

State of the Judiciary  
Chief Justice David E. Gilbertson, South Dakota Supreme Court  
Message to the Legislature  
January 2004, in Pierre, South Dakota

Dear Governor Rounds, members of the Legislature, Constitutional Officers, my fellow Justices, Circuit Court Judges, employees of the United Judicial System and all citizens of the State of South Dakota:

As I begin my third year as Chief Justice of the South Dakota Supreme Court, it is my pleasure to bring you, once again, both an oral and a written report on the state of the judiciary. I am pleased to report to you that the Unified Judicial System is strong and working well to meet the challenges that face us.

### THE ONGOING WORK OF OUR COURTS

In 1889, our constitutional drafters gave a gift to the citizens of this state. From the day it was signed, our constitution has provided that any person who does not prevail in a circuit court of this state has the guaranteed right to have his or her case reviewed by all the members of the South Dakota Supreme Court whether the case involves a traffic ticket all the way to the death penalty. Although it is not well known, that provision is a significant protector of the lives and liberties of those of us fortunate enough to reside in South Dakota. Only a very few states grant to their citizens the absolute right of appeal to their Supreme Court. In the vast majority of states, an intermediate court of appeals may be the court of last resort while the state supreme court considers a case only if it chooses to do so.

At this point in time, although the docket of the South Dakota Supreme Court is a busy one, we are getting our work done on a prompt basis and the Supreme Court is current with its caseload. Last year, through the hard work and cooperation of Justices Sabers, Konenkamp, Zinter and Meierhenry and the able assistance of a fine support staff, we disposed of 449 filings.

From time to time, it has been suggested that we create an intermediate appellate court system, or that we allow appeals to be heard by panels of fewer than the full Court of five Justices, or that we require the Court's permission to appeal. None of these well intended suggestions is necessary at this time. It is entirely appropriate to continue the appeals process to the full Supreme Court as a matter of right given to all citizens of this state and those who sue our judicial system.

We continue to take the work of the Supreme Court to the public as much as possible. Last March we held a full term of court consisting of 35 cases at the School of Law at the University of South Dakota. In October we accepted the invitation of Mt. Marty College in Yankton to hold a term of court on its campus. As many as 805 persons attended an oral argument, most of them high school students. Both terms outside of Pierre are annual events which we enjoy and look forward to. As far as we know, ours is the only Supreme Court in the country that regularly holds full terms of court in educational centers outside the capital to enhance student and public access

to our judicial process.

At the circuit court level, the court that each of you has in your local county, the number of criminal filings has remained consistent with past years. The good news is that there was a 7.5% decrease in the number of felony filings brought to circuit court. However, in FY 2003, 3605 people appeared in circuit court on petitions alleging them to be victims of domestic abuse and seeking the court's protection from other people. This was a 24% increase in protection orders and is in addition to the significant increase over the previous year. Although the increase in domestic protection orders may be partially attributable to the improved accessibility of judicial relief, the figures are still a cause for concern. The courts continue to work with the Department of Social Services to staff domestic violence coordinators in both Sioux Falls and Rapid City. The coordinators assist victims of domestic violence through a time of high emotions that is usually quite difficult.

The other area where there was a significant increase in workload at the circuit level was criminal background searches. Requests for background searches from employers, volunteer organizations, armed forces, and others increased by nearly 17%.

At the circuit court level, every ninety days all 38 circuit judges must file a report with my office that lists any case that has been under consideration for more than 90 days, whatever the reason. It is reassuring to note that for each 90-day reporting period, the number of cases state-wide under consideration for more than 90 days is always less than a half a dozen. Moreover, I have never received notice of a single case under consideration for a second ninety-day period.

The work of the circuit and magistrate courts is vitally important to the resolution of legal disputes and criminal charges in this state. In over 99% of the cases brought before these courts, the decision is not appealed to the South Dakota Supreme Court and thus is final. To most South Dakotans, circuit courts and magistrate courts are the courts they are familiar with, either because they have been a party in a case or because they have served as a juror. Caseload statistics for your local counties are available in the Annual Report of the UJS available on our Web site.

## TECHNOLOGY

We continue to improve and expand the Unified Judicial System's Web site. Any citizen with Internet capability can access our monthly calendar of cases, which is posted well in advance of our term. In addition, since November 2002, the public has been able to access "live" online streaming of the audio portion of the Supreme Court's oral arguments over the Internet. Should that not be possible or even convenient, the arguments are permanently archived for 24 hour a day, seven day a week access. Last month, 425 citizens took advantage of this opportunity.

When this Court issues a decision, it is available on our Web site within 24 hours of issuance. It used to take weeks for citizens to obtain copies of a decision of this Court from a law book publisher that was generally available only to lawyers and for a fee. Now, opinions are promptly available to all citizens at no cost to them. The Web site currently has 5,800 visits per month by persons who are viewing our opinions. The UJS Web site is another manner in which we are

educating and informing the public about how our state's judicial system adjudicates legal disputes.

