IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 27115

IN THE MATTER OF THE CERTIFIABILITY
OF BRETT JARMAN AS A SOUTH DAKOTA
LAW ENFORCEMENT OFFICER

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Brett Jarman is "Jarman." Appellee Law Enforcement Standards and Training Commission is "LEOS&TC." The Hearing Transcript is "Tr" plus the page number, followed by its Settled Record ("SR") page number. The Circuit Clerk's Certificate is "CC" plus the document number. "Hearing Officer" is "H.O."; the Attorney General's Office as "A.G."

JURISDICTIONAL STATEMENT

Jarman applied to the LEOS&TC for law enforcement certification (SR 1-6). It was denied after a contested hearing conducted by Hearing Officer Robert Anderson per entry of Findings of Fact, Conclusions of Law (SR 233-236; 241-245), and Order signed by the Chairman of the LEOS&TC, not by the H.O. Robert Anderson (SR 237-238; 246-247). The basis of the denial was that Jarman had bad moral character because the Commission found he had kicked his girlfriend in the knee (SR 234, 243), even though he was acquitted of the assault at trial and the matter was expunged from his record — both the criminal case and subsequent expungement involving attorneys from the AG's office. From there he appealed to the 7th Judicial Circuit Court, sitting as an appellate court (CC

1; SDCL §1-26-30; §1-26-30.2; §1-26-30.3; §1-26-30.4). The circuit court issued its Decision and Order of Affirmance (CC 642, 654). Notice of Entry was given by Jarman (CC 666, 680), and also by LEOS&TC (CC 701; 703; 717). There were no substantive hearings before the circuit court and the matter was decided on the written submissions of the parties. On June 19, 2014 Jarman filed his Notice of Appeal of right under SDCL §15-26A-3 and §15-26A-4 (CC 694).

STATEMENT OF LEGAL ISSUES

1. Whether using acquitted and expunged conduct is proper to deny law enforcement certification, when use of such is not specifically delineated by statute or rule, and when use of other matters is specifically delineated by statute and rule.

The LEOS&TC and circuit court held that it was.

ARSD §2:01:02:02
SDCL §23-3-42
SDCL §23A-3-32

2. Lack of "good moral character" was not established by "clear and convincing evidence," and thus Jarman's certification was wrongfully denied.

The LEOS&TC and circuit court held that it was.

SDCL §23-3-42
ARSD §2:01:02:01(4)
Matter of Certification of Ackerson, 335 NW2d 342 (SD 1983)

3. The Circuit Court's appellate ruling denying that the Findings, Conclusions, and Order are a nullity because they were signed by the LEOS&TC's acting chairman rather than the presiding judicial officer is erroneous because its legal analysis is in error, and also does not fit statutory authority

The Circuit Court held that due process of law was not violated by the LEOS&TC self-signing the Findings, Conclusions, and Order as a statutorily appropriate exercise of a valid judicial function and did not result in them being rendered a nullity.

State v. Blakny, 2014 SD 46 (Slip op., July 9, 2014)
Case v. Murdock, 1995 SD 26, 528 NW2d 386 (*Case II*)
Mordhorst v. Egert, 223 N.W.2d 501 (S.D. 1974)
SDCL §1-26D-6

STATEMENT OF THE CASE AND FACTS

In order to run for Fall River County Sheriff, Brett Jarman had to appear on the ballot so Fall River County voters could exercise their fundamental American right to vote for the candidate of their choice (Tr 1-172; SR 16-186). For Jarman to appear on the ballot he had to (re-)acquire South Dakota law enforcement certification.

Jarman, who has a quarter-century of law enforcement experience, already met the qualifications for certification (SR 1-6): He is a long-term resident of Fall River County, and a graduate of Edgemont High School (SR 2); a U.S. Marine Corps Veteran (SR 3) who participated in Operation Desert Shield/Storm (SR 6); his driver's license has never been suspended or revoked (SR 2); has no history of criminal convictions (SR 3); in December 1989 he received his law enforcement certification from the South Dakota LEOS&TC (SR 2); he worked as a Hot Springs policeman from 1989-1992 (Tr 134; SR 149); in December 2003 he received a similar certification as a Federal Law Enforcement Officer (SR 2); since 2006 he has had "secret" and "top secret" clearance (Tr 135-136; SR 3, 6, 150) working as an "Overseas Contractor – D.O.D. [Department of Defense]" in the category of "Security Specialist – Classified" (Tr 91; SR 3, 106); and his application listed the maximum number of references (SR 3). He has martial arts experience in three

styles: he's a black belt in karate Kyoko kun-ki; first class black belt in Judo; and fourth degree black belt in freestyle grappling (*Id*.). Although he knows how to perform martial arts kicks, kicking is not a priority that is taught in his preferred style (Tr 92; SR 107).

The LEOS&TC received Jarman's application on January 21, 2014 (SR 1). He was issued a reply on February 12, 2014 (letter of 02/12/14; SR 7-9). The letter centered on the phrase in §23-3-42 and ARSD 2:01:02:01: "good moral character" (SR 7, 8). Despite Jarman's acquittal of an aggravated assault charge involving former girlfriend Walleska Serafin, and the expungement of his record (SR 208, Hearing Exhibit A), the LEOS&TC stated there were concerns as to that event which rendered him unable to meet the minimum requirement of "good moral character" (SR. 7). Other grounds/events were cited through the process but by the time of the hearing were dismissed by the LEOS&TC and not heard (Tr 12-13; SR 27-28).

At the contested hearing, Serafin was the only witness called by the Commission's attorney (Tr 22-89; SR 37-104). Her testimony presented nothing new than what the jury had heard from her in *State v. Jarman*, resulting in Jarman's acquittal and expungement. Serafin is a Second Degree Black Belt in Jukite Ju-Jitsu (Tr 49; SR 64). She has been in training as a martial arts fighter for 15 years, and has competed in many tournaments (Tr 83-84; SR 98-99). Training for the white belt, the first, most basic belt, taught Serafin how to defend against a kick (Tr 53, 54; SR 68, 69).

Serafin and Jarman dated on and off until Serafin moved to Wyoming in May 2007 (Tr 91; SR 106). They attempted to maintain the relationship long distance (Tr 24-25; SR 39-40), but this failed and by 2010 they were merely friends, although Serafin

admitted she was in love with Jarman (Tr 52, 55, 83; SR 67, 70, 98). In 2010 Serafin hoped to be Jarman's girlfriend (*Id*.), and in that regard rode her motorcycle to Edgemont and stayed with Jarman for nearly a week when the couple went to the 2010 Sturgis Rally together (Tr 27, 29; SR 42, 44). During their time together at the Rally Serafin was jealous and easily angered (Tr 93-94, 126; SR 108-109, 141). It made her mad if she thought Jarman was talking on a phone with a woman (Tr 55, 93; SR 70, 108). On three or four occasions she angrily questioned him about phone calls (Tr 93: SR 108). One incident during the Rally involved Serafin grabbing Jarman's phone from him; it turned out Jarman was just talking with his daughter (Tr 55-56, 94; SR 70-71, 109). After the Rally ended Jarman and Serafin rode their motorcycles back to Jarman's home in Edgemont (Tr 95: SR 110).

The next day while Jarman was working in his garage, Serafin confronted him about where their relationship was going (Tr 98; SR 113). Jarman replied that he needed unobstructed communication and non-hostile responses when they disagreed on something, in essence saying he wanted no more angry outbursts (*Id*.). Serafin became irate, stated that love must be unconditional, but Jarman said that those were his conditions, so she began slamming tools in his garage which adjoins the kitchen to his small home. (Tr 99; SR 114). Jarman, sick of the way she kept getting angry, told Serafin she needed to leave (*Id*.). Serafin packed her things and left on her motorcycle for her home in Casper, Wyoming, only to return 45 minutes later because of the severe weather to the west of Edgemont (Tr 100; SR 115).

Jarman allowed her to stay one more overnight so she could travel safely in the daylight. (Tr 100-101; SR 115-116). Serafin slept on the couch (Tr 33, 101; SR 48, 116). The next morning Jarman conducted business at his computer for nearly an hour, made some phone calls, and began going through bills (Tr 105-106; SR 120-121). Serafin was on the couch, just feet away in the adjoining living room (Tr 35; SR 50) when Jarman received a telephone call from his female accountant (*Id*.). As the call ended Serafin heard Jarman say, "I [*sic*] call you later, babe." (Tr 35, 107; SR 50, 122.) Serafin demanded to know who it was, exclaiming, "who is the fucking puta," which is Spanish for whore, and going on, "Are you fucking the puta in the ass?". (Tr 62, 63, 107). Jarman told her to get out of his house, but Serafin refused to leave. (Tr 108; SR 123). Jarman walked through the small kitchen to his garage to get away from her and to try to calm things down and put his phone on the charger because it was dying (*Id*.).

Serafin went into Jarman's living room (Tr 64; SR 79; Hearing Exhibit H photos) where he kept his valuable possessions, including religious Asian figurines and swords (Tr 63, 64; SR 78, 79; Hearing Exhibit K). Upon hearing something hitting the walls inside the living room (Tr 108; SR 123), Jarman went inside to find Serafin in a crazed rage. He again told her to leave. (Tr 109; SR 124). She asked him what he was going to do about it since he was a coward (Tr 110; SR 125). An archery target was positioned much like a footstool near Jarman's couch and it appeared to Jarman she was going to sit down on it (Tr 110; SR 125), but she missed and instead fell onto her rear end and on to the floor (*Id*.). She then said, "That's domestic violence" (*Id*.). Jarman replied that it was not and again asked that she leave his house (*Id*.).

Serafin rose and again threw another one of Jarman's valuable items against the fireplace and sheet rock walls to break it (Tr 37, 64-65, 67, 111; SR 52, 79-80, 82, 126). Serafin admitted that while she was breaking Jarman's figurines "he was just standing there," and that she was not in fear of him (Tr 38, 84-85; SR 53, 99-100). Jarman kept telling Serafin to leave his home, but she wouldn't (Tr 112; SR 127).

Jarman's martial arts swords were on display in mortared slots in the rocks of the fireplace (*Id*.). Serafin started to grab at one, which changed the whole situation and put Jarman in fear for himself, not to mention as well as his property (Tr 112-113; SR 127-128). Serafin claimed she didn't remember having attempted to grab the sword, but she did admit owning one like it and that she knew how to use it (Tr 68-69; SR 83-84). In fact in order for her to receive her next martial arts black belt degree she had to obtain mastery of the sword and had been practicing with one (Tr 69; SR 84). Jarman told her not to touch the sword (Tr 113; SR 128) and moved towards her to get the sword away from her (*Id*.). Whereupon Serafin grabbed another object and turned and threw it at Jarman's face like a baseball pitcher would throw (Tr 114; SR 129). Jarman swiftly checked Serafin's throwing shoulder (right) with his left hand to deflect the throw and overhooked her left arm with his right hand to stop the aggression (Tr 113, SR 128). As this happened, Serafin's throwing motion was abruptly stopped and her left knee gave out and she collapsed to the floor (Tr 38, 113-114; SR 53, 128-129). As she went down he cradled her head so it would not hit the rock fireplace (Tr 115-116; SR 130-131). It is important to note in all the other times they had been together he had never touched her even once in a violent manner (Tr 52; SR 67).

Serafin's version was different. She claimed Jarman chest bumped her to the floor and outright kicked her left knee with a side thrust knee kick (Tr 38; SR 51).

Serafin admitted though she had been in a fighting stance, left foot forward, right foot back (Tr 88; SR 103) when he approached (Tr 38; SR 53.) Serafin contended this is when Jarman delivered a side thrust kick (Tr 39; SR 54). Jarman adamantly denied having kicked her (Tr 116, 126; SR 131, 141.) Although this "fighting stance" was the same position one would be in as if throwing an object hard like a baseball, just as Jarman described.

