainly states, "If convicted of a first violation of using a… noncommercial motor vehicle in the commission of <u>any</u> felony…." SDCL §§ 32-12A-36(4) and 32-12A-1(16) (emphasis added).

In application, the circuit court erred in declaring SDCL 32-12A-36(4) unconstitutionally vague. The OHE found that Ibrahim was pulled over for an equipment violation, he had a quantity of marijuana in the car, and it was enough to warrant felony charges. SR 42. Ibrahim's charges were felony offenses, and they fell within the purview of SDCL 32-12A-1(16). Appropriately, the Department disqualified Ibrahim under SDCL 32-12A-36(4). SR 31; 42-45. Further, the circuit court took judicial notice of Ibrahim's criminal docket of *State v. Ibrahim*, 49 CRI 17-6579. SR 87 (*see also* SR 33, "FEL" notation and docket number). However, in reversing the Department's Final Decision, the circuit court reads substantial language into SDCL 32-12A-36(4), essentially requiring that the vehicle be an instrumentality of the predicate crime. SR 91. Importantly, this language is not found in the statute nor has it been adopted by the Legislature. SDCL 32-12A-36(4).

The circuit court's analysis does not comport with binding precedent from this Court and strays wide from interpreting the plain language of SDCL 32-12A-36(4). *In re Certification, supra.*, ¶ 8; 851 N.W.2d at 927. The circuit court erred in construing SDCL 32-12A-36(4) as "so poorly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application." SR 91; *Asmussen, supra.*, ¶ 2, 668 N.W.2d at 728. The Department asserted then – as now – that the plain language of SDCL 32-12A-36(4) merits a straightforward "if/then" interpretation: <u>If</u> a person is convicted of using a noncommercial motor vehicle in the commission of any felony, <u>then</u> that person's commercial driving privileges are disqualified for a period of one year. Such an interpretation does not require the "guesswork" warned of in *Asmussen* and comports to plain definitions and interpretations. SDCL 2-12-1. Persuasive authority

is also found in our sister state's interpretation of a similar statute. *Radmacher v. Dir. of Revenue,* 405 S.W.3d 607, 610 (Mo. App. W.D. 2013).

Nevertheless, if the circuit court's rationale requiring an "instrumentality" portion is read into the SDCL 32-12A-36(4), that statute would only restrict those crimes which – by their nature – have the vehicle as part-and-parcel of the offense. This erodes the language of "any felony" within the statute. SDCL 32-12A-36(4). While this is contrary to the Legislature's intent, this likewise creates surplusage within the very statute at issue. If the circuit court's rationale is adopted, SDCL 32-12A-36(4) would stand as duplicative to SDCL 32-12A-36(1)-(3); (5)-(7). At that point, SDCL 32-12A-36(4) would have no bearing of its own, it stands as surplusage, and such construction leads to an absurd result. The circuit court's statutory construction rendering SDCL 32-12A-36(4) as surplusage should be met with disfavor by this Court. *Goin, supra.*, 2020 S.D. 32, ¶ 13, ___ N.W.2d ___.

Accordingly, based upon the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

C. DID THE CIRCUIT COURT ERR WHEN IT DETERMINED THAT THERE WERE NOT SUFFICIENT FACTS TO SUPPORT THE DEPARTMENT'S FINAL DECISION?

The circuit court erred when it dovetailed its erroneous constitutional interpretation and used that as a reason to find insufficient facts to support the Department's Final Decision. This Court's review of agency decisions gives great weight to the findings made and inferences drawn by an agency on questions of fact. SDCL 1-26-36; *Black v. Div. of Criminal Investigation,* 2016 S.D. 82, ¶ 13, 887 N.W.2d 731, 735-

736. This Court may reverse or modify an agency's findings if they are clearly erroneous in light of the entire evidence in the record; its review under the clearly erroneous standard is highly deferential; and it reverses only if review of the entire record has left it with a definite and firm conviction that a mistake has been made. *Id.* Further, "the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 36, 769 N.W.2d 440, 453.

The underlying facts have not been controverted. Ibrahim was driving a noncommercial motor vehicle, was pulled over, had felony levels of marijuana inside his vehicle, was cited, and convicted of a felony. SR 21, 42. These facts are found in Ibrahim's Abstract of Operating Record. SR 33 ("FEL" annotation on left-hand side with associated criminal docket number). The OHE found these facts, as did the Department. SR 42-46. On appeal, Ibrahim (as appellant) did not secure a transcript, and his failure to do so constitutes a waiver of the same. SDCL 1-26-32.2. Additionally, the circuit court took judicial notice of Ibrahim's underlying criminal file. SR 87; *see State v. Ibrahim*, 49 CRI 17-6579.

In application, the Department findings and inferences drawn on questions of fact are entitled to great weight. *Black, supra.* Under the facts, there is ample evidence that Ibrahim stands convicted of a felony committed while he was using a noncommercial motor vehicle. SR 21; 42. Specifically, on February 20, 2018, Ibrahim pled guilty to a violation of SDCL 22-42-6, "Possession of Marijuana, more than 2 Ounces, Less Than One Pound," a Class 6 felony, stemming from the citation Ibrahim was given while driving. *See State v. Ibrahim*, 49 CRI 17-6579. With the circuit court taking judicial notice of this file, it reinforces the facts as found within the record, the OHE's proposed

decision, and the Department's Final Decision.

No other facts have been shown. Ibrahim – as appellant to the circuit court – did not show any other countervailing facts and did not secure a transcript. This responsibility fell to Ibrahim. *Klutman, supra.* With no other facts presented to the circuit court, there was no showing of clear error, nor any showing that gives the required, "definite and firm conviction that a mistake has been committed." *Black, supra.*

Accordingly, based upon the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

CONCLUSION

The Department respectfully requests that this Court reverse the circuit court's Memorandum Opinion and Order, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year. The Department makes this request on several grounds. First, the Department asks that this Court reinforce its precedent of judicial restraint and further the Party Presentation Rule. The circuit court erred by interjecting constitutional questions neither framed nor presented by the parties. Second, the Department asks that this Court reverse the circuit court's *sua sponte* declaration of SDCL 32-12A-36(4) as unconstitutionally vague. The circuit court erred in its determination and analysis of the void for vagueness doctrine. Third, the Department asks that this Court reverse the circuit court's finding that there were insufficient facts to disqualify Ibrahim's commercial driving privileges. The circuit court erred in its review

of the record, and there were ample facts to support the Department's Final Decision. Fourth, the Department requests that this Court enter an order reinstating the Department's Final Decision upon remand.

REQUEST FOR ORAL ARGUMENT

The Department of Public Safety hereby requests oral argument on all issues and matters raised in this appeal.

Dated this 17th day of July 2020.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellant, State of South Dakota, The Department of Public Safety, hereby certify that on the 17th day of July 2020, a true and correct copy of Appellant's Brief was served by electronic mail to:

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and the original and 2 copies were mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

Dated this 17th day of July 2020.

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CERTIFICATE OF COMPLIANCE

Edward S. Hruska III, the attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

a. Appellant's Brief does not exceed 32 pages.

b. The body of Appellant's Brief was typed in Times New Roman 12-point typeface; and

c. The body of Appellant's brief contains 4,040 words and 21,645 characters with no spaces and 25,651 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

/s/ Edward S. Hruska III

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APPENDIX

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State of South Dakota
Department of Public Safety
Abstract of Operating Record

Driver History

FEL Felony committed in a vehicle by CDL holder
Violated: 2017-08-19 12:00 AM Convicted: 2018-03-28 Location: Minnehaha
Docket #: 49CRI17006579 MPH/Zone: 0/0 Detail:
Haz Mat: Court: CRI Type: Non-Commercial
ACD/ANSI: U03/*** Orig Code: Orig Ref:

PUD Permit unauthorized person to drive
Violated: 2017-01-18 12:00 AM Convicted: 2017-02-01 Location: Minnehaha
Docket #: 49MAG17000395 MPH/Zone: 0/0 Detail:
Haz Mat: N Court: MAG Type: Non-Commercial
ACD/ANSI: ***/*** Orig Code: PUD Orig Ref: 49MAG17000395

ACC Accident
Occurred: 2016-10-31 Location: Minnehaha
Accident No: 201616584 Type: Commercial

SPD Speeding
Violated: 2015-11-24 12:00 AM Convicted: 2015-12-21 Location: Minnehaha
Docket #: 49POA15019397 MPH/Zone: 35/30 Detail:
Haz Mat: N Court: UNK Type: Non-Commercial
ACD/ANSI: S93/*** Orig Code: Orig Ref:

FSS Fail to stop at sign or signal
Violated: 2014-01-29 12:00 AM Convicted: 2014-03-12 Location: Moody
Docket #: 50POA14000098 MPH/Zone: 0/0 Detail:
Haz Mat: N Court: UNK Type: Non-Commercial
ACD/ANSI: M15/*** Orig Code: Orig Ref:

SPD Speeding
Violated: 2013-11-01 12:00 AM Convicted: 2013-12-09 Location: Minnehaha
Docket #: 49POA13017050 MPH/Zone: 75/65 Detail:
Haz Mat: N Court: UNK Type: Non-Commercial
ACD/ANSI: S93/*** Orig Code: Orig Ref:

SPX Speeding 15 mph or more over limit
Violated: 2013-05-17 12:00 AM Convicted: 2013-05-29 Location: Minnehaha
Docket #: 49POA13007398 MPH/Zone: 35/15 Detail:
Haz Mat: N Court: UNK Type: Non-Commercial
ACD/ANSI: S15/*** Orig Code: Orig Ref:

I hereby certify that the record to which this certificate is affixed is a true copy of the original in the Department of Public Safety of South Dakota. This is a photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.