The Annual Report, which provides detailed statistical and written information regarding the entire Unified Judicial System, is found on our Web site.

## REGULATION OF THE BAR

Since South Dakota became a state, the Supreme Court has supervised attorneys licensed to practice law in this state, and we take this obligation very seriously. The license to practice law is a privilege granted only to those worthy of it. We do not admit to the bar those who do not meet this standard. We remove from its rolls those who commit a serious act of unprofessional misconduct when the protection of the public requires such action.

In the past few years, we have considered several attorney disciplinary cases. A fair summary would be that within the professional rules, attorneys have a professional obligation to be candid with their client, candid with the judiciary and candid with each other. Lincoln probably put it best when he advised a young man who was considering the law as a profession to resolve to be an honest person if he could not become an honest lawyer. I am pleased to report that the vast majority of the 1,650 licensed attorneys in South Dakota observe the highest ethical standards of conduct and require no disciplinary action by this Court.

In 2003, this Court reviewed the professional rules that guide attorney conduct. In August, we adopted a completely new and updated set of professional rules, which are being considered by most of the states in this country. While the basics largely remain the same, some areas were modified to keep up with the changing times in which we live and in which attorneys work.

## FISCAL MATTERS

For the past several years, the Unified Judicial System has responded to the ever-increasing demands placed upon it with basically the same number of employees. We accomplished this through the dedication and hard work of the 472 full-time personnel in the judicial system. In prior years, we sought additional FTEs for the UJS only when we were convinced they were essential to our mission.

The Supreme Court and presiding judges are well aware of the fiscal challenges that currently face our state. For the upcoming year, we will be requesting a budget increase of only .7% in general fund appropriations and an overall budgetary increase of .8%, excluding salary policy and health insurance. We believe this budget will allow us to continue to provide the people of the state with an effective judiciary utilizing the existing number of judges and justices.

I would further call to your attention that the judiciary is an instrument of the state that provides revenue to various units of government. In the past fiscal year, we collected \$21.1 million, as compared to our general fund budget of \$25.2 million. Of that \$21.1 million, we returned approximately \$13.7 million to the counties and school districts, \$6.6 million to the state and \$800,000 to the cities.

## PERSONNEL CHANGES

Recently, after holding a public hearing to determine the optimum need throughout the state, the Supreme Court transferred a vacant judgeship from the Sixth Judicial Circuit to the Seventh Judicial Circuit. Governor Janklow appointed A.P. Fuller to fill that position in Rapid City. In August 2003, Bradley Zell was appointed by Governor Rounds to fill a vacancy in the Second Judicial Circuit created by the appointment of Justice Judith Meierhenry to the Supreme Court. In October 2003, Steven Jensen was appointed to replace Judge Lee Tappe, who had earlier passed away. Judge Eugene Dobberpuhl of Aberdeen retired in September 2003 after many decades of distinguished service, leaving a vacancy in the Fifth Circuit. Recently, Governor Rounds appointed Scott Myren to fill that position. We wish Judge Dobberpuhl and Betty many happy years of retirement and to Judge Dobberpuhl many years of full limits of fish and game.

We continue to offer to the judges and staff of the Unified Judicial System the highest quality of training to enable them to perform their duties in the best manner possible. As always, the UJS strives to bring important and quality educational opportunities to its valued judges and employees.

## RURAL/URBAN ISSUES

For some time, the UJS has struggled to provide adequate judicial services to areas of the state that have experienced a significant increase in caseloads, an increase that is generally tied to a significant growth in population. At the same time, we have attempted to continue to provide adequate service to the rural areas that are struggling with a declining and aging population.

In January 2003, the UJS received a grant from the State Justice Institute to study the issues surrounding the delivery of judicial services to the rural and urban areas of South Dakota. The UJS Planning and Administrative Advisory Council (PAAC) and its predecessor committee, composed of judges, court administrators, court services officers, court reporters and court clerks, had earlier identified the delivery of core court services to the rural areas of South Dakota as worthy of study.

Led by PAAC, the State Justice Institute-funded study focused on the delivery of clerk of court services. Researchers from the Rural Sociology Department at South Dakota State University were hired to survey the public, circuit court clerks and attorneys practicing in the state. The survey's goal was to identify perspectives on clerk of court services currently provided as well as what additional services are needed now and in the future.

Although the grant period ended in December 2003, analysis of the information gained through this study will lead the UJS to both long- and short-term solutions to delivery of service issues. It will also provide a foundation for further research and changes to the delivery system, all with the goal of providing the best service available to the citizens of South Dakota in the most efficient and effective manner.