Jarman grabbed her phone to call the police but gave it back to her after he could not figure out how it worked. Serafin went outside in the front yard of Jarman's Edgemont home and phoned Jarman's son Dustin instead of 911 (Tr 42; SR 57). Importantly Serafin did not call out for help to three city workers working in the street 30 feet away (Tr 75; SR 90). Serafin didn't want an ambulance, nor did she want to go to Hot Springs for medical treatment, so the decision was that ultimately she would go home to Wyoming, receive medical treatment there (Tr 44, 74, 120; SR 59, 89, 135) and drop her motorcycle and possessions off at home. Jarman drove her to Casper, Wyoming in his pickup, and during the ride from Edgemont to Casper she asked him about the future of their relationship (Tr 50, 121; SR 65, 136). When Jarman didn't answer, Serafin said she was going to tell the doctors he had kicked her (*Id*.). Jarman told her, "You're full of shit. You need to tell the truth." (Tr 122; SR 137.) Then he said to her, "I'm tired of this. Why don't we just go to the police department in Casper" (*Id*.). He also told her that what laws were broken were by her causing intentional damage to his private

property, and failing to leave his residence despite numerous times being told to (Tr 123; SR 138). Serafin asked him not to take her to the Casper Police Department (*Id*.), so Jarman took her to her home. Upon arriving at Serafin's home in Casper, they offloaded her motorcycle, then went to find a medical clinic, with her driving (*Id*.). The first one they stopped at had an hour's wait, so they attempted to find another (Tr 124-125; SR 139-140). Serafin again repeated to Jarman that she was going to say he had kicked her in the leg, and once again Jarman told her she was "full of shit" (Tr 125; SR 140), so she dropped him off at his truck and he went back to Edgemont. Eventually Serafin did tell her version to medical personnel, a Wyoming police officer, and Social Services (Tr 47-48; SR 62-63), and ultimately needed a knee operation to repair the damage.

Two character witnesses testified to the LEOS&TC in favor of Jarman: Jeff Bauer (Tr 143-152; SR 158-167) and Marla Zimiga (Tr 153-154; SR 168-169). Bauer has been a high-ranking Rapid City Fireman for 21 years; served for three years as a deputy sheriff; and had undergone law enforcement training concerning domestic violence (Tr 143,152; SR 158, 167). He has known Jarman since approximately 1990 (Tr 143; SR 158). He and Jarman served in the Marines together and still associate often (Tr 144; SR 159). He knows Jarman to be "very honorable, very truthful" (*Id*.).

Bauer has known Serafin as long (Tr 145; SR 160). Since 1999 he has run Rushmore Jukiet Ju-Jitsu martial arts dojo (*Id*.). "She was one of our tougher female counterparts" (Tr 147; SR 162), was "very active in the circuit tournaments," and had "accumulated quite a bit of victories and trophies and stuff like that" (*Id*.). In that capacity he has sparred with Serafin (*Id*.). "I used to kick on her all the time. So yeah.

She's good at defending stuff like that" (*Id*.). Reacting instantaneously through muscle memory is important in martial arts (Tr 146; SR 161) as part of learning defensive techniques so that if a surprise confrontation comes, muscle memory takes over (*Id*.). An offer of proof was made over a sustained objection that Bauer's opinion was that Serafin was not a truthful person (Tr 147-148; SR 162-163). Jarman's martial arts format, American freestyle grappling, does not involve a lot of kicks (Tr 151; SR 166), but rather is more of a take-down, control, submission style (*Id*.).

The other character witness, Marla Zimiga, has actively known Jarman ever since 1970 when they were in elementary school (Tr 153; SR 168). She knows his reputation for truthfulness as being that "very truthful" (Tr 154; SR 169). She had not testified at Jarman's criminal trial (*Id*.).

As for Jarman's Petition of 93 signatures, and letters supporting his good moral character, the LEOS&TC not only did not want to consider them, but objected to having them as part of the record (Tr 126-128; SR 141-142, 219-223; Exhibits D, F). Jarman's counsel made appropriate offers of proof (TR 127-128; SR 142-143).

The LEOS&TC went into executive session (Tr 168; SR 183) and shortly thereafter emerging with a roll-call vote of 6-to-1 denying Jarman's application (Tr 170; SR 185). An indicia of prejudicial bias against Jarman was that the lone vote for Jarman had been cast by Ken Tracy, the only lay person not employed in law enforcement or the commission (*Id*.).

STANDARD OF REVIEW

The Supreme Court is "unaided by any presumption that the [circuit] court was correct." *Watertown Coop. Elevator Ass'n v. State Dep't of Revenue*, 2001 SD 56, ¶15, 627 NW2d 167, 173. Agency decisions are reviewed the same as the circuit court does, i.e., by giving "great weight" to findings and inferences on questions of fact (SDCL §1-26-36), and reviewing de novo questions of law. *Brown v. Douglas Sch. Dist.*, 2002 SD 92, ¶9, 650 N.W.2d 264, 267. An agency decision is reversed when "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are, among other things, in violation of statutes, affected by an error of law, are clearly erroneous, or constitute an abuse of discretion. See, e.g., *In re PSD Air Quality Permit Application*; 2013 SD 10, ¶16, 826 NW2d 649, 654; SDCL §1-26-36.

"An abuse of [that] discretion can simply be an error of law or it might denote a discretion exercised to an unjustified purpose, against reason and evidence." *Sjomeling v. Stuber*, 2000 SD 103, ¶11, 615 N.W.2d 613, 616; see also *Hill v. Hill*, 2009 SD 18, ¶5, 763 NW2d 818, 822. If a mistake of law has occurred, the mistake itself constitutes an abuse of discretion. *Corcoran v. McCarthy*, 2010 SD 7, ¶13, 778 N.W.2d 141, 146. "A trial court's discretion is a judicial [*sic* — judicious] discretion, not an uncontrolled one, and its exercise must have a sound and substantial basis in the testimony." *Meinders v. Meinders*, 305 NW2d 404, 408 (SD 1981) (Henderson, J., dissenting). A trial court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law[.]" *Id*., citing to *Zurich N. Am. v. Matrix Serv*., 426 F3d 1281, 1289 (10th Cir. 2005).

The Findings of Fact must support the Conclusions of Law, and it is axiomatic that the Order entered thereon is only as good as the factual and legal accuracy of the underlying Findings and Conclusions. See *Shroyer v. Fanning*, 2010 SD 22, ¶8 n2, 780 NW2d 467, 470 n2. This means that where no Finding or Conclusion exists for a specific factual scenario or particular legal ground, no relief may be accorded upon that ground, and where there has been an insufficiency of factual evidence to support a Finding of Fact or lack of proper legal basis to support a Conclusion of Law, the Order and Judgment fails. See, e.g., *March v. Thursby*, 2011 SD 73, 806 NW2d 239 (Findings and Conclusions supporting a Protection Order were entered on a pre-printed "form," which was factually and legally insufficient; the box(es) checked by the trial judge on it did not properly correspond with the evidence produced or support the allegations raised).

ARGUMENT

It is an injustice and a violation of due process and our state's public policy that Jarman's acquittal by a neutral jury of his peers, as well as the expungement he received thereafter from a dispassionate circuit judge, has, according to the result from which he has appealed, gained him less protection under the statutes than one who has received a suspended imposition of sentence by way of a guilty plea or conviction. Neither through consideration of properly allowable facts, nor an appropriate application of law to them, was there clear and convincing evidence establishing that Jarman lacked good moral character to receive law enforcement certification. The LEOS&TC should have granted the certification, and the Fall River County voters should be given the free choice to vote for or against him, and the circuit court erred in such affirmance.

1. <u>Whether using acquitted and expunged conduct is proper to deny law enforcement certification, when use of such is not specifically delineated by statute or rule, and when use of other matters is specifically delineated by statute and rule</u>.

At the outset of the LEOS&TC hearing the undersigned pointed out that since there were specific rules allowing the use of suspended impositions and misdemeanor convictions to ascertain good moral character, there must likewise be specific rules allowing the use of acquitted and expunged conduct before such can be used to ascertain good moral character (Tr 5-10; SR 20-35). Since the rules were silent as to acquitted and expunged conduct the board had no authority to use such in denying an application (Tr 9-10; SR 24-25).

Utilizing the rules of statutory construction, "[W]e have an obligation to interpret law in a manner avoiding 'absurd results … .'" *Murray v. Mansheim*, 2010 SD 18, ¶7, 779 NW2d 379, 382. Yet, an absurd result is what has occurred under the ruling of the LEOS&TC and circuit court because had Jarman not been acquitted and received a formal expungement, but rather had been convicted and thereafter had received a "reprieve, commutation or pardon," specific South Dakota rules of law would have offered him greater protection. This Court ought to remedy this inequity by reversing, and holding as a matter of law that nothing about the Serafin accusation for which Jarman was unanimously acquitted by a neutral jury, and had expunged by a dispassionate judge, could be a proper basis for denial of his law enforcement certification. This is especially so where, as here, the denial was against due process, was arbitrary and capricious, and lacked establishment under clear and convincing evidence, and when it was the AG's

Office which handled and lost the underlying criminal case, and which also ultimately agreed with the expungement after the acquittal as a party to the expungement proceedings.

Public policy — "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society" (*Black's Law Dictionary*, 1245 (7th ed. 1999)) — is a major consideration where there is a curative need when a statutory scheme reveals a distinct preference but an omission of additional statutes creates an inadvertent vacuum. "To determine legislative intent, this Court will take other statutes on the same subject matter into consideration and read the statutes together, . . ." *Onnen v. Sioux Falls Ind. School Dist. #49-5*, 2011 SD 45, ¶16, 801 NW2d 753.

The clear legislative intent, and thus South Dakota's public policy, is that exoneration, whether by acquittal and expungement or formal post-conviction reprieve, is not to form the basis for denial of law enforcement certification. SDCL §23-3-42 governs law enforcement certification qualifications. The only ground within it that pertains to this appeal is "good moral character." This same requirement appears in ARSD 2:01:02:01(4). Also in §23-3-42 a number of non-pertinent exceptions to initial eligibility are made for certain categories of convicted persons. Elected county sheriffs are not exempt from the qualification requirement. SDCL §23-3-43; §23-3-43.1.

For certification eligibility, a clear distinction is made between an acquitted person and a convicted person. For instance, ARSD §2:01:02:02 states: "No person may be . . . certified if [he] has pled guilty or no contest to, or been convicted of, any offense

that carries a maximum penalty that could result in incarceration for more than a year. . .” Another distinction is made between such felons and mere misdemeanants: Where the adjudicated person’s crime carried a maximum penalty of incarceration for a year or less, that person “remains eligible for . . . certification” except when certain other considerations exist which are not relevant to this appeal. *Id*. This latter part of the rule clearly shows a public policy that particular categories of convicted misdemeanants may receive law enforcement certification.

Another solid indicia of legislative intent to favor an exonerated person is found in ARSD §2:01:02:03.01, which provides forgiveness to an otherwise ineligible applicant. It states that a person otherwise ineligible for certification under §2:01:02:02 “may not be denied” certification “as a result of that conviction if the person, based upon a proof of innocence, received a reprieve, commutation or pardon.” *Id*. However, the range of forgiveness does have a lone exception, and it took an expressly-carved out exception to provide the legal authority for its existence, i.e., the legislature picked this exception and thus excluded all others. “Consideration of a conviction or plea” is not prohibited from being used “in determining moral character under subdivision 2:01:02:01(4).” In other words, where a person’s misdemeanor conviction or guilty plea has been commuted or pardoned — but not when he has been reprieved, or subsequently proven innocent — his guilty plea or conviction may be considered for one ground of rejection for certification, that being lack of good moral character. If a “conviction or plea” is specifically mentioned and allowed by rule to determine good moral character an acquittal plus an expungement, which is not mentioned by statute or rule, should not form

a basis for denial. If it could, such would be addressed in statute or rule, just as it is in the case with pardons, commutations, and reprieves. "The legal maxim 'expressio unius est exlusio alterius' means the expression of one thing is the exclusion of another. *Black's Law Dictionary* 581 (6th ed. 1990). The maxim is a general rule of statutory construction." *Engelhart v. Kramer*, 1997 SD 124, ¶18, 570 NW2d 550, 554 (citing *Aman v. Edmunds Cent. Sch. Dist. No. 22-5*, 494 NW2d 198 (SD 1992); *Argo Oil Corp. v. Lathrop*, 76 SD 70, 74, 72 NW2d 431, 434 (1955).