DEPARTMENT OF PUBLIC SAFETY

Signature: 7/1/19 By Kerry Date Officer or Employee

Kerry - 130

DEPARTMENT OF PUBLIC SAFETY DRIVER LICENSE PROGRAM SOUTH DAKOTA

Page 2 of 4

10

1

(11)

32-12A-36. Persons disqualified from driving commercial motor vehicle for period of not less than one year or not less than three years. Any person is disqualified from driving a commercial motor vehicle for a period of not less than one year:

(1) If convicted of a first violation of driving or being in actual physical control of a commercial or noncommercial motor vehicle while under the influence of alcohol, or any controlled drug or substance, in violation of § 32-23-1;

(2) If convicted of a first violation of driving or being in actual physical control of a commercial motor vehicle while there is 0.04 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance, in violation of § 32-12A-44;

(3) If convicted of a first violation of leaving the scene of an accident while operating a commercial or noncommercial motor vehicle, in violation of § 32-34-5 or 32-34-6;

(4) If convicted of a first violation of using a commercial or noncommercial motor vehicle in the commission of any felony other than a felony described in § 32-12A-38; or

(5) For refusing to submit to a chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46;

(6) If convicted of a first violation of operating a commercial motor vehicle while the person's commercial driver license is revoked, suspended, or canceled or the person is disqualified from operating a commercial motor vehicle in violation of § 32-12A-8. The department may not issue a new license until one year from the date the person would otherwise have been entitled to apply for a new license; or

(7) If convicted of a first violation of causing a fatality through the negligent operation of a commercial motor vehicle.

If any of these violations or refusal occurred while transporting hazardous material required to be placarded, the person is disqualified for a period of not less than three years.

Source: SL 1989, ch 267, § 23; SL 1991, ch 252, § 11; SL 1992, ch 220, § 6; SL 1995, ch 181; SDCL § 32-12-104; SL 2001, ch 171, §§ 95, 115; SL 2004, ch 213, § 4; SL 2005, ch 167, § 19; SL 2016, ch 166, § 2; SL 2019, ch 133, § 1.

CIV19-3197

STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

IBRAHIM NASR IBRAHIM **PROPOSED DECISION**
DI 19-34

V.

DEPARTMENT OF PUBLIC SAFETY

An administrative hearing was held in this matter on September 26, 2019. Petitioner/licensee, Ibrahim Nasr Ibrahim (Ibrahim), appeared and testified at the hearing. Ibrahim was represented by Amber Eggert. The Department of Public Safety (Department) was represented by Edward Hruska III. The Department had a witness, Kerry Schrank. Based on the evidence, the arguments of the parties, and the law, the Hearing Examiner enters the following Findings of Fact, Reasoning, Conclusions of Law, and Proposed Order.

ISSUES

Whether Ibrahim's commercial driver license/driving privileges should be disqualified for one year because he was convicted of committing a felony in a motor vehicle?

FINDINGS OF FACT

1. Ibrahim's current address is 47070 280TH Street in Worthing, South Dakota.

2. Ibrahim has a commercial drivers license (CDL). Ibrahim's drivers license number is 01328063.

3. On or about August 19, 2017, Ibrahim was pulled over for an equipment violation. It was later discovered that he had marijuana in the vehicle. The amount was large enough that he received a citation for a "felony committed in a vehicle by a CDL holder".

4. Ibrahim was driving a non-commercial vehicle at the time of the incident.

5. On March 28, 2018, Ibrahim was convicted of "felony committed in a vehicle by a CDL holder".

6. The Department sent a "Notification of Withdrawal of Driving Privileges" letter to Ibrahim on June 14, 2019. Ibrahim's commercial drivers license was to be disqualified for one year because he was convicted of felony committed while driving a vehicle.

7. The effective date of the disqualification was to be June 29, 2019.

(3)

8. Ibrahim filed a timely appeal of the determination.

9. Any additional findings included in the Reasoning section of this decision are incorporated herein by this reference. To the extent any of the foregoing are improperly designated and are instead conclusions of law, they are hereby redesignated and incorporated herein as conclusions of law.

REASONING

In this case, Ibrahim was convicted of a felony in the vehicle by a CDL holders. Any person is disqualified from driving a commercial motor vehicle for a period of not less than one year if convicted of a first violation of using a commercial or noncommercial motor vehicle in the commission of any felony other than a felony described in § 32-12A-38[1]. SDCL 32-12A-36(4).

The law is clear, if you are convicted of a felony in a vehicle while holding a CDL, there is a minimum one-year suspension. The SD Legislature has constructed a very important system of driver's licensing for commercial vehicle drivers. They understand the seriousness of drivers of large vehicles carrying cargo or passengers to be on our roadways. The Department is required to disqualify his commercial license for one year. I have no authority to make exceptions to the law.

CONCLUSIONS OF LAW

1. The Department of Public Safety has jurisdiction over the parties and subject matter of this appeal. The Office of Hearing Examiners has authority to conduct the appeal pursuant to the provisions of SDCL 1-26D.

2. Any Conclusions of Law in the reasoning section of this decision are incorporated herein by reference. To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated herein as findings of fact.

3. Ibrahim is disqualified from driving a commercial motor vehicle for one year. SDCL 32-12A-36(4).

[1] 32-12A-38. Disqualification for life using commercial or noncommercial motor vehicle in commission of felony involving controlled substance. Any person is disqualified from driving a commercial motor vehicle for life who uses a commercial or noncommercial motor vehicle in the commission of any felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to manufacture, distribute, or dispense a controlled substance.

PROPOSED ORDER

It is the proposed order of the Hearing Examiner that the determination of the Department of Public Safety be affirmed. Ibrahim Nasr Ibrahim's commercial driver's license/driving privileges should be disqualified for a year.

Dated October 23, 2019.

Ryan P. Darling
Office of Hearing Examiners
523 East Capitol
Pierre SD 57501

CERTIFICATE OF SERVICE

I certify that on _____, 2019, at Pierre, South Dakota, a true and correct copy of the Findings of Fact, Conclusions of Law and Order in the above-entitled matter was sent via U.S. Mail or Inter-Office Mail to each party listed below.

Kari Deyo

IBRAHIM NASR IBRAHIM
47070 280TH STREET
WORTHING SD 57077

AMBER EGGERT
4420 S TECHNOLOGY DR
SIOUX FALLS SD 57106

EDWARD HRUSKA III
PO BOX 1174
PIERRE SD 57501

FILED
NOV 18 2019
Minnehaha County, S.D.
Clerk Circuit Court

5

SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY
prevention ~ protection ~ enforcement
DRIVER LICENSING

STATE OF SOUTH DAKOTA
DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSING PROGRAM

118 WEST CAPITOL AVENUE ▪ PIERRE, SOUTH DAKOTA 57501
P: 605.773.6883
F: 605.773.3018
W: DPS.SD.GOV
E: DPSLICENSINGINFO@STATE.SD.US

IN THE MATTER OF

IBRAHIM NASR IBRAHIM

V.

DEPARTMENT OF PUBLIC SAFETY

FINAL DECISION AND
NOTICE OF ENTRY
DI 19-34

After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-6 the Hearing Examiner's proposed decision dated **October 23, 2019,** is adopted in full and shall be **effective** ten days after having been received by the petitioner or ten days after failure to accept delivery as provided by SDCL 1-26-32.

IT IS FURTHER ORDERED that the Proposed Order of the Hearing Examiner regarding Ibrahim Ibrahim be affirmed. Mr. Ibrahim's commercial driving privileges shall be disqualified for one year.

You are required to surrender your driver license to this office. It is a Class 1 misdemeanor to be in possession of an invalid driver license/restricted permit (SDCL 32-12-17.3). Enclosed is a self-addressed, stamped envelope for your use to return your driver license. Alternatively, you may surrender it at a South Dakota exam station and apply for a class 1 driver's license. Please refer to the attached brochure for the identification documents you will be required to present if you wish to apply for a class 1 driver's license. The fee for a class 1 driver's license is $28.00.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that this Final Decision was duly issued and entered on the 23rd day of Oct., 2019.

Parties are hereby advised of the right to further appeal the final decision to circuit court within thirty (30) days of receiving such decision pursuant to the authority of SDCL Chapter 1-26.

Dated 10/23/19

Jane Schrank

Jane Schrank
Program Director
Department of Public Safety
Driver Licensing
118 West Capitol
Pierre, SD 57501

SOUTH DAKOTA
DEPARTMENT
OF PUBLIC SAFETY
prevention ~ protection ~ enforcement
DRIVER LICENSING

118 WEST CAPITOL AVENUE • PIERRE, SOUTH DAKOTA 57501
P: 605.773.6883
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W: DPS.SD.GOV
E: DPSLICENSINGINFO@STATE.SD.US

CERTIFICATE OF SERVICE

I certify that on 10/24/19, at Pierre, South Dakota; a true and correct copy of the Proposed Findings of Fact, Reasoning, Conclusions of Law, Proposed Order, Notice of Entry, and Final Decision were mailed to the parties listed below.

Kerry Schrank
Senior Secretary
South Dakota Department of Public Safety
Driver Licensing Program

AMBER EGGERT
4420 S TECHNOLOGY DR
SIOUX FALLS, SD 57106

RYAN DARLING
OFFICE OF HEARING EXAMINERS
523 EAST CAPITOL AVE
PIERRE SD 57501

Hoffman, Judge Doug

From: Edward Hruska <ehruska@pirlaw.com>
Sent: Thursday, March 26, 2020 5:22 PM
To: Hoffman, Judge Doug; Laura Carlson
Cc: Jason Adams; Miller, Tracy
Subject: RE: [EXT] Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Please file this email for the record. Thanks, DH
5-11-20

Will do Judge.