A formal commutation, pardon, or reprieve is not to be confused with a criminal conviction that disappears because its post-conviction punishment included suspended imposition of sentence under SDCL §23A-27-13. Upon a convicted person's completion of imposed conditions of punishment under a suspended imposition, the person's conviction or plea "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime." §23A-27-14. An express exception was created by the Legislature, though, for law enforcement certification. Per a provision within §23-3-42, "Notwithstanding [the suspended imposition statutes], any person seeking certification as a law enforcement officer who has received [a suspended imposition] may have his or her application refused." If a rule is required to allow a suspended imposition to form the basis of the application refusal, does it not stand to reason a rule would likewise be required to use acquitted/expunged conduct to form the basis of application refusal?

An expungement order is different yet. §23A-3-30. It is allowable when the circuit court determines that "the ends of justice and the best interest of the public" will

be served. *Id*. It may pertain to a convicted person's criminal record or a non-convicted person's arrest. §23A-3-27; §23A-3-30. The legal effect of an expungement is significant:

> The effect . . . is to restore the . . . arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest . . .. No person as to whom an order of expungement has been entered shall be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of the person's failure to recite or acknowledge the person's arrest, indictment or information, or trial in response to any inquiry made of the person for any purpose.

§23A-3-32. The prohibition regarding "any inquiry made of the person for any purpose" functionally translates to a complete prohibition of use of the underlying matter concerning the exonerated person's arrest or trial. What good is an expungement upon an acquittal if it does not end there. "Any purpose" means just that.

Jarman was not convicted, nor did he plead guilty or otherwise suffer a Judgment of Conviction; rather, he was fully acquitted. Jarman did not need post-conviction proof of innocence, a post-conviction reprieve, a commutation of his sentence, nor pardon of his alleged crime. Because he was acquitted he did not need to be rehabilitated to the status of an innocent man. He did obtain a formal expungement, though, to nail shut the door to the non-credible facts that led to his arrest and trial.

Enter absurdity. The statutes and ARSD rules are silent about the effect on a certification request could occur concerning an acquitted person, or an acquitted person who obtained a formal expungement. Why? Common sense and a reasonable extrapolation of the clear intent of the statutes and rules reflect public policy, and no need

was perceived to state the obvious, i.e., as a matter of law the underlying accusation may not be used.

The circuit court's legal analysis was that in denying certification, the LEOS&TC had properly used the underlying conduct rather than the mere fact of the arrest. (Decision, p. 6.) This is a distinction utterly without a difference, and if permissible would constitute an exception swallowing a rule. And it ignores reason and common sense. Good moral character is the ultimate basis of the refusal. If it were true a determination of good moral character allowed the committee to look at anything, including acquitted and expunged conduct, there would be no reason to require specific statutes or rules to look at suspended impositions, juvenile adjudications, commutations, reprieves, or pardons. The committee could just look at whatever it wanted. This shows a limit on good moral character and thus prohibits the subjective, prejudicial use of it to deny applicants. And this is especially so when the commission has no detailed rules or guidelines on good moral character other than the specific exceptions cited above which allow the suspended imposition and commutations, etc., to be utilized in considering good moral character.

If these statutory protections are in place for one who has been convicted of a crime or received judicial grace, so that he or his credibility is not wrongly burdened, more protection exists for a person like Jarman who has been acquitted. SDCL §23A-3-32 says the following: "The effect of an order of expungement is to restore the defendant or arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest or indictment or information. . . . " In other words, restored to

innocence. It cannot be denied, however, that the presumption of innocence, plus an acquittal plus an expungement, put a person in a much better position.

For an acquitted person, the extent of protection offered by an expungement "for purposes of disqualifications or disabilities" exceeds that for a person who without judgment of guilt being entered becomes a probationer, then subsequently receives a discharge upon completion of conditions. Under SDCL §23A-27-14, in pertinent part:

> . . . Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. . . ." Furthermore, under SDCL §23A-27-17 the record of such discharge are sealed: ". . . The effect of such order is to restore such person, in the contemplation of the law, to the status he occupied before his arrest or indictment or information. . . ."

The difference between circumstances involving an acquittal, versus that arising from a conviction, is expressly seen in SDCL §23-3-42, which carves out an exception to restrictions of use of a conviction or its foundational facts to deny certification as a law enforcement officer.

> In addition to the requirements of §23-3-41, the commission, by rules promulgated pursuant to chapter 1-26, shall fix other qualifications for the employment and training of appointed law enforcement officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the various responsibilities of law enforcement officers. The commission shall also prescribe the means for presenting evidence of fulfillment of these requirements. <u>Notwithstanding §§23A-27-14 and 23A-27-17, any person seeking certification as a law enforcement officer who has received an order pursuant to</u>

> §23A-27-13 may have his or her application refused. Notwithstanding §§26-7A-105 and 26-7A-106, any person seeking certification as a law enforcement officer who has received an adjudication or disposition pursuant to chapter 26-7A or 26-8C may have his or her application refused if the adjudication or disposition was for a crime which, if committed by an adult, would constitute a crime under chapter 22-42 that is punishable as a felony, a sex crime as defined in §22-24B-1, or a crime of violence as defined in subdivision 22-1-2(9).

SDCL §23-3-42 (Emphasis added). The statute concentrates on statutory vehicles which technically take the place of convictions of criminal conduct, not arrests that end in acquittals and expungement. Great pains are taken to list the statutory substitutes for conviction, which do not technically equate with conviction, and allow those to be considered and form the basis of denial. If an acquittal or expunged conduct had been intended by the legislature to be on this list, it would be there. But the legislature felt otherwise, as such is not on the list, showing there really is a legislative distinction relating to conduct a jury has heard, judged, and entered an acquittal upon. And this Court has noted in the expungement context the A.G.'s stance that an acquittal is to be treated differently than even an arrest with no charge: "As the state points out, it is quite possible that the legislature felt there was a qualitative difference in conduct resulting in charges (unless acquitted) and conduct that does not result in charges being filed." *Expungement of Oliver*, 2012 SD 9, ¶14, 810 NW2d 350, 353.

Since the only basis of fact upon which Jarman's alleged lack of good moral character was determined was acquitted and expunged conduct it was a prejudicial error of law to have used any of this against Jarman without specific statutory authority or rules

allowing such. The affirmance of the decision by the circuit court was in error as it did not apply the rules of statutory construction or address the specific rules allowing certain matters to be used in determining good moral character and how those specific statutes inferentially preclude the use of acquitted conduct.

2. Lack of "good moral character" was not established by "clear and convincing evidence," and thus Jarman's certification was wrongfully denied.

Only if, as a matter of law, any aspect of the Serafin incident was permissible to be used to deny Jarman's certification request can any of its facts be scrutinized under the clear and convincing evidence burden to determine if they established alleged lack of good moral character. If so, there are two questions that must be answered "Yes" for Jarman's denial to pass appellate review: (1) Did the evidentiary proof at the LEOS&TC hearing establish by clear and convincing evidence that Jarman purposefully kicked Serafin's knee so as to injure her?; and (b) did the evidentiary proof at the hearing establish by clear and convincing evidence that by virtue thereof Jarman lacks good moral character to be certified as a law enforcement officer? See *Kent v. Lyon*, 1999 SD 131, ¶15, 555 NW2d 106, 110. These questions do not exist in a vacuum. Whereas Jarman's acquittal had been by a unanimous vote from a neutral 12-person jury, his rejection by the non-neutral LEOS&TC through the less-difficult-to-achieve "clear and convincing evidence standard" was not unanimous out of a mere 7 participating voters.

The first element of that analysis is the definition of "clear and convincing evidence." S.D. Pattern Jury Instruction (Civil) 1-60-30 states in pertinent part:

> Clear and convincing evidence . . . is that measure or degree of proof which will produce . . . a firm belief or conviction as to the allegation sought to be established. It is evidence that is so clear, direct, weighty, and convincing that it allows [the fact-finder] to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth. Evidence need not be voluminous or undisputed to accomplish this.

Id. See also, *In re Setliff*, 2002 SD 58, ¶¶13, 17, 645 NW2d 601, 605-606. The key words are "so clear, direct, weighty, and convincing that it allows you to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth."

The Circuit Court's affirmance was arbitrary and capricious because it rested on circular reasoning and conclusory language, without including a single example of detrimental comparison of Jarman's version to Serafin's: (a) "[G]reat deference is accorded to the findings of credibility made by the fact-finder or in this case Commission"; and "A review of the record establishes that Commission found Walleska Serafin to be credible and accepted her version of events." (Decision, CC 654, page 9.) In other words, essentially the Circuit Court held, "The evidence was clear and convincing because the LEOS&TC said it was clear and convincing." That kind of appellate review logic would per se never result in a reversal.

An examination of the Commission's Findings of Fact shows a similar paucity of factual analysis: "12. Jarman then kicked Serafin's knee. This kick is referred to as a side-kick thrust." (SR 243). . . . 18. Serafin's testimony is credible and there is clear and convincing evidence that Jarman kicked her as she described." (*Id*.) The Findings failed to include any reference to the testimony of Bauer or Zimiga, or attempt at distinguishing

why a neutral 12-person jury would unanimously determine Jarman to be more credible, whereas a non-neutral Commission—literally the AG's client—could only muster 6 of 7.

"Credibility" means "The quality that makes something (as a witness or some evidence) worthy of belief." *Black's Law Dictionary*, (Seventh Ed., p. 374). A properly dispassionate clear and convincing evidentiary review does not support a determination that Serafin's credibility surpasses Jarman on whether he caused injury to her knee because he purposely kicked her. Serafin was an angry attacker; she went down to the floor when Jarman had to defend his person and property by checking her shoulder when she was attempting to wield a martial arts sword against him and hurled at dangerously close range a metal figurine at his face. And as a seasoned champion martial artist she possessed significant skills and muscle memory to easily deflect a side-thrust kick, if there really had been one, which was not even a type of move Jarman's preferred style of marital arts uses, showing her version is unbelievable and nonsensical. Furthermore, she admitted at the hearing she did not even see the kick (Tr 69; SR 84). And there is even more which greatly brings into question her claims.

Remember, if Jarman kicked Serafin it makes no sense she would ride all the way to Casper with him. She agreed one who could kick her like that could just as easily kill her and if the kicking were true she would never ride with him (Tr 74; SR 89). Also remember she did not call 911 or call out for help when city workers were 30 feet away (Tr 42, 74; SR 57, 89). Also remember that if he kicked her in such a fashion she would never want to be in a relationship with him; yet on the way back to Casper she wanted to know about the future of their relationship (Tr 51, 52; SR 66, 67). Also remember that

when filling out a form for medical treatment she stated her knee was injured in a "left knee accident" (Tr 72; SR87). Her testimony on cross tells the real story:

> Q. (By Mr. Rensch) When a man snaps and does something like this to you if you're to be believed, that makes you deathly afraid of him, doesn't it?
> A. (By Walleska Serafin) Afraid in what sense?
> Q. Afraid that he might kill you.
> A. At that moment probably your mind would be crazy and say, oh, my gosh.
> Q. Sure. If someone were really kicked the way you describe with all of that force?
> A. Yes.
> Q. It would be natural for that person to think, oh, my God. I've got to get away from this person. They might hurt me more. True?
> A. True. Yes.
> Q. Okay. And that is the reason that you wanted to call 911 because you were deathly afraid of him; correct?
> A. Not deathly. But at that moment, yes.
> Q. Well, if a guy can snap and kick you that hard and hurt you the way you contend, you'd have to be afraid that he could do something worse. Wouldn't you agree?
> A. At that point, yes.
> Q. Okay. And if a guy just snaps and if you really were injured in the fashion you're claiming, you would agree that there would be no reason at all that you would ever want to remain around such person; correct?
> A. Correct

(Tr 60-61; SR 75-76). Yet not only did she remain with him, she let him take her back to Casper. Likewise she made a Freudian slip in the medical records and wrote it was an accident:

> Q. (By Mr. Rensch) Sure. What does the word "accident" mean to you?