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Thursday, March 26, 2020 5:21 PM
To: Edward Hruska <ehruska@pirlaw.com>; Laura Carlson <Laura@tschetteradams.com>
Cc: Jason Adams <jason@tschetteradams.com>; Miller, Tracy <Tracy.Miller@ujs.state.sd.us>
Subject: Re: Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Perfect but please email me the order and I'll print and sign and then scan in. Thanks, DH

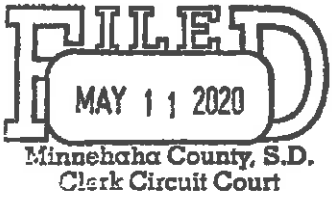
Get Outlook for iOS

From: Edward Hruska <ehruska@pirlaw.com>
Sent: Thursday, March 26, 2020 4:54:07 PM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Laura Carlson <Laura@tschetteradams.com>
Cc: Jason Adams <jason@tschetteradams.com>; Miller, Tracy <Tracy.Miller@ujs.state.sd.us>
Subject: RE: [EXT] Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Judge Hoffman,

I just got off the phone with attorney Adams. We are in agreement with submitting simultaneous briefs by close-of-business on April 27.

If that works for the Court, I can submit a proposed order to that affect in ODY.



Eddie

From: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>
Sent: Thursday, March 26, 2020 4:11 PM
To: Edward Hruska <ehruska@pirlaw.com>; Laura Carlson <Laura@tschetteradams.com>
Cc: Jason Adams <jason@tschetteradams.com>; Miller, Tracy <Tracy.Miller@ujs.state.sd.us>
Subject: RE: Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Dear Counsel,

Please submit supplemental briefing on the following issues in this case:

1. Whether one's having been convicted of felony possession of marijuana arising from a set of facts where the defendant possessed the marijuana inside of a motor vehicle which he was operating, but without any other facts suggesting that the vehicle was an instrumentality of the crime of possession, constitutes "using... a motor vehicle in the commission of a felony" in violation of SDCL 32-12A-36?

2. Whether there is any crime of "using a commercial or noncommercial motor vehicle in the commission of any felony" codified in the state of South Dakota, and if not, whether that renders SDCL 32-12A-36 void for vagueness, or otherwise nugatory?

Please discuss and agree upon a briefing schedule and then notify me of the same. Thank you,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
425 N. Dakota Ave.
Sioux Falls, SD
doug.hoffman@ujs.state.sd.us

From: Hoffman, Judge Doug
Sent: Monday, February 24, 2020 11:49 AM
To: Edward Hruska <ehruska@pirlaw.com>; Laura Carlson <Laura@tschetteradams.com>
Cc: Jason Adams <jason@tschetteradams.com>; Miller, Tracy <Tracy.Miller@ujs.state.sd.us>
Subject: RE: [EXT] Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Negative, tied up with a trial. Also, I am not sure we need a hearing yet. I need to read all the briefs. Stand by. Thanks,

Douglas E. Hoffman
Circuit Court Judge
Second Judicial Circuit
Sioux Falls and Canton, SD
doug.hoffman@ujs.state.sd.us

From: Edward Hruska [mailto:ehruska@pirlaw.com]
Sent: Monday, February 24, 2020 11:12 AM
To: Hoffman, Judge Doug <Doug.Hoffman@ujs.state.sd.us>; Laura Carlson <Laura@tschetteradams.com>
Cc: Jason Adams <jason@tschetteradams.com>
Subject: Re: [EXT] Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Judge Hoffman,

Any chance you'd have time for argument on March 6th? I will be in the area for the VLEG legal clinics, and thought to kill two birds, so to speak.

Thanks,

Eddie

From: Laura Carlson <Laura@tschetteradams.com>
Sent: Monday, February 24, 2020 11:06 AM
To: Judge Doug Hoffman <Doug.Hoffman@ujs.state.sd.us>
Cc: Edward Hruska <ehruska@pirlaw.com>; atgservice@state.sd.us <atgservice@state.sd.us>; Jason Adams <jason@tschetteradams.com>
Subject: Ibrahim Ibrahim v. State of South Dakota, Department of Public Safety; CIV 19-3197

Judge Hoffman,
Attached please find a copy of Appellant's Reply Brief and Affidavit of Mailing regarding Ibrahim Nasr Ibrahim v. State of South Dakota, Department of Public Safety, CIV. 19-3197. Both documents have been electronically filed in Odyssey. In addition, I am sending you the original Reply Brief and two copies by U.S. Mail.

Mr. Hruska, Special Assistant Attorney General, will also be receiving copies by e-service, this email, and by U.S. Mail.

Thank you,

Laura E. Carlson

Legal Assistant
Tschetter & Adams Law Office, P.C.
5919 S. Remington Place, Suite 100
Sioux Falls, SD 57108
605-367-1013

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
Ibrahim Nasr Ibrahim Appellant, vs. **State of South Dakota, Department of Public Safety,** Appellee,	CIV. 19-3197 **MEMORANDUM OPINION AND ORDER**

Ibrahim Nasr Ibrahim ("Ibrahim") appeals the disqualification of his commercial driver's license ("CDL") by the Department of Public Safety ("DPS"). Ibrahim is represented by Attorney Jason R. Adams. The DPS is represented by Attorney Edward S. Hruska, III. The Court reverses and remands with directions to reinstate Ibrahim's CDL.

STATEMENT OF FACTS

Ibrahim has a commercial driver's license ("CDL") issued by the State of South Dakota. On June 14, 2019, the DPS mailed a letter providing notice to Ibrahim that his CDL was disqualified for one year, effective June 29, 2019, for "felony committed while driving a vehicle." Ibrahim requested, and was granted, an administrative hearing on the matter. Following a hearing on September 26, 2019, the Office of Hearing Examiners ("OHE") issued a Proposed Order on October 23, 2019, determining that the DPS's disqualification of Ibrahim's CDL should be affirmed, and Program Director of the DPS, Jane Schrank, issued a Final Decision adopting the Proposed Order that same day.

The Agency found that on August 19, 2017, Ibrahim was driving a non-commercial vehicle and was pulled over for an equipment violation. It was later discovered that he had marijuana with him in the vehicle. The amount was large enough that he was charged with felony possession of marijuana. According to the Administrative Hearing Officer's Findings of Fact, on March 28, 2018, Ibrahim was "convicted of" a "felony committed in a vehicle by a CDL holder."[1] Based on these Findings of Fact, DPS reasoned that, pursuant to SDCL § 32-12A-

[1] This statement appears to be drawn from the DPS Abstract of Operating Record, Settled Record ("SR") p. 21, which references Docket # 49CRI17-6579. This Court may take judicial notice of said predicate file herein as an adjudicative fact that is an extension of the settled record. SDCL § 19-19-201. As demonstrated *infra*, the ALJ's findings of fact #'s 3 and 5 that Ibrahim was cited and convicted of "felony committed in a vehicle by a CDL holder" are clearly erroneous and without any factual or legal basis.

36(4), Ibrahim was disqualified from driving a commercial motor vehicle for one year. On June 14, 2019, DPS sent Ibrahim a "Notification of Withdrawal of Driving Privileges" which cited the grounds as "felony committed while driving a vehicle."

Ibrahim, pro se, timely filed a Notice of Appeal from DPS' Final Decision on November 18, 2019. Neither party requested a transcript of the OHE hearing. The parties submitted briefs on the issue of whether sufficient evidence exists in the record to support the DPS's decision to disqualify Ibrahim's CDL. Further, the parties submitted supplemental briefing on the following issues: (1) whether one's having been convicted of felony possession of marijuana arising from a set of facts where the defendant possessed the marijuana inside of a motor vehicle which he was operating, but without any other facts suggesting that the vehicle was an instrumentality of the crime of possession, constitutes "using . . . a motor vehicle in the commission of a felony" in violation of SDCL § 32-12A-36(4); and (2) whether there is any crime of "using a commercial or noncommercial vehicle in the commission of any felony" codified in the State of South Dakota, and if not, whether that renders SDCL § 32-12A-36(4) void for vagueness, or otherwise nugatory.

LEGAL ANALYSIS

Under SDCL § 32-12A-36(4), disqualification of a CDL is required if the licensee is "convicted of a first violation of using a commercial or noncommercial motor vehicle in the commission of any felony other than a felony described in § 32-12A-38." Ibrahim was convicted of a Class 6 felony for "possess[ing] more than two ounces of marijuana but less than one-half pound of marijuana." SDCL § 22-42-6. DPS asserts that this conviction falls within the purview of SDCL § 32-12A-36(4) because his felony crime occurred while he was driving a motor vehicle. Ibrahim contends that, to apply, SDCL § 32-12A-36(4) requires a finding that the vehicle was used to commit the underlying felony conviction, and since no such evidence was presented, his case does not fall within the scope of § 32-12A-36(4). In essence, the parties have diverging interpretations of what role a motor vehicle must play in an underlying felony crime in order to trigger disqualification under § 32-12A-36(4).

This case boils down to a matter of statutory construction, for which there are two primary rules. "The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *Abata v. Pennington Cty. Bd. Of Commissioners*, 2019 S.D. 39, ¶ 18, 931 N.W.2d 714, 721 (quoting *In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 15, 675 N.W.2d 222, 226). Overall, it is fundamental that "the words of a statute must be read in their context and with the view to their place in the overall statutory scheme." *Expungement of Oliver*, 2012 S.D. 9, ¶ 9, 810 N.W.2d 350, 352 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000)).

Ibrahim contends that a plain reading of the statute requires, in order to trigger the sanction of licensure disqualification, that an individual actually use the vehicle to commit the felony. As examples, he points to eluding law enforcement or using a vehicle as a get-a-way car in a robbery. DPS argues that such an interpretation is a strained, impractical, or illogical

conclusion. In making this claim, however, DPS must avoid any analysis of the dispositive phrase "*uses* a ... vehicle *in the commission*" and instead focus on the Legislature's phrase of "any felony." As described below, that tactic is untenable. In short, the direct object of a verb phrase does not nullify the operative verbs.

In its argument, DPS alters the language of the statute to arrive at its desired result by stating "Ibrahim's felony occurred *while* Ibrahim was using a noncommercial motor vehicle" instead of "Ibrahim used a noncommercial motor vehicle in the commission of his felony." The sentences provide two completely different meanings. This is further evidenced in the notice of withdrawal of driving privileges mailed to Ibrahim, wherein the reason cited for the disqualification was "felony committed *while* driving a vehicle." Contrary to what DPS wants the statute to mean, "the intent of a statute is determined from what the legislature said . . . and the court must confine itself to the language used." *Goetz v. State*, 2001 S.D. 138, ¶ 16, 636 N.W.2d 675, 681. It is the reading of the statute through DPS's lens that is strained, impractical, and illogical.

A simple viewing of subsection (4) in the context of the entire statute, as we are required to do, shows that subsection (4) only applies when the vehicle is an instrumentality of the crime. SDCL § 32-12A-36 provides, in relevant part:

> Any person is disqualified from driving a commercial motor vehicle for a period of not less than one year:
>
> (1) If convicted of a first violation of driving or being in actual physical control of a commercial or noncommercial motor vehicle while under the influence of alcohol, or any controlled drug or substance, in violation of § 32-23-1;
>
> (2) If convicted of a first violation of driving or being in actual physical control of a commercial motor vehicle while there is 0.04 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance, in violation of § 32-12A-44;
>
> (3) If convicted of a first violation of leaving the scene of an accident while operating a commercial or noncommercial motor vehicle, in violation of § 32-34-5 or 32-34-6;
>
> (4) If convicted of a first violation of using a commercial or noncommercial motor vehicle in the commission of any felony other than a felony described in § 32-12A-38; or
>
> (5) For refusing to submit to a chemical analysis for purposes of determining the amount of alcohol or drugs in that person's blood or other bodily substance while driving a commercial or noncommercial motor vehicle in violation of § 32-12A-43 or 32-12A-46;
>
> ...

> (7) If convicted of a first violation of causing a fatality through the negligent operation of a commercial motor vehicle.

Read literally, most of the subsections only require temporal correlation of driving a vehicle with the other proscribed behavior to trigger disqualification. For example, in subsections (1), (2), (3), and (5), the operative word is "while." This demonstrates the Legislature knew how to phrase a statute to predicate disqualification upon merely driving a vehicle while simultaneously violating a criminal statute. The Legislature chose to use different language in subsections (4) and (7). Both subsections (4) and (7) require the vehicle to be *used* as an instrument in the commission of the criminal act. The comparison between the subsections clearly demonstrates that the Legislature carefully worded each subsection to require mere concurrence of action in some subsections, while requiring instrumentality in others.

Here, there is nothing in the record showing that Ibrahim used the motor vehicle as an instrument to commit felony possession of marijuana. All that is suggested is that he merely drove it while possessing the marijuana. The fact that he was driving a vehicle was not relevant to the charge or conviction in any way. In this case he would have been guilty of the exact same offense had he been walking down the street.[2] If the Legislature had intended to disqualify a CDL holder for committing a felony while operating a motor vehicle, they could have, and logically would have, used the same language they used in subsections (1), (2), (3), and (5) of the very same law. However, the Legislature did not do so. DPS ignores this critical point.

As further support, Ibrahim points to the chosen statutory language in SDCL § 32-12-52.3 which mandates revocation of a driver's license for certain drug-related offenses committed in a vehicle:

> Upon a first conviction or a first adjudication of delinquency for any violation, *while in a vehicle*, of §§ 22-42-5 to 22-42-9, inclusive, 22-42A-3, or 22-42A-4, the court shall revoke the driver license or driving privilege of the driver so convicted for a period of ninety days.

SDCL § 32-12-52.3 (emphasis added). Clearly, as in SDCL 32-12A-36 subsections (1), (2), (3), and (5), had the Legislature truly intended SDCL § 32-12A-36(4) to mandate a one year CDL disqualification for the mere commission of any felony while in a motor vehicle, it knew full well how to say that. But it did not. The Legislature's intent is determined by what the Legislature said, not what DPS thinks it should have said.

Finally, it is worthy of note that the awkward phrasing of SDCL § 32-12A-36(4) is, in my view, an unfortunate contributing factor to the muddled nature of DPS' argument. Subsection (4) mimics the language of the prior subsections, but that format does not fit the issue under subsection (4) because the context is fundamentally different. In the first three subsections,

---

[2] On September 28, 2017, Ibrahim was indicted for felony possession of marijuana with intent to distribute, felony possession of marijuana, and misdemeanor offenses for paraphernalia and contributing to the abuse or neglect of a minor. On February 20, 2018, he pled guilty to felony possession of marijuana and the other charges were dismissed. On March 28, 2018, he was sentenced to probation and 45 days jail with 2 years prison suspended. On June 5, 2019, his conviction was modified, withdrawn and expunged under the Suspended Imposition laws. Nowhere in any of these pleadings is there any reference to a motor vehicle.

unlike subsection (4), the Legislature is addressing actual moving violations. The phrase "if convicted of a first violation of" DUI or leaving the scene of an accident makes sense because DUI and leaving the scene are actual crimes of which one may be convicted.

In contrast, subsection (4) speaks to the very different scenario of where one uses a motor vehicle in the commission of a felony. So the language "if convicted of a first violation of using a . . . vehicle in the commission of any felony . . ." is nonsensical in the sense that "using a . . . vehicle in the commission of any felony . . ." is not itself a crime.[3] Therefore, one can never be literally "convicted of a first violation of using a . . . vehicle in the commission of a felony." In a linguistic sense, SDCL § 32-12A-36(4) is a nonsequitur. As such, it is unconstitutionally vague, as a matter of law. *United States v. Davis*, 139 S. Ct. 2319, 2323 ("In our constitutional order, a vague law is no law at all."); *State v. Asmussen*, 2003 S.D. 102, ¶ 10, 668 N.W.2d 725, 731 ("A statute will be held unconstitutional for vagueness where the forbidden conduct is so poorly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application.").

In any event, SDCL § 32-12A-36(4) appears conceptually parallel to its sister statute SDCL § 32-12A-38 which addresses consequences for "us[ing] a . . . motor vehicle in the commission of any felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to [do the same.]" Neither section has annotations, but both seem to be analogous to the civil forfeiture laws, which sanction the use of personal property in the commission of such offenses with forfeiture of the property to the government. *See* SDCL § 34-20B-70 (forfeiture of property which is used, or intended for use, in the possession, manufacturing or distribution of illegal drugs.) The South Dakota Supreme Court has held that these laws are to be strictly construed, *See State v. Three ISO-2 Devices,* 296 N.W.2d 510, 513 (S.D. 1980), and that in order to justify civil forfeiture the property must be used to "facilitate" the possession rather than being "merely incidental" thereto. *State v. One 1972 Pontiac Grand Prix*, 242 N.W.2d 660, 663 (S.D. 1976).

A common thread runs through the civil forfeiture concept that use requires facilitation rather than mere co-existence, the phraseology in SDCL § 32-12A-38 that lifetime CDL disqualification results from "use" of a vehicle in the manufacture or distribution of narcotics, and SDCL § 32-12A-36 (4)'s predicate "use" of a vehicle in the commission of "any felony," and that thread is instrumentality. Any other interpretation is contrary to the rules of statutory construction, is nonsensical, and thus unconstitutionally vague.

CONCLUSION

Based on the reasons outlined above, the Court finds that SDCL § 32-12A-36(4) is inapplicable to the facts of the case at bar. The Findings of Fact cited in the Final Decision do not support a decision to disqualify Ibrahim's CDL nor are supportive facts found anywhere in

[3] SDCL § 32-12A-36(4) can be contrasted with SDCL § 22-14-12, which criminalizes the commission of a felony while armed- "Any person who commits . . . any felony while armed . . . is guilty of a class 2 felony . . ." Bearing arms is a legal activity but to do so while committing a felony is itself a separate felony crime. Read literally, SDCL § 32-12A-36(4) suggests that it is a crime to use a vehicle in the commission of another felony—a parallel structure with a primary and secondary offense relation, as in SDCL § 22-14-12. But, there is no such crime of "using a . . . vehicle in the commission of any felony."

the record, including the underlying criminal file. Accordingly, the Court reverses the Final Decision issued by the DPS.

ORDER

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that

(1) The Final Decision of the Department of Public Safety disqualifying Ibrahim Nasr Ibrahim's Commercial Driver's License is REVERSED.

(2) Ibrahim Nasr Ibrahim's Commercial Driver's License shall be immediately reinstated by the South Dakota Department of Public Safety.

Dated this 11 day of May, 2020.

BY THE COURT:

Douglas Hoffman
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court
By _____, Dep

FILED
MAY 11 2020
Minnehaha County, S.D.
Clerk Circuit Court

APPELLEE'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
THE DEPARTMENT OF PUBLIC SAFETY, No. 29344
Appellant,

v.

IBRAHIM NASR IBRAHIM,

Appellee.

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

HONORABLE DOUGLAS E. HOFFMAN
Circuit Court Judge

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Notice of Appeal Filed June 5, 2020.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
THE DEPARTMENT OF PUBLIC SAFETY, No. 29344
Appellant,

v.

IBRAHIM NASR IBRAHIM,

Appellee.