A. (By Walleska Serafin) Accidents mean something unexpected or – an accident.
Q An accident is something that's unintentional, isn't it?
A. Yeah.
Q. Something that just happens accidently; correct?
A. Uh-huh. Correct.

(Tr 61; SR76).

Q. (By Mr. Rensch) Yes. Would you agree with me that if this kick really occurred the way you claim, that there would be no reason in the world that you would ever refer to the knee injury as an accident?
A. (By Walleska Serafin) Yes. Okay.

(Tr 70; SR 85).

Q. (By Mr. Rensch) Okay. And after the question that says "Why are you seeing the doctor today?" would you please read to the Commission what it was you wrote?
A. (By Walleska Serafin) I wrote "left knee accident."
Q. Now if this really were an accident, then a person wouldn't need to be afraid with someone they drove from Edgemont to Casper with. Would you agree?
A. Agree.
Q. But if this really were a callous act where a man snapped and decided he was going to break your leg, you wouldn't want to be in that pickup truck with him from Edgemont to Casper for fear that something bad might happen to you. Wouldn't you agree with that?
A. Sure.

(Tr 72; SR 87). And it is without dispute that Serafin was willing to ride to Casper with Jarman. Can you imagine what the state would do if Jarman had made a statement that he kicked Serafin? But Serafin says in writing it was an accident and she is clear and convincing — no way. In fact, on that trip she wanted to know if their relationship had a

future and asked him where they were going to go from there in terms of their relationship:

Q. (By Mr. Rensch) You mentioned that you had said to him on this ride Where do we go from here? Is that true?
A. (By Walleska Serafin) I believe so, yes.
Q. And that was in terms of your relationship with him; correct?
A. Yes.
Q. Okay. And he was silent to you when you asked him Where do we go from here on that ride; is that correct?
A. If I can recall, yes.
Q Okay. And then it was after that you said to him you're going to tell the doctors that he kicked you; true?
A. Yes.

(Tr 50; SR65).

Q. (By Mr. Rensch) Okay. So when you were in the car or his truck with your motorcycle in the back on the way to Casper you wanted to know from him where did you go from here in your relationship; correct?
A. (By Walleska Serafin) I guess so.
Q Okay. My question to you is if this guy kicked you the way you claim, why would you still want to be in a relationship with him?
A. I didn't want to be in that relationship with him.
Q. If you didn't want to be in a relationship with him, why would you say Where do we go from here with our relationship?
A. I wanted to hear from him.
Q. What would you have done if he had said I want to be in a relationship with you?
A. I would say no, I guess.
Q. Then why even ask it to begin with?
A. Just to see his side of the story too.

(Tr 50-51; SR 65-66). The truth is if he kicked her the way she claims she would not be interested in the future relationship. She would not have gotten into his pickup. She would not have written it was an accident unless it really was. She only says she is going to say he kicked her when he won't answer her about their future. This is why the jury acquitted. She was the aggressor and vandal and it does not make Jarman immoral in any sense of the word to have done just what he did. And even Serafin admitted she lost her job with the City of Box Elder as Assistant Finance Office for financial impropriety and was paid them back money (Tr 76; SR 91). Her moral character, to a reasonable person, is much more questionable than Jarman's, as is her credibility.

Both the commission and the circuit court erred in claiming Serafin was more believable, let alone by clear and convincing evidence. It could be said that Serafin's version of events, even if true, holds no bearing upon Jarman's moral character in light of her damage to property, aggressive acts, proximity to weapons, and Jarman's right of defense of self and property. But the acquittal and expungement seal the deal.

The definition of "good moral character" is not defined by statute as relating to the office of sheriff. In SDCL §23-3-42(e) the term merely appears. A statutory definition for accountants exists at §36-20B-14 to mean "lack of a history of dishonest or felonious acts." Even then, lack of good moral character is restricted in its use to deny certification:

> The board may refuse to grant a certificate on the ground of failure to satisfy this requirement only if there is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a licensee and if the finding by the board

> or lack of good moral character is supported by clear and convincing evidence. If an applicant is found to be unqualified for a certificate because of a lack of good moral character, the board shall furnish the applicant a statement containing the findings of the board, a complete record of the evidence upon which the determination was based, and a notice of the applicant's right of appeal.

Id. There was no such proper finding in this case.

For attorneys, "good moral character" is defined under SDCL §16-16-2.1 as including but not being limited to "qualities of honesty, candor, trustworthiness, diligence, reliability, observance of fiduciary and financial responsibility, and respect for the rights of others and for the judicial process." See *Steele v. Bonner*, 2010 SD 37, ¶16, fn1, 782 NW2d 379, 383 n1. The term "good moral character" was criticized by this Court as a "nebulous and unarticulated ground" concerning its use in a law enforcement certification controversy in *Matter of Certification of Ackerson, et al.,* 335 NW2d 342, 346 (SD 1983).

Denial of Jarman's certification for lack of good moral character was solely based upon Serafin's rejected accusation and her debunked credibility. Contrarily, Jarman's favorable proof of credibility and good moral character was substantial: He is a Marine Corps veteran with a long history of law enforcement certified-work; he had been a former Edgemont Police Chief; he had served as a Fall River County Deputy Sheriff; he had gained federal law enforcement certification; he holds "Top Secret" clearance for overseas specialty security duty on behalf of our national government. He was able to produce a Petition of 93 Fall River County residents, plus two live witnesses, supportive of his good moral character. The Commission produced only the discredited Walleska

Serafin. Neither the Commission's Findings and Conclusions, nor the Circuit Court's Decision, attempted to address these points.

In this appeal, denial of Jarman's certification is wrongful unless the proof of his lack of good moral character was "so clear, direct, weighty, and convincing that it allows you to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth." Denial of Jarman's certification upon an alleged lack of good moral character supposedly established by clear and convincing evidence fails to survive real appellate scrutiny. This Court ought to so declare. When fairly considering the acquittal, expungement, subsequent conduct of Serafin, and the outright damage she sustained on cross, there is no way it can be said with a straight face that her version is more credible than Jarman's, let alone clearly and convincingly so.

3. <u>The Circuit Court's appellate ruling denying that the Findings, Conclusions, and Order are a nullity because they were signed by the LEOS&TC's acting chairman rather than the presiding judicial officer is erroneous because its legal analysis is in error, and also does not fit statutory authority</u>.

The circuit court's Decision on this issue is contradictory. It begins by reciting that "Robert Anderson was appointed to be the hearing examiner to conduct the contested case pursuant [to] the Administrative Procedures Act. See SDCL §1-26D-3." (Decision, CC 654, p. 11; *see also* page 4: "Attorney Robert Anderson presided as the Hearing Officer.") Further down the same page the court seems to deny that the Hearing Examiner was "presiding": "Had the Office of Hearing Examiners been asked to preside over the case, then §1-26D-6 provides that the Hearing Examiner shall enter the decision

and other documents . . .. That was not done in this case . . .." (*Id*.) The Transcript shows that Anderson was indeed acting in a judicial capacity, both "conducting" and "presiding" — it was he who ruled on objections, received exhibits, et cetera. At the commencement of the hearing Leidholt says: "I'll turn it over to the Hearing Officer." (Tr. 3; SR 08.)

On two grounds the circuit court held that entry of the Findings, Conclusions, and Order by Leidholdt rather than Anderson was proper. First was: "Nothing in South Dakota law requires a hearing officer to sign . . . on behalf of the decision-maker." (CC 654, p. 11.) This analysis presents the standard exactly backwards. Judicial authority does not exist only where it is denied to exist, but rather its existence arises from a statute granting it. In other words, one does not possess judicial authority because no statute says he does not possess it; instead, judicial authority is present only when it is expressly granted.

This first issue thus concerns improper delegation of judicial authority. See, e.g., *State v. Blakny*, 2014 SD 46, ¶14 (July 9, 2014) (improper delegation of judicial authority occurred when Court Services Officer imposed probation conditions not ordered by circuit judge). An example is *Case v. Murdock*, 1995 SD 26, ¶12, 528 N.W.2d 386, 389 [*Case II*], where the trial court was held to have "improperly delegated judicial authority" by having a court-appointed receiver perform "core judicial functions." Citing to the open courts provision of Article VI, §20 of the South Dakota Constitution, this Court reversed, declaring, "

> Nowhere under the South Dakota Constitution nor the statutes of the State of South Dakota are receivers granted judicial authority to act in place of a court.
>
> * * * *
>
> "Judicial power must be exercised by the courts and cannot be delegated or surrendered by a court or judge to a nonjudicial body or person, even with the consent of the parties[.]" 16 AmJur2d, *Constitutional Law*, §334.

Case II, at ¶¶6, 12, 528 N.W.2d at 389. In other words, judicial authority is gained by its grant, not its prohibition. Without express statutory permission, a contrary delegation is improper.

Under SDCL §1-26-18.3 and ARSD §2:01:04:13, a Hearing Officer may be used as the judge in contested cases, of which issuance or non-issuance of a license is one. SDCL §1-26-27. The process is to conclude in written Findings, Conclusions and an Order. SDCL §1-26-25. The judicial officer who presided at the matter in question is to sign Findings, Conclusions, and Orders. *See, e.g.*, SDCL §15-6-52(a). An Order or Judgment is not valid until "reduced to writing, and signed by the court or judge, . . ." *Peters v. Barker & Little, Inc.*, 2009 SD 82, ¶8, 772 NW2d 657, 660; *see also* SDCL §15-6-58. "It is to be assumed that [a statute] means what it says and that the legislature has said what it meant." *Kreager v. Blomstrom Oil Co.*, 298 N.W.2d 519, 521 (S.D. 1980). "An agency or commission may not enlarge upon its statutory authority to provide additional regulations even if such additions are advisable." *Matter of Certification of Ackerson, et al.,* 335 N.W.2d 342, 345 (S.D. 1983).

For one of the voting members of the commission, Acting Chairman Mike Leidholt, to sign the Findings, Conclusions and Order is akin to a Jury Foreman not only signing the Verdict, but also the Judgment, and then ruling on post-trial motions. Here, the Commission was hardly a neutral, impartial agency. Rather, it was part of the DCI which had investigated Serafin's allegations against Jarman, then had passed the results to the Office of Attorney General of which it is a part (SDCL §23-3-28; §23-3-28.1; §23-3-46), who then unsuccessfully prosecuted Jarman, and ultimately agreed to an expungement after the acquittal. When he sought to become (re)-certified as a law enforcement officer so he could appear on the ballot for Fall River County voters to decide if he should be their Sheriff, the same AG's Office and DCI — through the LEOST&C — in essence became Jarman's accuser, investigator, prosecutor, judge, jury, and executioner. This Court has strongly rejected such a mixing of roles as constituting a denial of the fundamental constitutional right of due process through fair and impartial consideration. Prior to any testimony being given, a standing due process objection was made by Jarman. (Tr. 5, 8; SR 20, 23). *See* U.S. Const. amend. V; *Armstrong v. Turner Co. Board of Adjustment*, 2009 SD 81, ¶19-23, 772 N.W.2d 643, 650-651; *Hanig v. City of Winner*, 2005 SD 10, ¶10, 692 N.W.2d 202, 205; *Riter v. Woonsocket Sch. Dist.*, 504 NW2d 572, 574 (SD 1993); *Mordhorst v. Egert*, 223 N.W.2d 501 (S.D. 1974). "The 'very appearance of complete fairness' must be present." *Armstrong*, at ¶23, 772 N.W.2d at 651. See also, *Northwestern Bell Tel. Co., Inc. v. Stofferahn*, 461 N.W.2d 129, 132-133 (S.D. 1990); *Mordhorst*, at 505.

The appearance of impropriety was noticeable as the Board was essentially an advocate against Jarman. The Hearing Officer introduced the Board's Attorney Kempema by stating: "I'm not sure exactly who your client is, Mr. Kempema." (Tr 4; SR 19.) However, the official transcript identifies him as "appearing on behalf of the Commission." (TR cover; SR 16.) In other words, the LEOS&TC was not neutral to the prosecution, it was the prosecutor's client. This is a clear denial of the constitutional requirement of disinterested neutrality. *See*, SDCL §1-1A-1 (Unconstitutional state actions are void); §1-1A-2 (Enforcement of unconstitutional policies are prohibited); §1-1A-3 (State officers are to protect constitutional rights).

> A fair and impartial tribunal requires at least that the trier of fact be disinterested ... and that he also be free from any form of bias or predisposition regarding the outcome of the case ... . Not only must the procedures be fair, 'the very appearance of complete fairness' must also be present. ... These principles apply not only to trials, but equally, if not more so, to administrative proceedings."

Wall et al. v. American Optometric Association, Inc. et al., 379 FSupp 175 (ND Ga 1974), quoted in *Mordhorst*, 223 N.W.2d 501, at 505.

> The absence of fundamental fairness in proceedings followed by the South Dakota State Board of Examiners in Optometry spawned this litigation. . . . [T]his and other similarly constituted boards should re-examine their structures and procedures, remembering that the final refuge people have in all governmental procedures is that of due process, the eternal friend of justice and unrelenting foe of undue passion.

Mordhorst, 223N.W.2d at 505. *See also*, *Id*. citation to *Gibson v. Berryhill*, 411 US 564, 93 SCt 1689, 36 LEd2d 488) (where "preconceived opinions" are "almost certain," there is no need to show "actual bias").

The second basis in the Circuit Court's appellate ruling was that §1-26D-6 was curative: "The hearing examiner, after hearing the evidence in the matter, shall make proposed findings of fact and conclusions of law, and a proposed decision. The agency may accept, reject, or modify those findings, conclusions, and decisions, and an appeal may be taken therefrom pursuant to chapter 1-26." (CC 654, p. 11.) A measured examination of this assertion reveals that the Circuit Court's reasoning fails.

SDCL §1-26D-6 mandates that the hearing examiner "shall" — is required to (SDCL §2-14-2.1) — propose Findings, Conclusions, and a Decision. Here, the H. O. did not. Only after this has occurred is the agency empowered to "accept, reject, or modify" the H.O.'s initial findings, conclusions, and Decision. Under SDCL §1-26D-8 if the agency does not agree with the H.O.'s proposed decision, "it shall give reasons for doing so in writing." *Id*. The agency does not have free reign to do so: "[T]he reviewing agency shall give due regard to the hearing examiner's opportunity to observe the witnesses." Section 1-26D-8 presupposes: (a) an active judicial, determinative role by the H.O.; (b) the H.O.'s observation of the witnesses and a declaration from him about it; (c) initial entry by the H.O. of findings, conclusions, and a decision; (d) "due regard" required to be given to the H.O.'s determination of credibility of witness testimony; and (e) affording the Supreme Court an opportunity to compare the H.O.'s initial determination to any changes made to it by the agency. See *Watertown Coop. Elevator*

Ass'n v. State Dep't of Revenue, 2001 SD 56, ¶16, 627 N.W.2d 167, 173 ("Certainly, SDCL 1-26D-8 requires the [agency] to give written reasons for rejecting a [H.O.'s] decision; the purpose of such a requirement is to ensure meaningful appellate review.")

The next statute in line, §1-26D-9, requires that any "final decision shall" — mandatory — "include, or incorporate by reference to the initial decision, all matters required by §1-26-25." In short, the H.O. is to act; the agency is to react. The agency does not go first; the H.O. does not remain silent.

Here there was no "initial decision" by the H.O. — a neutral person — because the LEOS&TC erroneously usurped his judicial authority, or he improperly delegated it. Either way, as a matter of law, the due process of law was violated and statutory authority was abrogated. The circuit court's appellate review erroneously attempted to remedy this problem by taking umbrage with the part of §1-26D-6 where it says the "agency may accept, reject, or modify" the H.O.'s [initial] findings, conclusions, and Decision. However, its analysis does not accord with the statutory language. Statutory intent is not judged by "what the courts think it should have said," but rather, "the court must confine itself to the language used." *Rowley v. S.D. Bd. of Pardons & Paroles*, 2013 SD 6, ¶7, 826 NW2d 360, 366. Because the H.O. failed to make its required initial findings, conclusions, or Decision, there was nothing for the Commission (which is not itself an "agency") to "accept, reject, or modify," which is the limitation of the statutory authority granted to an agency. The Findings, Conclusions, and Order that Commissioner Leidholt are a nullity, and ought to be declared as such by this Court.

CONCLUSION

For all of the reasons appearing above, Jarman seeks reversal of the denial of his application for certification as well as the decision of the circuit court affirming that denial.

REQUEST FOR ORAL ARGUMENT

Appellant Jarman hereby respectfully requests the opportunity to present oral argument in this appeal.

Dated this 8th day of August, 2014.

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/s/ Timothy J. Rensch

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APPENDIX

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27115

IN THE MATTER OF THE CERTIFIABILITY
OF BRETT JARMAN AS A SOUTH DAKOTA
LAW ENFORCMENT OFFICER

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
Circuit Court Judge

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Notice of Appeal filed June 19, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27115

IN THE MATTER OF THE CERTIFIABILITY
OF BRETT JARMAN AS A SOUTH DAKOTA
LAW ENFORCMENT OFFICER

PRELIMINARY STATEMENT

Throughout this brief, Appellant, Brett Jarman, will be referred to as "Jarman." The South Dakota Law Enforcement Officers Standards and Training Commission will be referred to as "Commission." All other individuals will be referred to by name. The settled record in the underlying case, *In the Matter of the Certifiability of Brett Jarman as a South Dakota Law Enforcement Officer,* Fall River County Civil File No. 14-28, will be referred to as "SR." The transcript of the contested hearing before the Commission held on March 19, 2014, will be referred to as "HT." Any reference to Appellant's brief will be designated as "JB."

JURISDICTIONAL STATEMENT

Appellant Jarman was denied a certificate of qualification to run for county sheriff before the Commission on March 19, 2014. SR 6-7. He appealed the decision to the circuit court. SR 1-2. On May 28, 2014, the Honorable Jeff W. Davis, Presiding Judge, Seventh Judicial Circuit, affirmed the Commission's decision. SR 654-65. Jarman filed

a Notice of Appeal on June 19, 2014. SR 694-95. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE COMMISSION PROPERLY DENY JARMAN'S REQUEST FOR A CERTIFICATE OF QUALIFICATION AS A COUNTY SHERIFF BECAUSE HE LACKED GOOD MORAL CHARACTER?

The Commission denied Jarman's request for a certificate of qualification because he lacked good moral character.

State v. Schindler, 986 S.W.2d 209 (Tenn. 1999)

Ligon v. Davis, 424 S.W.3d 863 (Ark. 2012)

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ARSD 2:01:02:03.01

II

DID CLEAR AND CONVINCING EVIDENCE ESTABLISH JARMAN SHOULD BE DENIED A CERTIFICATE OF QUALIFICATION AS A COUNTY SHERIFF BECAUSE HE LACKED GOOD MORAL CHARACTER?

The Commission found Jarman lacked good moral character by clear and convincing evidence.

Farmer v. City of Rapid City, 2011 S.D. 41, 801 N.W.2d 291

Vollmer v. Wal-Mart Store, Inc., 2007 S.D. 25, 729 N.W.2d 377

Johnson v. Albertson's, 2000 S.D. 47, 610 N.W.2d 449

SDCL 1-26-36

SDCL 16-16-2.1

III

DID THE ACTING CHAIRMAN OF THE COMMISSION PROPERLY SIGN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE ORDER?

The Commission's acting chairman signed the findings of fact and conclusions of law and order.

SDCL 1-26-25

STATEMENT OF THE CASE

Appellant Jarman applied for a certificate of qualification as a county sheriff pursuant to SDCL 23-3-43.1. SR 33-35. The Law Enforcement Training Executive Secretary recommended a formal contested hearing before the Commission. SR 39-41. The hearing was held on March 19, 2014. HT 1-171, SR 319-489. The Commission denied Jarman's application. HT 169-70, SR 487-88. Findings of Fact and Conclusions of Law and an Order were signed March 21, 2014. SR 6-12.

Jarman appealed the Commission's decision to circuit court by filing a notice of appeal on March 25, 2014. SR 1-2. The Honorable Jeff W. Davis, Presiding Judge, Seventh Judicial Circuit, issued a memorandum decision affirming the Commission's Findings of Fact and Conclusions of Law and Order on May 28, 2014. SR 654-65.

Jarman filed notice of appeal to this Court on June 19, 2014. SR 694-95.

STATEMENT OF FACTS

In January 2007, Walleska Serafin (hereinafter "Serafin") and Jarman were introduced by a mutual acquaintance. HT 23; SR 341. Shortly after being introduced, Serafin and Jarman began dating. *Id.* In May of that year, a career opportunity arose for Serafin that required her to move to Casper, Wyoming. HT 24-25; SR 342-43. Serafin and Jarman discussed the matter and agreed to attempt a long distance relationship. HT 24; SR 342. Despite the difficulties of starting a new job, Serafin would come back to South Dakota on her days off to spend time with Jarman. HT 25; SR 343.

Serafin and Jarman had what would be categorized as a "normal" relationship. *Id.* The couple admittedly would argue, but those arguments never got physical. *Id.* Among the couple's activities was their common interest in the martial arts. HT 24; SR 342. Serafin is a second degree black belt in Jukite Ju-Jitsu. HT 49; SR 367. Jarman is a black belt in karate Kyoko kun-ki, a first degree black belt in judo, and a fourth degree black belt in freestyle grappling. HT 91; SR 409.

Despite their attempts to maintain a relationship, the couple decided to separate after Jarman began looking for a job overseas. HT 25-26; SR 343-44. After the break up, Jarman contacted Serafin and asked her to go to the Sturgis Motorcycle Rally with him in August

of 2010. HT 27; SR 345. The purpose of the trip was to see if the two could "work things out." *Id.*

As they had agreed, Serafin drove her motorcycle from Casper to Jarman's residence in Edgemont, South Dakota, and stayed the night. HT 29; SR 347. The following day, Jarman and Serafin went to Sturgis where they spent four or five days. *Id.* The trip to Sturgis was relatively uneventful except for a minor incident in Hermosa where Serafin tipped her motorcycle. HT 30-31; SR 348-49.

On the Saturday following the trip to Sturgis, Jarman and Serafin returned to Jarman's residence in Edgemont. HT 32; SR 350. There were no incidents between Jarman and Serafin on that day. *Id.* Serafin testified that on Sunday, a "discussion" occurred between the two of them. HT 33; SR 351. Serafin could not recall if the "discussion" escalated to the point of yelling and swearing but did recall that it was severe enough for her to end up sleeping on a couch while Jarman slept on the floor. *Id.*

The following morning, Jarman and Serafin awoke at approximately 7:00 a.m. HT 34; SR 352. Jarman planned to leave the house. *Id.* Serafin inquired as to where he was going and when they would discuss their relationship. *Id.* Jarman told Serafin he "had things to do" and that they could talk when he returned. *Id.* Jarman was gone for two and one-half hours. *Id.* Upon his return, Jarman sat down at a computer where he received a phone call. HT 35; SR 353.

After the phone call, Serafin inquired as to whom Jarman was speaking. *Id.* Jarman did not respond. *Id.* At this point, Serafin was admittedly upset and the two began to argue. HT 36; SR 354.