PRELIMINARY STATEMENT

Any references in this brief will be consistent with the page numbers set forth in the settled record. Counsel will refer to the settled record as "SR" followed by the page number. Appellee Ibrahim will be referred to as "Ibrahim" and the South Dakota Department of Public Safety will be referred to as the "Department". Counsel will attempt to specify any other documents referred to in the record by name to provide clarity to the Court. Any references to the State's/Appellant's Brief will be indicated by "SB" followed by the page number.

JURISDICTIONAL STATEMENT

Appellant, the Department of Public Safety, appeals the Memorandum Opinion and Order of the Circuit Court, issued by the Honorable Douglas Hoffman, Circuit Court

Judge, Second Judicial Circuit, dated May 11, 2020. (SR, 87-96; AB, A-11-A16) The circuit court reversed the Department's Final Decision dated October 23, 2019. *Id.* The Department filed a Notice of Appeal on June 5, 2020. (SR, 104) This Court has jurisdiction over this appeal pursuant to SDCL § 1-26-37.

STATEMENT OF LEGAL ISSUES

I. DID THE CIRCUIT COURT ERR BY CALLING INTO QUESTION THE CONSTITUIONALITY OF SDCL § 32-12A-36(4)?

The circuit court did not err when it considered the constitutionality of SDCL § 32-12A-36(4).

Relevant Cases:

Erickson v. Dep't of Pub. Safety, 2017 SD 75, 904 N.W.2d 352,
Kern v. City of Sioux Falls, 1997 SD 19, 560 N.W. 2d 236
Sharp v. Sharp, 422 N.W.2d 443 (S.D. 1988)

Relevant Statutes:

SDCL § 15-6-24(c)
SDCL § 32-12A-36(4)

II. DID THE CIRCUIT COURT ERR BY DECLARING SDCL § 32-12A-36(4) UNCONSTITUTIONAL?

The Circuit Court did not err when in declared SDCL § 32-12A-36(4) unconstitutional on a void-for-vagueness standard.

Relevant Cases:

State v. Hoeft, 1999 SD 24, 59 N.W.2d 323
State v. Big Head, 363 N.W.2d 556 (S.D. 1985)
Goetz v. State, 2001 SD 138, 636 N.W.2d 675

Relevant Statutes:

SDCL § 32-12A-36
SDCL § 32-12A-36(4)

III. DID THE CIRCUIT COURT ERR WHEN IT DETERMINED THAT THERE WERE NOT SUFFICIENT FACTS TO SUPPORT THE DEPARTMENT'S FINAL DECISION?

The circuit court did not err in finding that there were not sufficient facts in the record to support the Department's Final Decision.

Relevant Cases:

Erickson v. Dep't of Pub. Safety, 2017 SD 75, 904 N.W.2d 352
Klutman v. Sioux Falls Storm, 2009 SD 55, 769 N.W.2d 4403

Relevant Statutes:

SDCL § 32-12A-36(4)

STATEMENT OF THE CASE AND FACTS

Ibrahim had a commercial driver's license issued by the State of South Dakota. The Department sent a Notification of Withdrawal of Driving Privileges to Ibrahim on June 14, 2019. (SR, 31) The notification informed Ibrahim that his commercial driver's license was disqualified for one year because of a "FELONY COMMITTED WHILE DRIVING A VEHICLE". (SR, 31) Ibrahim obtained counsel and requested an administrative hearing[1]. An administrative hearing was held in front of Ryan Darling, of the Office of Hearing Examiners, on September 26, 2019. (SR, 42) The Department submitted a document referred to as an Abstract of Operating Record into evidence at the administrative hearing as proof of a felony committed by Ibrahim in a vehicle by commercial driver's license holder. (SR, 33-35, 42) This Abstract of Operating Record reports a conviction from March 28, 2018. (SR, 33) The Department sent the notice of

1 Counsel for the administrative hearing were attorneys with Strange, Farrell, Johnson & Brewers, P.C. Beau Blouin requested the hearing and Amber Eggert represented Ibrahim at the hearing. Appellate counsel was retained on January 6, 2020.

disqualification on June 14, 2019. (SR, 31) There is no documentation in the settled record indicating what other evidence the hearing examiner relied upon to make the determination that Ibrahim was convicted of a felony and that it occurred in a motor vehicle. There is a finding made by the hearing examiner that "Ibrahim was pulled over on August 19, 2017, for an equipment violation." (SR, 4) The examiner further found that Ibrahim "had marijuana in the vehicle." (SR, 4) He also made a finding that "the amount was large enough that he received a citation for a felony committed in a vehicle by a COMMERCIAL DRIVER'S LICENSE holder." (SR, 4) He made another finding that "Ibrahim was driving a non-commercial vehicle at the time of the incident." (SR, 4) He made a finding that Ibrahim was convicted on March 28, 2018 "of felony committed in a vehicle by a COMMERCIAL DRIVER'S LICENSE holder (sic)." (SR, 4) Mr. Darling proposed Findings of Fact and Conclusions of Law along with a proposed order on October 23, 2019. (SR, 4-6; AB, A-3-5) A Final Decision, signed by Jane Schrank, Program Director of the Department of Public Safety on October 23, 2019, adopted the decision of the hearing examiner and an order was entered against Ibrahim which disqualified his commercial driver's license for one year. (SR, 45, AB, A-6-7)

Ibrahim, initially representing himself, appealed the Department's decision to disqualify his commercial driver's license to the circuit court on November 18, 2019. (SR, 1-3) Ibrahim failed to request a transcript of the hearing within the proscribed days of his appeal pursuant to SDCL §1-26-32.2 when he was still pro se. The Department, knowing Ibrahim was pro se, also failed to request the transcript of the hearing pursuant to SDCL §1-26-32.2. Ibrahim subsequently obtained counsel and, as the Appellant in the

circuit court case, filed his Appellant's Brief and raised the issue whether sufficient evidence existed in the record to support the Department's decision to disqualify Ibrahim's COMMERCIAL DRIVER'S LICENSE. (SR, 50-59) The Department, as Appellee, responded and argued that sufficient evidence was found in the administrative record to support the disqualification of Ibrahim's commercial driving privileges. (SR, 61-65) Ibrahim filed his reply brief, countering the claims made in appellee's brief. (SR, 71-75)

In a March 26, 2020 email, the circuit court raised two additional issues and asked the parties to submit supplemental briefing regarding the same. (SR, 93-95) The two issues were:

> "(1) Whether one's having been convicted of felony possession of marijuana arising from a set of facts where the defendant possessed the marijuana inside of a motor vehicle which he was operating, but without any other facts suggesting that the vehicle was an instrumentality of the crime of possession, constitutes "using … a motor vehicle in the commission of a felony" in violation of SDCL § 32-12A-36?
>
> (2) Whether there is any crime of "using a commercial or noncommercial vehicle in the commission of any felony" codified in the State of South Dakota, and if not, whether that renders SDCL § 32-12A-36 void for vagueness, or otherwise nugatory?" (SR, 93-95)

Neither party objected to the circuit court's request to address the above issues, and both parties submitted briefs per the circuit court's direction. (SR, 77-86) The Honorable Douglas Hoffman, Circuit Court Judge, Second Judicial Circuit, reviewed briefs submitted by counsel and entered a Memorandum Decision and Order dated May 11, 2020. (SR, 87-92; AB, A-11) The circuit court determined that the Department's Findings of Fact and Conclusions of Law cited in the Final Decision did not support a

decision to disqualify Ibrahim's COMMERCIAL DRIVER'S LICENSE nor are supportive facts found anywhere in the record, including the underlying criminal case. (SR, 87-92; AB, A-11) The circuit court also found that "the Department's Findings of Fact #3 and #5 that Ibrahim was cited and convicted of "felony committed in a vehicle by a CDL holder" are clearly erroneous and without factual basis. (SR, 87; AB, A-11) In its decision and order, the circuit court reversed the Department's final decision and ordered the Department to reinstate Ibrahim's Commercial Driver's License. (SR, 92; AB, A-16) The Department filed a Notice of Appeal of the circuit court's order on June 5, 2020. (SR, 104)

Notice of Entry of the circuit court's decision was filed on May 15, 2020. (SR, 96-97) The Department's Notice of Appeal was filed on June 5, 2020. (SR, 104)

STANDARD OF REVIEW

Under SDCL § 1-26-36, a court may reverse or modify a decision of an agency if a party has been prejudiced by administrative "findings, inferences, conclusions, or decisions" that are clearly erroneous, erroneous as a matter of law, or arbitrary, capricious, or characterized by an abuse of discretion. *Sharp v. Sharp*, 422 N.W.2d 443 (S.D. 1988) In *Permann v. Dept. of Labor Unemp. Ins. D.*, 411 N.W.2d 113 (S.D. 1987), this Court clarified the scope of review under SDCL § 1-26-36. *Id.* When the issue is a question of fact, the circuit court and, on further appeal, this Court, must ascertain whether the administrative agency's findings of fact were clearly erroneous. *Id.* When the

issue is a question of law, the administrative agency's and circuit court's conclusions of law are fully reviewable. *Id.*

ARGUMENT

I. DID THE CIRCUIT COURT ERR BY CALLING INTO QUESTION THE CONSTITUIONALITY OF SDCL § 32-12A-36(4)?

The State argues that the circuit court erred when it "took up for the first time on appeal and *sua* sponte the issue of the constitutionality of SDCL § 32-12A-36(4)". (SB, 5-8) The State's argument fails on both claims.

First, the State failed to object to the circuit court's request to address the constitutionality of SDCL § 32-12A-36(4), thereby waiving the issue. Not only did the State fail to object to the circuit court's request, the State submitted a Supplemental Brief and briefed the issue. (SR, 77) The State also failed to object to the circuit court's request in their Supplemental Brief. (SR, 77-80) Not until the State's arguments failed in circuit court did the State raise this issue for the first time on appeal to this Court. In its brief, the State claims the issues requested by the circuit court were asserted for the first time on appeal. (SB, 5-8) However, both parties had the opportunity to brief the issues and submit argument to the circuit court.