As the argument between Jarman and Serafin was ensuing, Jarman stood up and approached Serafin. *Id.* She began asking him about the ongoing status of their relationship. *Id.* Jarman did not answer and became upset. HT 36-37; SR 354-55. At this point, Jarman gave Serafin a "chest bump," knocking her to the floor. HT 37; SR 355. After getting up from the floor, Serafin began throwing Jarman's figurines toward the wall, asking Jarman for an answer about the status of their relationship. *Id.*

After throwing the last figurine, Serafin took a stance with her left foot out in front of her and her right foot behind her. HT 38-39; SR 356-57. Jarman was approximately four feet in front of her. HT 38; SR 356. Suddenly Jarman executed a "side thrust kick" on Serafin's knee. *Id.* Serafin testified this happened "in the blink of an eye" and so quickly that her martial arts training would not have helped her. HT 39; SR 357.

Serafin dropped to the ground. She thought that her leg had been broken. HT 41; SR 359. While on the ground, Serafin told Jarman that he broke her leg and she attempted to grab her purse to get her cellphone. HT 41-42; SR 359-60. Jarman would not immediately let Serafin have access to her purse. HT 42; SR 360. It

was not until Serafin crawled out of Jarman's house that he gave her access to her purse and phone. *Id.* Once Serafin was able to get her phone, she contacted Jarman's son, Dustin, who had been on the Sturgis trip with the couple. *Id.* At the contested hearing, Serafin admitted it was an act of "stupidity" to call Dustin rather than law enforcement. *Id.* Once Dustin arrived at Jarman's home, he made sure Jarman and Serafin were separated. HT 43; SR 361.

It was after Dustin arrived that it was decided that Serafin should seek medical attention. HT 44; SR 362. Because of an approaching storm, Jarman and Dustin decided it would be best to proceed directly to Casper as opposed to Rapid City. *Id.* Therefore, Serafin's motorcycle was loaded into Jarman's truck and Jarman drove her to Casper. *Id.*

Once Jarman returned Serafin to Casper, it became clear to him that Serafin intended on telling the staff at the hospital that she was kicked by Jarman. HT 46-47; SR 364-65. At that point, Jarman elected to not take Serafin to the hospital, and instead took her home. HT 47; SR 365. Serafin was forced to drive herself to the hospital while Jarman retreated to Edgemont. *Id.* As a direct result of Jarman's kick to Serafin's knee, Serafin's knee required reconstructive surgery. HT 79; SR 397.

While at the hospital, Serafin gave statements to law enforcement and social services. HT 48; SR 366. Jarman was

eventually arrested for aggravated assault based on the kick he delivered to Serafin's knee. The matter was tried before a Fall River County jury and Jarman was acquitted. Jarman's arrest and court records were subsequently expunged pursuant to SDCL 23A-3-32. HT Exhibit A; SR 240.[1]

STANDARD OF REVIEW

This Court reviews the administrative decision in the same manner as the circuit court. SDCL 1-26-37; *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶ 13, 816 N.W.2d 843, 847. Great weight is given to the findings made and the inferences drawn by the agency on a question of fact. SDCL 1-26-36. Factual findings based on oral testimony may only be set aside if "clearly erroneous." *Id.* Questions of law are reviewed de novo. *Manuel v. Toner Plus, Inc.*, 2012 S.D. 47, ¶ 8, 815 N.W.2d 668, 670.

ARGUMENTS

I

THE COMMISSION PROPERLY DENIED JARMAN'S REQUEST FOR LAW ENFORCEMENT CERTIFICATION BECAUSE HE LACKED GOOD MORAL CHARACTER.

At the hearing before the Commission, evidence was presented, over objection by Jarman, about the 2010 assault which led to Jarman's criminal charge. The facts underlying the criminal charge

[1] The second page of the Order of Expungement is not included in the record. Appellant attached a copy to his brief as an appendix.

were introduced even though Jarman was acquitted at trial and his arrest record and court file relating to the charge was expunged pursuant to SDCL 23A-3-30.

When reaching its decision on Jarman's application, the Commission did not consider any expunged materials, finding: "[w]hen reaching the foregoing Finding of Fact, LET considered the conduct of Jarman during the argument and how that conduct reflected upon Jarmon's (sic) moral character. LET did not rely on any subsequent arrest or trial which have been expunged." SR 266. The only evidence considered by the Commission was the underlying conduct of Jarman during the incident with Serafin. Jarman argues it was not proper for the Commission to consider his August 2010 assault against Serafin when considering his application for a certificate of qualification for county sheriff.

Jarman argues that since he was acquitted of the criminal charges and his record was expunged, the underlying conduct should not have been considered by the Commission. JB 13. He claims the lack of specific administrative rule allowing the consideration of acquitted or expunged conduct precludes the Commission from considering the underlying conduct. JB 13. However, nothing in the administrative rules prohibits the Commission from considering assaultive conduct in reaching a determination as to whether Jarman

possesses the requisite good moral character to become a law enforcement officer.

SDCL 23-3-42 authorizes the Commission to make administrative rules setting the qualifications necessary for certification as a law enforcement officer.[2] SDCL 23-3-42 states, in part:

> In addition to the requirements of § 23-3-41, the commission, by rules promulgated pursuant to chapter 1-26, shall fix other qualifications for the employment and training of appointed law enforcement officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the various responsibilities of law enforcement officers. The commission shall also prescribe the means for presenting evidence of fulfillment of these requirements.

In addition to the above statutory requirements, as authorized by SDCL 23-3-42, the Commission adopted administrative rules setting forth the minimum standards for employment as a law enforcement officer. See ARSD Article 2:01. Those rules provide that the applicant must be of good moral character. ARSD 2:01:02:01(4).

The Commission denied Jarman's application because he failed to meet the "good moral character" requirement. In determining Jarman's moral character, the Commission properly considered evidence of Jarman's assaultive conduct in August of 2010. It did not consider Jarman's status as an arrestee or former criminal defendant.

[2] Candidates for county sheriff must meet the same qualifications as other law enforcement officers. SDCL 23-3-43.

Jarman's focuses on certification denials based on grounds other than good moral character to argue the Commission erred when it denied his application. JB 13-21. SDCL 23-3-42 specifically authorizes the Commission to consider criminal conduct for which an applicant received a suspended imposition of sentence, successfully completed probation and had his records sealed. ARSD 2:01:02:02 provides for the denial of applicants with a felony conviction, but possible certification for those with a misdemeanor conviction. ARSD 2:01:02:03.01 prohibits the Commission from considering convictions for which an applicant received a reprieve, commutation or pardon based upon proof of innocence. The Commission is allowed, however, to consider the conviction or plea in determining "good moral character." None of these statutes or rules prohibit the Commission from considering conduct that reflects negatively on an applicant's moral character.

When SDCL 23-3-42 and the administrative rules are viewed as a whole, several things are clear. First, the Commission has authority to consider the entire background of an applicant. This includes acts done as a juvenile (SDCL 23-3-42); uncharged acts such as drug use (ARSD 2:01:02:01(9)); felony and misdemeanor convictions (ARSD 2:01:02:02); and good moral character in general (ARSD 2:01:02:01(4)). There is no requirement, statutorily or otherwise, that

conduct must be criminal in order to be considered in determining good moral character.

Second, even successful rehabilitation does not guarantee certification. Notwithstanding successful discharge from probation after completing the terms of a suspended imposition of sentence, the Commission may consider the underlying conduct and deny certification. SDCL 23-3-42.

Finally, even proof of innocence resulting in a reprieve, commutation, or pardon may still justify denial of certification. The conduct can still be considered in determining moral character. ARSD 2:01:01:03.01. In other words, a person may be convicted, apply for a pardon, prove innocence, receive the pardon, and still have his conduct considered by the Commission in determining moral character. SDCL 24-14-11, in defining the effect of a pardon, states:

> The pardon restores the person, in the contemplation of the law, to the status the person occupied before arrest, indictment, or information. No person as to whom such order has been entered may be held thereafter under any provision of the law to be guilty of perjury or of giving a false statement by reason of such person's failure to recite or acknowledge such arrest, indictment, information, or trial in response to any inquiry made of such person for any purpose.

The pardon erases the conviction but not the behavior.

Jarman was charged with aggravated assault for kicking Serafin. He was acquitted after a jury trial. He subsequently filed a Motion for an Order of Expungement pursuant to SDCL 23A-3-27. Jarman's

motion was granted and the court entered an order of expungement. The effect of an order of expungement is set forth in SDCL 23A-3-32.

> The effect of an order of expungement is to restore the defendant or arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest or indictment or information. No person as to whom an order of expungement has been entered shall be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of the person's failure to recite or acknowledge the person's arrest, indictment or information, or trial in response to any inquiry made of the person for any purpose.

The effect of an expungement mirrors that of a pardon. Expungement means the records on file within any court, detention or correctional facility, law enforcement agency, criminal justice agency, or Department of Public Safety concerning Jarman's detection, apprehension, arrest, detention, and trial are sealed. SDCL 23A-3-26. It does not mean the underlying event never occurred.

This Court has not addressed whether underlying conduct of expunged matters may be used when determining good moral character for law enforcement officers. Other states have concluded that any conduct reflecting on the moral character of an applicant is relevant.

The Supreme Court of Tennessee considered the use of expungements under language similar to SDCL 32A-3-32. *State v. Schindler*, 986 S.W.2d 209 (Tenn. 1999). At issue in *Schindler* was whether trial courts can consider expunged records in determining eligibility for a prosecution diversion program. *Id.* at 211. In reaching

its decision that expungement does not require the court to ignore bad behavior, the Tennessee Supreme Court examined the effect of expungements. The court noted that expungement returns the person to the position "occupied before such arrest or indictment or information" under Tennessee's statute. *Id.* It does not return a person to the position occupied prior to committing the offense. *Id.*

As can be seen by the foregoing, Tennessee's expungement statute uses language very similar to SDCL 23A-3-32. When interpreting this language, the Tennessee Supreme Court refused to put the individual back into the position they were prior to committing the underlying conduct. Instead, the Tennessee Supreme Court simply opined that the effect of the expungement would be to place the individual back into the legal status he was in prior to the arrest, indictment or information. Therefore the court held that, "the testimony and evidence of criminal acts preceding the arrest are admissible as evidence of prior bad acts or evidence of social history even if expungement is later obtained." *Schindler*, 986 S.W.2d at 211.

As applied to Jarman, the effect of his expungement would be to place him back into the legal status he was in prior to his arrest, trial, acquittal and successful expungement. That is to say, it would be as if Jarman were never arrested or tried for the incident with Serafin. The expungement does not, however, negate the fact that the incident

occurred. Nor does it require the Commission to pretend the assault never happened.

The Supreme Court of Arkansas has also addressed a similar issue. *Ligon v. Davis*, 424 S.W.3d 863 (Ark. 2012). At issue in *Ligon* was whether an attorney disciplinary board may use expunged felony conduct to discipline an attorney. In *Ligon*, the special judge concluded that attorney Davis did not have a felony conviction due to his expungement. *Id.* at 866. Despite this finding, the special judge considered the underlying conduct and how that conduct reflected upon Davis' honesty, trustworthiness, or fitness as a lawyer. *Id.* The Arkansas Supreme Court affirmed, holding that the special judge did not err in considering Davis' conduct leading to the expunged matters. *Id.* at 867.

Similarly, in South Dakota, expunged arrests and convictions can be used to determine good moral character of persons seeking admission to practice law. SDCL 16-16-2.3 provides that "unlawful conduct, including cases in which the record of arrest or conviction was expunged, with the exception of juvenile arrests and dispositions unless they pertain to a serious felony," is relevant to the determination of good moral character of persons seeking admission to the South Dakota State Bar.

At Jarman's contested hearing, the Commission treated the incident between Jarman and Serafin in a manner consistent with the

analysis of *Schindler* and *Ligon*. The Commission did not consider Jarman's arrest or trial when reaching its decision. SR 266. The Commission only considered Jarman's underlying conduct. *Id.* The Commission determined that Jarman's conduct toward Serafin is relevant in determining his moral character. Based on the record, the Commission did not improperly deny Jarman's request for a certificate of qualification based on his lack of good moral character.

II

CLEAR AND CONVINCING EVIDENCE ESTABLISHED JARMAN SHOULD BE DENIED A CERTIFICATE OF QUALIFICATION AS A COUNTY SHERIFF BECAUSE HE LACKED THE REQUIRED GOOD MORAL CHARACTER.

Jarman next argues that his application was improperly denied because his lack of good moral character was not established by clear and convincing evidence. The clear and convincing standard lies somewhere between "the rule in ordinary civil cases and requirements of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt." *In re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605.

As previously stated, this Court should give "great weight" to any agency findings of fact and inferences drawn from those facts. SDCL 1-26-36. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are

"clearly erroneous in light of the entire evidence in the record." SDCL 1-26-36(5).

Jarman argues that the Commission's findings were clearly erroneous. This Court has defined the clearly erroneous standard. Findings are clearly erroneous if, after reviewing the entire record, the Court is left with a definite and firm conviction that a mistake has been made. *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382. When reviewing an issue of fact, this Court must give "due regard to the opportunity of the agency to judge the credibility of the witness." *Johnson v. Albertson's*, 2000 S.D. 47, ¶ 22, 610 N.W.2d 449, 453-54. This Court does not "substitute our judgment for the agency's judgment on the weight of the evidence pertaining to the question of fact." *Id.* at ¶ 22, 610 N.W.2d at 454.

The Commission had the opportunity to observe the testimony of Jarman and Serafin, the only two people present when Serafin was injured by Jarman's kick. The Commission was able to personally observe both witnesses, the manner in which they testified, and judge their credibility. The Commission found Serafin to be credible. SR 10.

In his brief, Jarman notes that for law enforcement purposes "good moral character" is not defined by administrative rule or statute. JB 27. Law enforcement officers "are expected to uphold the highest standards of conduct." *Farmer v. City of Rapid City*, 2011 S.D. 41, ¶ 22, 801 N.W.2d 291, 297. They must use good judgment, employ

restraint, and necessary compassion. *Id.* (citation omitted). Similarly, good moral character is expected of attorneys and has been defined in the context of the admission to practice law. "Good moral character" includes, but is not limited to qualities of honesty, candor, trustworthiness, diligence, reliability, observance of fiduciary and financial responsibility, and respect for the rights of others and for the judicial process. SDCL 16-16-2.1.

Jarman does not state so explicitly, but by implication suggests that intentionally kicking and injuring another person does not amount to poor moral character. To the extent that is Jarman's argument, the Commission found otherwise. Law enforcement officers are sworn to uphold the laws and investigate crimes, including domestic assaults. It is not unreasonable for the Commission to require its applicants not behave in a manner that involves assaulting others, even if the victim of the assault is trained in the martial arts. Further, the Commission was justified in finding good moral character lacking based on how Jarman reacted to Serafin. Law enforcement officers typically find themselves in hostile situations with difficult people. Jarman's reaction to Serafin demonstrated a lack of restraint, an unhealthy temperament and poor moral character. The Commission recognized this and found that Jarman lacked the good moral character to become a law enforcement officer. SR 10.

Finally, Jarman argues the acquittal in Fall River County should prove Jarman to be more credible than Serafin. JB 29. As pointed out in issue one of this brief, evidence of an acquittal does not erase the bad conduct. Here, the Commission personally observed each of the witnesses and made its own determination as to the facts and credibility of each of the witnesses, finding by clear and convincing evidence that Serafin was credible. That a jury failed to find "beyond a reasonable doubt" that Jarman was guilty of a crime does not preclude the commission from finding by clear and convincing evidence that Jarman does not meet the good moral character requirement imposed on applicants appearing before the Commission.

III

THE ACTING CHAIRMAN OF THE COMMISSION PROPERLY SIGNED THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE ORDER DENYING JARMAN'S APPLICATION.

For his final argument, Jarman claims the Findings of Fact, Conclusions of Law and Order are void because they were signed by the Acting Chairman of the Commission rather than the hearing officer. JB 29-35. The Acting Chairman properly signed the documents.

Jarman and his attorney were given written notice of the contested hearing. SR 43-45. The notice advised that Jarman could require the Commission to use the Office of Hearing Examiners by giving notice of the request to the Commission no later than ten days

after receiving notice of the hearing. SR 44-45; SDCL 1-26-17; SDCL 1-26-18.3. Jarman was further advised that failure to exercise that right to use the Office of Hearing Examiners at the hearing would waive that right. SR 44-45. Neither Jarman nor his attorney requested use of the Office of Hearing Examiners.

Jarman and his attorney appeared for the contested hearing. The Commission appointed a hearing officer, but he was not from the Office of Hearing Examiners. The role of the appointed hearing officer was to conduct the hearing in a fair manner. The hearing officer directed the order of the hearing, accepted exhibits, ruled on objections, and made sure both parties had an opportunity to present facts and arguments. The hearing officer did not participate in the decision making process. Based on his limited role, the hearing officer was not the appropriate person to sign the Findings, Conclusions and Order.

Jarman erroneously relies on SDCL Ch. 1-26D to support his argument that the Acting Chairman could not sign the Findings, Conclusions and Order. JB 34-35. Because there was no request to use the Office of Hearing Examiner, SDCL Ch. 1-26D does not apply.[3] This case is governed by SDCL Ch. 1-26.

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[3] Use of the Office of Hearing Examiner does not mandate that the findings and order be signed by the hearing examiner. SDCL 1-26D-11 allows the agency to limit the powers of the hearing

(continued . . .)

Nothing in SDCL Ch. 1-26 mandates that a hearing officer sign the findings, conclusions and Order. The only requirements for the findings, conclusions and Order are contained in SDCL 1-26-25, which requires the final decision or Order be in writing or stated in the record. Written Findings of Fact and Conclusions of Law must be prepared, setting forth the underlying facts supporting the findings. SDCL 1-26-25.

The requirements for the findings, conclusions and Order were complied with in this case and there is no basis to rule them a nullity.

(. . . continued)
examiner to conduct the contested hearing, rule on procedural, evidentiary and other motions raised by the parties, and provide legal assistance to the agency.

CONCLUSION

The State respectfully requests that this Court uphold the denial of Jarman's application for a certificate of qualification as a county sheriff.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,329 words.

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

Dated this ____ day of September, 2014.

_____
Kelly Marnette
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of September, 2014, a true and correct copy of Appellee's Brief in the *Matter of the Certifiability of Brett Jarman as a South Dakota Law Enforcement Officer* was served by electronic mail on Timothy J. Rensch at timothy.rensch@renschlaw.com.

_____
Kelly Marnette
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 27115

IN THE MATTER OF THE CERTIFIABILITY
OF BRETT JARMAN AS A SOUTH DAKOTA
LAW ENFORCEMENT OFFICER

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL WAS FILED JUNE 19, 2014

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #27115

IN THE MATTER OF THE CERTIFIABILITY OF BRETT JARMAN
AS A SOUTH DAKOTA LAW ENFORCEMENT OFFICER

STATEMENT OF LEGAL ISSUES

1. Whether using acquitted and expunged conduct is proper to deny law enforcement certification, when use of such is not specifically delineated by statute or rule, and when use of other matters is specifically delineated by statute and rule.

The LEOS&TC and circuit court held that it was.

ARSD §2:01:02:02
SDCL §23-3-42
SDCL §23A-3-32

2. Lack of "good moral character" was not established by "clear and convincing evidence," and thus Jarman's certification was wrongfully denied.

The LEOS&TC and circuit court held that it was.

SDCL §23-3-42
ARSD §2:01:02:01(4)
Matter of Certification of Ackerson, 335 NW2d 342 (SD 1983)

3. The Circuit Court's appellate ruling denying that the Findings, Conclusions, and Order are a nullity because they were signed by the LEOS&TC's acting chairman rather than the presiding judicial officer is erroneous because its legal analysis is in error, and also does not fit statutory authority

The Circuit Court held that due process of law was not violated by the LEOS&TC self-signing the Findings, Conclusions, and Order as a statutorily appropriate

exercise of a valid judicial function and did not result in them being rendered a nullity.

State v. Blakny, 2014 SD 46 (Slip op., July 9, 2014)
Case v. Murdock, 1995 SD 26, 528 NW2d 386 (*Case II*)
Mordhorst v. Egert, 223 N.W.2d 501 (S.D. 1974)
SDCL §1-26D-6

STATEMENT OF THE CASE AND FACTS

Appellant reasserts the statement of facts, as well as all legal points, caselaw, and argument and authorities contained in Appellant's Brief as previously served and tendered.

ARGUMENT

1. Whether using acquitted and expunged conduct is proper to deny law enforcement certification, when use of such is not specifically delineated by statute or rule, and when use of other matters is specifically delineated by statute and rule.

The state has not responded to the cases and authority cited by Appellant Jarman at pages 13, 14, and 16 of Appellant's Brief concerning the rules of statutory construction. Please consider the arguments advanced by Appellant as unopposed. In that regard it is the most basic rule of statutory construction that the law must be interpreted in such a manner so as to avoid absurd results. *See*, e.g. *Murray v. Mansheim*, 2010 SD 18, ¶7, 779 N.W.2d 379, 382. It is absurd that one who has been acquitted of aggravated assault and had the arrest expunged without any objection from the Attorney General's office receives less protection than a person who has pled guilty and/or been convicted of a crime, which has been forgiven by a suspended imposition, pardon, reprieve, or commutation. After all, should we not give the verdict of twelve fair and

impartial jurors mutually acceptable to both the state and defense some credence? Had there been a conviction the verdict would have been honored by the state and relied upon to provide a statutory basis for certification refusal. It seems unfair and an insult to the finality of a jury decision that the same fact pattern can be opened up and litigated again by the same law offices which fought the matter out before a jury to a full and fair verdict, with all available information being presented to the at a solemn and serious trial. This seems even more clear when those same law offices mutually appeared on the record in an expungement proceeding before the very judge who tried the case and granted an uncontested expungement.

The state tries to sidestep by arguing that since the legislature granted the commission the authority to determine good moral character by statute, it can separately consider the "assaultive conduct," as the state puts it, which formed the basis for the charge in the first place, despite acquittal and expungement. In so doing the state cites ARSD 2:01:02:03.1 for the proposition that a conviction or plea can still be used to determine good moral character. *See*, Appellee's Brief at page 11. But this does not answer the valid and powerful points of Appellant regarding ARSD 2:01:02:03.1 at Appellant's Brief, pages 15-18.

ARSD 2:01:02:03.1 states:

> **Exception from prohibition on employment or certification**. Any person ineligible under § 2:01:02:02 to be hired or certified as a result of a conviction, may not be denied employment or certification as a result of that conviction if the person, based upon a proof of innocence, received a reprieve, commutation, or pardon. This section does not prohibit the consideration of a conviction or plea

> in determining moral character under subdivision 2:01:02:01(4).

Since this rule specifically allows that "a conviction or plea" can still be used in determining moral character, it shows that a reprieve, commutation, or pardon, upon proof of innocence, would otherwise be disallowed in determining moral character. If this were not so there would be no need to place such in the rule itself. Hence, the legal maxim *expression unius est exlusio alterius* seen at page 16 of Appellant's Brief, which means the expression of one thing is the exclusion of another, comes into play. And this was not addressed at all in the state's submission. There was good reason the state does not deal with this argument: expressing by rule that a conviction or plea can be considered in determining moral character excludes an acquittal with an expungement for the same use. This makes sense in the entire scheme which forms the powers of the commission in the statutes passed by the legislature and expressed by the commission through the promulgation of its own rules. If the commission could consider anything in determining good moral character, as the state herein contends, convictions, pleas, pardons, reprieves could all be considered anyway without any rule. But there is a rule. And there are rules about suspended impositions, misdemeanor convictions, and juvenile adjudications. And why? This shows there is a limit on what can be considered by the commission to determine moral character. If a rule (ARSD 2:01:02:03.01) provides convictions and pleas *can be used*, it naturally follows that the opposite – acquittals and expungements – cannot be used, i.e., the expression of one thing excludes the other. Put another way, under "*expression unius est exlusio alterius*" expressing that convictions

and pleas can be used to determine moral character likewise and inferentially excludes acquitted and expunged conduct.