Previously, in *Erickson v. Dep't of Pub. Safety*, 2017 SD 75, the Department objected to a circuit court's question regarding an issue not brought by appellant counsel. *Id.* ¶17. In this case, the Department did not make a similar objection to the circuit court's question and that failure to do so waives the issue before this Court. This Court has repeatedly indicated that "we will not review a matter on appeal unless proper objection was made before the

circuit court.'" *Osdoba v. Kelley-Osdoba*, 2018 SD 43, ¶23, citing *Halbersma v. Halbersma*, 2009 S.D. 98, ¶ 29, 775 N.W.2d at 219 and quoting *Rogen v. Monson*, 2000 S.D. 51, ¶ 15 n.2, 609 N.W.2d 456, 460 n.2. An objection must be made to allow a circuit court to correct its mistakes. *Halbersma* at ¶29, 775 N.W.2d at 219.

If this Court takes the position the issue was properly brought up for the first time on appeal to this Court, it is well established in South Dakota that the constitutionality of a statute cannot be raised for the first time on appeal. *Kern v. City of Sioux Falls*, 560 N.W. 2d 236, 239 (citing *Sharp v. Sharp*, 422 N.W.2d 443, 445 (S.D. 1988); *Carr v. Core Indus.*, 392 N.W.2d 829, 830 (S.D. 1986); *Bayer v. Johnson*, 349 N.W.2d 447, 449 (S.D. 1984). This is a rule of procedure, not jurisdiction, and this court may consider a matter for the first time on appeal if faced with a "compelling case." *Sharp*, 422 N.W.2d at 445-46. However, the attorney general must be allowed to participate. *Id.* The person challenging the constitutionality of a statute must give notice to the attorney general of the pendency of the action. SDCL 15-6-24(c). *Id*. SDCL § 15-6-24(c) states in relevant part:

> When the constitutionality of an act of the Legislature affecting the public interest is drawn in question in any action to which *the state or an officer, agency, or employee of the state is not a party*, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him the opportunity to intervene." (emphasis added)

In the case at hand, the State of South Dakota-Department of Public Safety, is represented by the Attorney General's Office. The Attorney General's Office briefed the issues and submitted argument. (SR, 77-81) To now claim they did not have proper notice is questionable at best. The Special Assistant to the Attorney General briefed the questions

posed by the circuit court and fully participated in arguing the State's contrary position to the constitutionality of this statutory provision.

Further, if this Court finds that notice was not given to the Attorney General as required by SDCL § 15-6-24(c), the State's argument still fails. "Although an appellate court will ordinarily decline to rule on the constitutionality of a statute unless the attorney general has been notified, since the failure to give such notice does not deprive the court of jurisdiction, it may determine the question when it is a matter of considerable public importance which should be promptly resolved." *See* 16 CJS, Constitutional Law 86 (1984), *Sharp v. Sharp* 422 N.W.2d 443, 446 (S.D. 1988). The two-part test to determine whether a court should decline to rule on the constitutionality of a statute is 1.) whether the statute is of considerable public importance which 2.) requires prompt resolution. *Id.* The first prong is met as an individual's ability to earn a living is impacted by the revocation of a commercial driver's license. Several holders of commercial driver's licenses only source of income stems from their ability to transport goods by semi-truck, which requires a commercial driver's license. The second prong is met because those individuals whose commercial driver's licenses are revoked by the Department need prompt resolution to return to their livelihood.

Further, as stated by Justice Morgan is his concurring opinion in *Sharp v. Sharp*, "By our prior decision in *Bayer v. Johnson*, 349 NW2d 447 (S.D. 1984), we have held that this court can decide a constitutional issue *sua sponte* where we have jurisdiction on other grounds, where the decision is decisive of the appeal, or when the point is one of law and not dependent on facts that might have been raised below had the point been

there raised. *Sharp* at 448.

The State claims that Ibrahim, after learning the circuit court's preferred analysis, "rode the argument suggested," and Ibrahim's arguments fell by the wayside as they did not mesh with the circuit court's theory of the case". (SB, 7-8) The State fails to recognize that in Ibrahim's Supplemental Brief, Ibrahim stated he "hereby submits this supplemental brief *in support of* the Appellant's Brief and Reply Brief in the above-listed appeal. (SR, 77) (emphasis added) Ibrahim further stated that "*Appellant submits this supplemental brief to specifically address those issues"* raised by the circuit court. (SR, 77) (emphasis added) Ibrahim, just like the Department, simultaneously briefed the issues posed by the circuit court. At no time did Ibrahim forgo his original claim that there were not sufficient facts in the record to support the Department's decision to disqualify Ibrahim's commercial driver's license. In fact, the circuit court concluded and agreed with Ibrahim's initial argument that there were not sufficient facts in the record to affirm the hearing examiner's decision. Specifically, the circuit court determined that "findings of fact #3 and #5 that Ibrahim was cited and convicted of "felony committed in a vehicle by a CDL holder" were "clearly erroneous and without any factual or legal basis." (SR, 87)

For the reasons set forth in the argument above, Ibrahim requests this Court affirm the circuit court's decision.

II. DID THE CIRCUIT COURT ERR BY DECLARING SDCL § 32-12A-36(4) UNCONSTITUTIONAL?

The circuit court was correct in finding that SDCL § 32-12A-36 is void for vagueness. Ibrahim may succeed in a vagueness challenge "if the enactment is

impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 , 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982). The statute itself must provide certainty regarding the acts or omissions that constitute the violation. The doctrine thus protects two interrelated essentials of due process. First, the court requires that statutes be drawn with sufficient clarity and specificity so that a person of reasonable intelligence knows what is prohibited or required. *State v. Hoeft*, 1999 SD 24 ¶ 16, 59 N.W.2d 323, 327; *State v Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982). If a person of common intelligence must guess at what the act requires or prohibits, the statute is unconstitutionally vague.

Second, the statute must define the criminal act with sufficient clarity so that it does not encourage arbitrary or discriminatory enforcement. "Criminal statutes must…set out 'explicit standards' for enforcement, or in other words, define the criminal offense with 'sufficient definiteness.'" *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985) (*quoting Kolender v Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (additional citations omitted)). The most important aspect of the void for vagueness doctrine is that it prevents arbitrary enforcement by requiring adequate statutory guidance to govern law enforcement. *Kolender*, 461 U.S. at 357-58, 103 S.Ct. at 1858, 75 L.Ed.2d at 909. In *State v Asmussen*, 2003 S.D. 102 at ¶10, this Court noted that, "as a general rule, a void for vagueness review is limited to the specific facts of the case."

Application of the case law set forth above establishes that SDCL § 32-12A-36(4) is vague. SDCL § 32-12A-36 (4) sets forth: "(i)f convicted of a first violation of **using** a commercial or noncommercial motor vehicle **in the commission** of any felony other than

a felony described in § 32-12A-38" (emphasis added) The circuit court pointed out in the Memorandum Decision that subsection (4) is contrasted with the other sections of SDCL §32-12A-36 and "is nonsensical in the sense that 'using a . . . vehicle in the commission of any felony . . .' is not itself a crime." (SR, 91) Subsections (1-3) and (5-7) refer to specific crimes and acts while subsection (4) is not drawn with the sufficient clarity and specificity required. Additionally, subsection (4) begins, like the other subsections, with the language "if convicted of a first violation" rendering it meaningless as the circuit court established "(i)n a linguistic sense , SDCL § 32-12A-36 (4) is a nonsequitur. As such, it is unconstitutionally vague as a matter of law." (SR, 91)

Since this statute requires an individual to be using a vehicle in the commission of a felony, not all felonies require revocation. Eluding law enforcement is an example of what this statute covers as well as being a get-a-way driver in a robbery. Both examples require the vehicle to be used in the commission of the felony as does the case in Missouri cited by the Department. (SB, 12) In *Rademacher v. Dir. of Revenue,* 405 S.W.3d 607 (M.O. 2013), the driver committed the crime of second-degree felony assault for operating a motor vehicle while intoxicated resulting in serious bodily injury. *Id.* at 608. Under SDCL § 32-12A-36(4), if a sex offender fails to register in the time required by law, is that person subject to a revocation of a commercial driver's license for a failure to register? If a person possesses a forged instrument in a vehicle is that also a violation? The Department's interpretation of this statute would require a revocation of a holder of a commercial driver's license for every felony and not requiring the vehicle to be used in the commission of a felony. Had the legislature intended this result they would have used

language similar to SDCL§ 22-14-12, which states in part: "Any person who commits or attempts to commit **any felony while** armed with a firearm, including a machine gun or short shotgun, is guilty of a Class 2 felony for the first conviction." (irrelevant portion omitted and emphasis added)

The Department again ignores any analysis of the phrasing in SDCL § 32-12A-36(4) of the words "uses a . . . vehicle in the commission" and again focuses their argument on "any felony". (SB, 10-11) Based on the actual language of SDCL § 32-12A-36(4), this subsection applies only when the vehicle is used as an instrumentality of the crime. As the circuit court explained, "the direct object of a verb does on nullify the operative verbs." (SR, 89) The Department's interpretation of this statute inserts the word "while" into their definition, which is evidence in the notice sent to Ibrahim. *See* Notification of Withdrawal Privileges of Driving Privileges, (SR 22) Interestingly, the legislature used "while" in defining reasons for disqualification in subsections (1-3) and (5-6), but used different language in subsection (4) because it intended a different result than argued by the Department. The term "while" is also used in SDCL§ 22-14-12, discussed above.

Had the legislature truly intended a disqualification for the offense allegedly committed by Ibrahim in this case they would have used similar language in SDCL § 32-12A-36 as they did in SDCL § 32-12-52.3. SDCL § 32-12-52.3 sets forth:

> **Revocation for drug-related offenses**. Upon a first conviction or a first adjudication of delinquency for any violation, **while in a vehicle**, of §§ 22-42-5 to 22-42-9, inclusive, 22-42A-3, or 22-42A-4, the court shall revoke the driver license or driving privilege of the driver so convicted for a period of ninety days. (irrelevant portion of statute omitted and emphasis added)

There is no evidence in the administrative record, or Findings of Fact and Conclusions of Law, that Ibrahim's conviction included an "in vehicle" designation pursuant to SDCL § 32-12-52.3. "The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute." *Goetz v. State*, 2001 SD 138, ¶16 *quoting Appeal of AT&T Information Systems*, 405 N.W.2d 24, 27 (SD 1987). "The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used". *Id*. The language in SDCL § 32-12A-36(4) conveys a different meaning than the language in SDCL § 32-12-52.3, which requires a different result regarding the Department's decision to disqualify Ibrahim's commercial driver's license. The legislature's intent is determined from what they said in SDCL § 32-12A-36(4), not what the Department thinks it should have said, which is suggested in the Department's "if/then" argument. (SB, 11) Had the legislature intended the Department's definition they would have used similar language clearly set forth in SDCL § 32-12-52.3.

The Department argues that the circuit court's interpretation creates surplusage between SDCL § 32-12A-36(1-3)(5-7) and subsection (4). (SB, 12) This is clearly not true as subsections (1-3,6,7) each deal with misdemeanor offenses while subsection (5) deals with refusing chemical testing. Additionally, subsection (7) only pertains to those driving commercial vehicles. Subsection (4) deals with using a vehicle in the commission of a felony. Subsection (4) cannot be duplicative and does not erode from the "any felony" language because subsection (4) is the only provision in SDCL 32-12A-

36 that pertains to a felony offense.

Based on the facts of this case and the legal argument set forth above, this Court should affirm the circuit court's decision.

III. DID THE CIRCUIT COURT ERR WHEN IT DETERMINED THAT THERE WERE NOT SUFFICIENT FACTS IN THE RECORD TO SUPPORT THE DEPARTMENT'S DECISION TO DISQUALIFY IBRAHIM'S COMMERCIAL DRIVER'S LICENSE?

The administrative record is void of any documentary evidence confirming that Ibrahim was convicted of a felony or that his conviction occurred in a motor vehicle. There are no statutory citations of which felony Ibrahim was convicted and there is no citation in the record for "felony committed in a vehicle by a CDL holder (sic)". We are left to assume that the felony for which the Department relies upon involves marijuana based on the findings of fact, but the record is void of any evidence to support this finding of fact. There are no charging documents, no judgment of conviction, and no transcript of the plea or sentencing. Neither party timely requested the transcript of the hearing, so it is unknown whether any evidence was presented at the hearing, but that is unlikely as these items could clearly have been received as documents by the Department.

The circuit court supplemented the record made by the Department by taking judicial notice of the underlying criminal file and concluded in footnote two of the Memorandum Decision that there was no reference to a motor vehicle. (SR, 90) Based on the evidence available to the circuit court on this appeal, there was no evidence in the record, or the judicially recognized file in 49 CRI17-6579, to support the Department's

findings of fact. Issues one and two posed by the Department above are irrelevant as the circuit court determined, based on Ibrahim's initial appeal issues, that there was insufficient evidence in the record to support the Department's decision to revoke Ibrahim's commercial driver's license.

The Department's findings of fact refer to Ibrahim receiving a citation for a "felony committed in a vehicle by a CDL holder" that he was convicted "of felony committed in vehicle by a CDL holder" and that his "commercial driver's license was to be disqualified for one year because he was convicted of felony committed while driving a vehicle". SR, 16 There is no citation in the record for "felony committed in vehicle by CDL holder" and no statute exists setting forth the same. The same is true for the alleged conviction and the Department added "while" to the finding of fact definition it relied upon in disqualifying Ibrahim's license. The circuit court did not err in finding that the Department's finding of fact #3 and #5 were "clearly erroneous and without any factual or legal basis." (SR, 87)

Factually, the Department made a similar error in *Erickson v. Dep't of Pub. Safety*, 2017 SD 75. In *Erickson*, the Department failed to put Erickson's criminal file or a transcript of Erickson's plea hearing into the record. *Id*. at ¶4. The Department is clearly on notice of what reviewing courts deem necessary from an evidentiary standpoint. Simply put, the record is incomplete. The South Dakota Supreme Court has criticized parties for failure to complete the record. In *Klutman v. Sioux Falls Storm*, 2009 SD 55, the Court failed to grant relief to appellant to add parents as a party because the parties "did not make a clear record facilitating appellate review". *Id*. ¶11

The Department's failure to submit evidence regarding a conviction, or facts that Ibrahim was in a vehicle, are insufficient to support the Department's decision to disqualify his commercial driver's license for one year. The Department's failure to establish said evidence makes the hearing examiner's decision in this matter clearly erroneous and the circuit court's decision should be affirmed.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Ibrahim respectfully requests that the trial court's Memorandum Opinion and Order be affirmed.

Respectfully submitted this 31st day of August, 2020.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, THE DEPARTMENT OF PUBLIC SAFETY, Appellant, vs. IBRAHIM NASR IBRAHIM, Appellee.	)))))))))))	Appeal No. 29344

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas E. Hoffman
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

For convenience and clarity, the Appellant/State of South Dakota, the Department of Public Safety, will be referred to as the "Department." The Appellee/Ibrahim Nasr Ibrahim will be referred to as "Ibrahim." References to Ibrahim's Brief will be referred to as "IB" and the appropriate page number. References to the Office of Hearing Examiners will be "OHE." References to the Settled Record will be "SR" and the appropriate page number. References to the Commercial Driver's License will be "CDL."

ARGUMENT

A. DID THE CIRCUIT COURT ERR BY OVERRIDING THE ISSUES AS FRAMED BY THE PARTIES AND *SUA SPONTE* CALLING INTO QUESTION THE CONSTITUTIONALITY OF SDCL 32-12A-36(4)?

1. IBRAHIM'S CLAIM OF FAILURE TO OBJECT

Ibrahim attempts to cloud the issues on appeal, raising now a "failure to object" argument. This argument is factually unsound based on the record before this Court. When the parties were before the circuit court, the Department filed its Appellee's Brief. SR 61-65. There, the Department pointed the circuit court towards the correct standard of review. SR 62 ("Standard of Review," citations to SDCL 1-26-36; *see also* ft. nt. 2, correcting Ibrahim's erroneous citation). The Department also cited *Erickson* throughout its brief. SR 63; *Erickson v. Dep't of Public Safety*, 2017 S.D. 75, 904 N.W.2d 652.[1]

[1] Of note, the issues warned of by Justice Wilbur and Justice Kern in their concurrence have come to pass, as the circuit court again ignored the prudential rules of appellate practice, expanded the record, and addressed matters not properly before it. *Erickson, supra*, ¶ 17, 904 N.W.2d at 357.

After the circuit court's *sua sponte* interjection of constitutional questions, the Department was required to submit additional responses. SR 93-95. Noticeably absent from the circuit court's email is any discretion on the matter. *Id.* Nevertheless, when the Department's supplemental brief was filed, it deliberately incorporated by reference all of the foregoing arguments made by the Department. SR 77 ("The Department hereby incorporates all of its previous arguments made in its February 7, 2020 Appellee Brief."). This includes all provisions of the Department's Appellee's Brief, to include the appropriate review at the circuit court level. *Id.;* SR 62. Further, Ibrahim's notion of a "failure to object" is contrary to the Department's entire supplemental brief. Taken as a whole, the Department filed a 5-page refutation of the circuit court's preferred theory. SR 77-81. Such a refutation is an objection, plain and simple.

For legal authority on Ibrahim's "failure to object" proposal, he cites to the divorce case of *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, 913 N.W.2d 496. Reliance on a divorce proceeding in an administrative appeal is error. Frankly, to be similarly situated as *Osdoba*, Ibrahim would have had to give notice to the Attorney General's office (which he failed to do), raise these constitutional questions at the administrative hearing (which he did not do), the Department would have had to stay silent on the matter (which it has not), and then the appeal be taken. *Osdoba, supra.* That is not the record before this Court. This is further underscored by the fact that the only opportunity the Department had to address these constitutional challenges was after the circuit court interjected its preferred theory of the case. SR 93-95. This is inapposite to *Osdoba*. The more-analogous

case is the striking resemblance these facts display as overlaid by *United States v. Sineneng-Smith*, 590 U.S. ___, 140 S. Ct. 1575, 1578-1579 (2020).[2]

Based upon the foregoing, Ibrahim's claim of a "failure to object" must fail for several reasons. First, it is unrefuted that these constitutional questions were never raised at the administrative (i.e. "trial") level, which thereby precluded any objection. IB 5. Second, the Department pointed the circuit court to its correct standard of review. SR 62. Third, while the circuit court mandated supplemental briefing, the Department incorporated by reference its argument made in its Appellee's Brief in the supplemental briefing. SR 77. Fourth, Ibrahim has failed to cite applicable legal authority, and argument made without authority is deemed waived. IB 7; SDCL 15-26A-60(6).

2. ATTORNEY GENERAL PARTICIPATION

Ibrahim has failed to point to any part of the settled record that provides the mandatory notice required to be given to the Attorney General's office regarding constitutional challenges. SDCL §§ 15-6-24(c) and 2-14-2.1. That's because no notice exists in the record. This lack of notice was pointed out to underscore Ibrahim's noncompliance with mandatory statutes as well as the broader issue: that the constitutional questions were only brought up in the midst of the appeal through the circuit court's *sua sponte* interjections. SR 93-95.