In that vein see the unopposed arguments at page 19 of Appellant's Brief, concerning the wording of SDCL 23-3-42 allowing refusal to certify even if an applicant received a suspended imposition or juvenile adjudication. The unopposed argument in essence is that if the legislature wanted certification to be rejected based upon acquitted and expunged alleged conduct, such conduct would have been also listed in SDCL 23-3-42. Since it was not, based upon logic, common sense, and the rules of statutory construction – including the maxim *expressio unius est exlusio alterius* – expression of the legal substitutes for conviction (suspended impositions and juvenile adjudications) excludes acquittals coupled with expungement as we see in Jarman's case herein. If the legislature took pains to list out these matters and allow rejection thereon, it could have just as easily included acquittals, but chose otherwise. If a rule is required to allow a suspended imposition to form the basis of the certification refusal, does it not stand to reason a rule would also be required to allow acquitted and expunged conduct to be so used? The same arguments also apply equally to ARSD 2:01:02:02 (Felons to be rejected – Misdemeanants to be reviewed), meaning that persons who have been acquitted are *not* to be rejected and/or reviewed.

Looking at the statutory scheme as a whole along with the administrative rules proves determining good moral character does not allow the relitigation a three day jury trial which resulted in an acquittal and expungement at a half day hearing before the commission.

The state's ultimate position is that even if there is proof of innocence resulting in a reprieve, commutation, or pardon, under ARSD 2:01:02:03.1, "[t]he conduct can still be considered in determining good moral character." Appellee's Brief, page 12. As the state goes on to argue, "In other words, a person may be convicted, apply for a pardon, prove innocence, receive the pardon, and still have his conduct considered by the Commission in determining moral character." *Id*. The reason the commission can consider the information is because the rule allows it, not because it automatically comes in under the general good moral character inquiry based upon moral character alone. While the rule actually says "conviction or plea" can be considered the state properly notes it is "the conduct" which can be used to determine good moral character. Appellee's Brief, page 12. This shows "conviction and plea" really refers to the conduct, not the formal conviction or plea. Since this conduct surrounding a conviction and/or plea can be considered by virtue of the rule (ARSD 2:01:02:03.1), acquitted/expunged conduct cannot be considered without a similar rule giving the commission the power to do this. It is undisputed there is no such similar rule.

The state cites *State v. Shindler*, 986 S.W.2d 209 (Tenn. 1999) for the proposition that expunged matters can be used by trial courts in determining eligibility for a prosecution and thus the commission here in South Dakota should be able to do the same. That case is inapplicable, distinguishable, and dissimilar. Kristina Schindler, the defendant in that case, opened her boyfriend's mail, found out he had a girlfriend and what her address was, and drove from Texas to Knoxville, Tennessee to illegally enter the girlfriend's apartment and beat her with an axe handle. *Schindler*, supra, at 210. She was

convicted at trial of Aggravated Burglary. *Id*. Schindler requested a post-trial diversion at sentencing, despite the fact that she had two prior convictions (shoplifting in Texas and telephone harassment in Kansas) for which she was sentenced, completed probation, and was given post-trial diversions. *Id*. After completing the diversion programs her records were expunged. At sentencing for the Aggravated Burglary the trial judge considered Schindler's prior convictions, despite the fact that they were expunged, and denied her request for a third pretrial diversion. The Supreme Court of Tennessee affirmed the trial court's sentence, noting the broad discretion of the criminal sentencing court to consider sentencing factors. *Id*. In pertinent part the court held, as Appellee cites, "Expungement does not return a person to the position occupied prior to committing the offense." *Id*. at 211. Appellant Jarman herein was acquitted and therefore committed no offense. Furthermore, his expungement was not after some statement by him or determination by a trier of fact that he committed an offense. His acquittal plus the uncontested enxpungement put him in a completely different and distinguishable position. The case does not fit here and offers nothing to this analysis and should be disregarded.

The state then takes us to a disciplinary action in the Arkansas Supreme Court in *Ligon v. Davis*, 424 S.W.3d 863 Ark. 2012, (Appellee's Brief, page 15) where former Circuit Court Judge Fred D. Davis was convicted at trial of felony tax evasion, received a suspended imposition of sentence, appealed the criminal case to the state Supreme Court, and sought to reinstate his law license by separate action. *Id*. at 864. In the disciplinary action Davis claimed that his felony conviction could not be properly considered in determining fitness to practice as he had completed the terms of the suspended

imposition, the file was sealed/expunged, and under state law was not a conviction. *Id*. The Tennessee Supreme Court held that is was proper to use the underlying conduct to determine his fitness to practice law, despite the successfully completed and sealed suspended imposition of sentence/expungement. *Id*. at 868.

This case is inapplicable to Appellant Jarman's situation. He was acquitted at trial, not convicted of fraudulent acts which were essentially forgiven through judicial grace after completion of terms of a suspended imposition of sentence, like the former Judge Fred D. Davis. And factually Davis' situation, while involving felony fraud in the first instance, was in itself almost a fraud on the court in that he did what he did and then claimed he could use a statutory device to say he did not. The statutory scheme of the disciplinary situation in Tennessee is nowhere close to the statutes and administrative rules governing the LEOST&TC here in South Dakota and is therefore distinguishable and dissimilar. Here Jarman is not relying on expungement and a sealed suspended imposition, he is relying on acquittal, uncontested expungement, and the lack of a specific rule allowing such matters to be considered, when there are specific rules allowing other more culpable matters to be considered.

The state goes on to cite how expunged arrests can be used per SDCL 16-16-2.3 to determine good moral character for one seeking admission to the bar. Appellee's Brief, page 15. The state argues, "SDCL 16-16-2.3 provides that 'unlawful conduct, including cases in which the record of arrest or conviction was expunged, with the exception of juvenile arrests and dispositions unless they pertain to a serious felony,' is relevant to the determination of good moral character of persons seeking admission to the

South Dakota State Bar." *Id*. The legislature in this instance chose to specifically legislate the ability to look into expunged conduct for attorneys. This shows the legislature is cognizant of expungements and took steps to particularly allow them to be considered when involving unlawful conduct. Had the legislature wanted to do the same in relation to law enforcement certification it could have. The fact that it did not for law enforcement, but did for lawyers proves such was not to be considered by the commission. And it cannot be said that Jarman's conduct was unlawful since he was acquitted. There is no dispute that a provision similar to SDCL 16-16-2.3 does not exist in relation to law enforcement certification.

For the reasons stated herein the commission should not have been allowed to use acquitted and expunged conduct to deny Jarman's certification, and the circuit court abused its discretion in failing to rectify the error. In so doing, the commission exceeded its statutory authority in violation of due process.

2. Lack of "good moral character" was not established by "clear and convincing evidence," and thus Jarman's certification was wrongfully denied.

It is unfair to characterize Jarman's acquitted conduct as assaultive domestic violence. First of all Jarman and Serafin never lived together and the charge he faced at trial did not carry the "domestic violence" designation. The purported belief by the commission of Serafin, and the circuit court's affirmance thereof, are clearly erroneous, in that a fair review of the record and the contradictory and unlikely contentions of Serafin, prove her testimony lacks any credibility at all, and should leave a reviewing court to determine any such determination was clearly erroneous in that there exists a

definitive and firm conviction a mistake was made. The state did not address any of the specific points about Serafin's testimony which totally eviscerate any realistic claim she is worth of even a modicum of belief. Please consider those points unopposed and consider them in Jarman's favor.

A review of the pattern jury instructions and caselaw cited at pages 21-22 of Appellant's Brief can be summarized as follows: clear and convincing evidence requires evidence so clear, direct, weighty, and convincing that the conclusion is reached without hesitancy. The analysis of the state and the circuit court merely recites the deference which must be extended to the fact finder and does not explain how Serafin could possibly do and say such things and be reasonably believed.

As a recap Serafin agreed that if the kick occurred the way she contended she would never want to remain with Jarman for any reason. Apellant's Brief, page 23, 24. (Tr. 60-61; SR 75-76). Yet she willingly rode all the way to Casper with him, even though she agreed if he could kick her the way she claimed he could just as easily kill her and if the kicking were true she would not want to be with him. *Id*. at 23, 25. (Tr. 50, 72, 74; SR 63, 65, 89). She did not call 911 or call out for help to the city workers 30 feet in front of the Jarman home. Id. (Tr. 42, 74; SR 57,89) On the way to Casper she wanted to know if they were going to have a future relationship together, but if Jarman had done what she was claiming she would never want a future relationship with him. (Tr 50-51; SR 65-66). She knew what the word "accident" meant and would never have characterized what Jarman did as an accident if what she says was true, but then filled out medical records and wrote in her own hand "left knee accident" as the reason for

treatment. Appellant's Brief, page 24 (Tr 61, 70, 72; SR 76, 85, 87).

Calling the incident an "accident" in and of itself is enough to hesitate in accepting Serafin's version of events, which would militate against finding her testimony credible based upon clear and convincing evidence. But her question to Jarman about the future of their relationship brings additional pause. Why would she ever want one if what she claims is true? Then she agrees it was after his silence to this question she says she is going to tell the doctors that he kicked her. And the fact that she would even ride with him all the way to Casper if he had supposedly committed such a callous act is more consistent with Jarman's version and brings further question to her claims. This is especially so when she agreed that if he could kick her he could hurt her or kill her on the way to Casper. She agrees that she threw items all over his living room and at him. She is the real aggressor. And she lost her job as a City Finance Officer for financial irregularities and was paying money back to the city. (Tr. 76; SR 91). It is hard to envision how she could realistically be believed under even a preponderance of evidence standard, let alone the standard of clear and convincing evidence. And nobody thus far has evaluated the content of the evidence in any detailed and reasoned fashion and addressed how a reasonable and fair fact finder could dismiss the contradictions, incongruent actions, and claims of Serafin. The decision of the circuit court lacked detail, was circuitous, and was thus arbitrary and capricious in light of the sum total of these factual admissions which are wholly inconsistent with Serafin's claim.

All in all, Jarman's explanations were far more likely, more in line with the facts, and much less impeached in logic and testimony than Serafin's. And the character

witnesses who knew him well, along with Jarman's security clearance and extensive law enforcement experience, prove independently he is more worthy of belief than Serafin.

3. The Circuit Court's appellate ruling denying that the Findings, Conclusions, and Order are a nullity because they were signed by the LEOS&TC's acting chairman rather than the presiding judicial officer is erroneous because its legal analysis is in error, and also does not fit statutory authority.

The state claims that since SDCL Chapter 1-26D does not apply, there was no need for the Hearing Officer to comply with SDCL § 1-26D-6, mandating preparation of proposed Findings of Fact and Conclusion of Law by said officer and presentation to the agency for acceptance, rejection, or modification. Appellee's Brief, pages 20-21. But the circuit court held that Robert Anderson was appointed to be the hearing examiner to conduct the contested hearing per "the Administrative Procedure Act. *See,* SDCL 1-26D-3," (*See* A-11 of Appellant's Brief) in its opinion. From this it is clear SDCL Chapter 1-26D governs and should have been followed. Since the hearing examiner did not follow this mandatory procedure Jarman's due process was violated and must be remedied in the event this court affirms on issues 1 and/or 2 above.

REQUEST FOR ORAL ARGUMENT

Appellant Jarman hereby respectfully renews his request for the opportunity to present oral argument in this appeal.

Dated this 8th day of October, 2014.

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