3. APPLICATION OF BINDING PRECEDENT

Ibrahim asserts that the constitutionality issues were duly raised and briefed throughout this administrative appeal. IB 7. An administrative hearing is – for all intents

[2] Through the entirety of his brief, Ibrahim neither cites to nor addresses this binding precedent. SDCL 15-26A-60(6).

and purposes – the trial level. Ibrahim was represented by counsel at the administrative hearing, yet at no point in that hearing were any constitutional challenges presented. IB 3, ft. nt. 1. Further, the OHE's proposed decision is likewise void of any constitutional analysis. SR 42-44.

However, Ibrahim's engagement in the *Sharp* two-part test begs the question evinced by the case itself: if Ibrahim truly believes that the constitutional interpretation of SDCL 32-12A-36(4) is of such considerable public importance and it requires immediate resolution, then why is it that Ibrahim never brought such a question forward at the administrative hearing or circuit court appeal? *Sharp v. Sharp,* 422 N.W.2d 443, 446 (S.D. 1988). Why leave such an important issue up to the predilections of the circuit court?

The answer to that rhetorical question was provided previously by Justice Ginsburg, insofar as ultimately Ibrahim rode the argument suggested by the circuit court. *Sineneng-Smith, supra,* 140 S. Ct. at 1581-82. This erodes Ibrahim's position in performing the *Sharp* two-part test: this is neither a matter of public importance nor existing emergency. *Sharp, supra,* 422 N.W.2d at 446.

Accordingly, based on the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

B. DID THE CIRCUIT COURT ERR BY DECLARING SDCL 32-12A-36(4) UNCONSTITUTIONAL?

1. ADMINISTRATIVELY COERCIVE STATUTES

As this Court has mentioned time-and-again, words and phrases in a statute must be given their plain meaning and effect; it is fundamental that the words of a statute must be read in their context; it must be done with a view to their place in the overall statutory scheme; judicial construction that renders a statute as mere surplusage is met with disfavor; and it is not for the Court to lift its judicial pens and amend unambiguous statutes, as that task is left to the body elected to make laws. *See generally, In re Certification of a Question of Law from the U.S. Dist. Court, Dist. of South Dakota, S. Div.*, 2014 S.D. 57, ¶ 8, 851 N.W.2d 924, 927; *Goin v. Houdashelt*, 2020 S.D. 32, ¶ 13, ___ N.W.2d ___; *State v. Bryant*, 2020 S.D. 49, ¶ 31, ___ N.W.2d ___.

As the Department pointed out to the circuit court, administratively coercive statutes of general applicability enjoy the presumption of constitutionality and should be held as such. *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552; *see also City of Wichita v. Jones*, 353 P.3d. 472 (Kan. App. 2015). SR 80. Neither the circuit court below – nor Ibrahim in his brief – have addressed the presumption of constitutionality enjoyed by the statute. Instead, both resort to describing SDCL 15-26A-36(4) as, "nonsensical," "meaningless," or a "nonsequitur." IB 11. Such dismissiveness of the Legislature's enactment is folly.

Ibrahim likewise engages in a "parade of horribles" to cloud the facts as found by the OHE – facts that are entitled to great weight. SDCL 1-26-36; *Certifiability of Jarman*, 2015 S.D. 8, ¶ 8, 860 N.W.2d 1, 5. The settled record does not deal with sex offender registry nor convictions of forgery, as suggested by Ibrahim. IB 12. Factually, the settled

record indicates that Ibrahim was pulled over for an equipment violation, he had felony levels of marijuana in the vehicle, he was convicted, and he took a suspended imposition of sentence. SR 21, 33, 42; *see also State v. Ibrahim,* 49 CRI 17-6579. Finally, before addressing the language of the statute itself, Ibrahim makes the bold assertion that it is the Department that has re-read the statute to include words like "while." This is notwithstanding that the circuit court and Ibrahim have lifted their pens to rewrite SDCL 32-12A-36(4), requiring an "instrumentality" provision; something neither found nor written in the statute.

The circuit court's analysis of SDCL 32-12A-36(4) was mistaken. Ibrahim has compounded this in his brief. Ibrahim urges this Court to find that SDCL 32-12A-36(4) is not drawn with specific clarity nor does it define a criminal act clearly. IB 10-11. Ibrahim places reliance – in part – upon the circuit court's grammatical explanation of, "the direct object of a verb does not nullify the operative verbs." IB 12; SR 89. This is error.

At the onset, SDCL 32-12A-36(4) can be broken down easily. First, at SDCL 32-12A-36, you have the independent clause: Any person (subject) is disqualified (verb) from driving (object)…. Then comes the subordinate clause at subsection 4: if convicted (verb) of using a vehicle in the commission of any felony (adverb clause). In this breakdown, the subordinate clause is subsection 4, and cannot stand alone without the independent clause found at the onset of SDCL 32-12A-36. Further, the adverb clause, "of using a vehicle in the commission of any felony" modifies the verb "if convicted." This grammatical exercise underscores the correct interpretation of SDCL 32-12A-36(4). Plainly put, any person is disqualified from driving a commercial vehicle for a year if convicted of using any vehicle in the commission of any felony.

Further, SDCL 32-12A-36 is not a criminal statute penalizing other acts; it is an administratively coercive statute, civil in nature, which aims to bring CDL drivers into compliance with the law. *McNeeley, supra.* That is because no one has a "right" to drive; it is a privilege. SR 77.

Accordingly, based on the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

C. DID THE CIRCUIT COURT ERR WHEN IT DETERMINED THAT THERE WERE NOT SUFFICIENT FACTS TO SUPPORT THE DEPARTMENT'S FINAL DECISION?

1. DOCUMENTARY EVIDENCE

Ibrahim does not contest that this Court's review of agency decisions gives great weight to the findings made and inferences drawn by an agency on questions of fact. SDCL 1-26-36; *Black v. Div. of Criminal Investigation,* 2016 S.D. 82, ¶ 13, 887 N.W.2d 731, 735-736. Rather, Ibrahim asserts that the administrative record is "void" of any documentary evidence confirming that his felony conviction stems from activity that occurred when he was using a vehicle in the commission of any felony.

Ibrahim's assertion strays wide of the mark. Documentary evidence is found in the record. SR 33. SR 33 is Ibrahim's "Abstract of Operating Record" placed into the record by the Department. *Id.* At the upper left-hand corner, Ibrahim's Abstract of Operating Record indicates, "Felony committed in a vehicle by CDL holder," the violation date, the conviction date, the location, and the criminal docket number. *Id.*

These facts were before the OHE, and form the basis for the OHE's findings of fact 3-5. SR 42. This was likewise pointed out to the circuit court. SR 62.

Further, the circuit court took judicial notice of Ibrahim's criminal case, docketed at *State v. Ibrahim*, 49 CRI 17-6579. In doing so, the record is supplemented by judicial notice of the nine offenses Ibrahim was cited for on August 19, 2017, that the offenses stem from a moving violation by Ibrahim's failure to have his license plate illuminated in violation of SDCL 32-17-11, and that on February 20, 2018, Ibrahim pled guilty to Possession of Marijuana, More Than 2 Ounces, Less Than One-Half Pound, in violation of SDCL 22-42-6, a Class 6 Felony. The record is not "void" as Ibrahim suggests. To the contrary, the record is replete with facts indicating that Ibrahim was operating a vehicle, he committed a felony, and he stands convicted of that felony. These findings and inferences are reasonable, entitled to great weight, were relied upon by the OHE, and adopted in full by the Department. SR 42-46.

Further, Ibrahim attempts to "burden shift" his responsibilities during his appeal to the circuit court. At that appeal level, Ibrahim was the appellant. Yet it was Ibrahim who failed to request any transcript, and decided to proceed on the record "as is." Ibrahim's piecemeal citation to the *Klutzman* case ignores this Court's central point that, "the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant." *Klutzman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 36, 769 N.W.2d 440, 453.

The circuit court did not find a lack of facts. Rather, the circuit court *sua sponte* held that SDCL 32-12A-36(4) was impermissibly vague, and therefore could not provide a basis for any revocation. SR 91-92. Indeed, of the circuit court's six-page Memorandum Opinion and Order, a scant three paragraphs are directed at the factual background of the

case, with the remainder being the circuit court's erroneous legal interpretation. SR 87-92. That is not a basis to say there are no facts; to the contrary, that only underscores the issue that the circuit court dovetailed its erroneous interpretation of SDCL 32-12A-36(4) and used that as its basis to reverse the Department's Final Decision.

Accordingly, based upon the foregoing facts and legal argument, this Court should reverse the circuit court, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year.

CONCLUSION

The Department respectfully requests that this Court reverse the circuit court's Memorandum Opinion and Order, affirm the Department's Final Decision, and remand the case for reinstatement of the Department's Final Decision disqualifying Ibrahim's commercial driving privileges for a period of one year. The Department makes this request as previously stated in the Appellant's Brief, and for the reasons expounded on above.

Dated this 28th day of September 2020.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellant, State of South Dakota, The Department of Public Safety, hereby certify that on the 28th day of September 2020, a true and correct copy of Appellant's Reply Brief was served by electronic mail to:

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and the original and 2 copies were mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

Dated this 28th day of September 2020.

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CERTIFICATE OF COMPLIANCE

Edward S. Hruska III, the attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

a. Appellant's Reply Brief does not exceed 16 pages.

b. The body of Appellant's Brief was typed in Times New Roman 12-point typeface; and

c. The body of Appellant's brief contains 2.391 words and 12,682 characters with no spaces and 15,062 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

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