## JUVENILE JUSTICE

During the past year, there has been much public discussion both in and out of state government about what to do with the problems concerning juvenile justice. I have visited informally with Governor Rounds and some of you on this subject. The UJS does not pass the laws, you legislators do. However, I assure you that the judiciary of this state stands ready within its constitutional and statutory limits to cooperate with all other governmental units. This is not a piece-meal problem and piece-meal attempts at solutions probably will not work or will not work as successfully as a united effort.

It is no secret that we in South Dakota are facing a declining birth rate. A couple of years ago Governor Janklow reported that not a single school district in the state contained as many first graders as seniors in high school. Beyond that, each year a significant number of our youth leave the state and, unfortunately, do not return. We cannot afford to let the youth who remain slip through the cracks. Borrowing a motto from our President's view on education, juvenile justice should also attempt to see that no one is left behind.

### SUBSTANCE ABUSE

In 1995, I was preparing to take office as a Justice of the South Dakota Supreme Court. Behind me were ten years of prosecuting and another nine years as a circuit judge. A friend of mine who had been the Roberts County State's Attorney throughout that time, stopped by for a visit. We tried to identify a single felony prosecution in Roberts County where the perpetrator had not been intoxicated or under the influence of illegal drugs when the felonious act was committed, or where the perpetrator was not committing the felony to get money to purchase drugs or alcohol. We could not come up with a single felony committed during those 19 years where the defendant made a sober decision to support himself or herself by becoming a professional criminal. While this is admittedly anecdotal and possibly unique to my experience, it goes to show the extent to which adult and juvenile criminal activity in this state is tied to substance abuse.

In last year's message I talked about projects that affect adult populations. One of those projects targeted DUI offenders. DUI offenders create a serious community safety issue and contribute significantly to the courts' workload. This past year, the UJS, together with the Division of Alcohol and Substance Abuse and the Council of Substance Abuse Directors, studied curriculums that are appropriate to DUI offenders. They selected a research-based curriculum and the curriculum providers have completed training in the curriculum. The UJS believes strongly that utilization of a standardized research-based curriculum for DUI first offenders is the first step in the long road of reducing DUI offenses.

If we can successfully deal with substance abuse, we will reduce crime in this state, especially crimes committed by repeat offenders.

### COURT SERVICES

Court services operations continue to be an emphasis of the UJS. Senate Bill 202—the Juvenile Justice and Delinquency Act (JJDP)—as adopted by the 2003 Legislature is very significant legislation for the treatment of juveniles. The UJS supports the legislation and will put forth

every effort to comply with the four key requirements of the Act. However, we must recognize that the alternatives to jails and secure detention are currently limited by bed space and geography. It is no secret that a major reason for opting out of the JJDP in 1995 was the lack of alternative programs and placement centers in this state's rural areas. It is my sincere hope that as South Dakota adjusts to the JJDP, a full continuum of resources will be developed. To that end, the UJS is developing a centralized intake system for juvenile detention services.

The centralized intake system will use centralized sites for intake, a detention risk screen instrument, and a web-based menu of available services. The system will collect data on the utilization of all detention services. Our goal with the centralized intake project is to minimize the time it takes to access services, link a juvenile to the most appropriate service and collect data so that limited financial resources will be targeted to produce the greatest effect. The project should be operational by the end of this fiscal year. The UJS wishes to thank our project partners, the South Dakota Coalition for Children, who have embraced the vision and committed financial resources to the project.

The Interstate Compact on Juveniles, which was established in 1955 and adopted by South Dakota in 1961, addresses the needs of juveniles within the juvenile justice system who move between states. This compact has not been sufficiently amended in its 47-year existence. After exhaustive research and detailed study, the Office of Juvenile Justice and Delinquency (OJJDP) and the Council of State Governments formulated recommendations and implemented changes to the compact so it better addresses public safety, enforcement, accountability and communication concerns. The UJS will sponsor legislation in 2004 to adopt the new Juvenile Interstate Compact. If 35 states enact this legislation, those 35 states will begin making administrative decisions, by-laws, and rules to govern the signatory states.

### CASA

For many years, Court Appointed Special Advocates, or CASA, volunteers have provided a valuable service to the citizens of this state by appearing in juvenile court proceedings and other matters as friends of the court. The program has been an unqualified success.

The 2003 Legislative Session created a CASA Commission administered and staffed by the UJS, to award grants to CASA programs in South Dakota. You also created a permanent funding mechanism for the CASA program by authorizing a fee to be applied to criminal fines. With these enhancements now in place, we hope for even better results in the future from this fine program.

### EQUAL JUSTICE FOR ALL—AT HOME

Since the end of the Civil War, this country has attempted to achieve equal protection of the law for all its citizens. While this is a simple concept on the surface, as with other ideas, the "devil is in the details."

With the beginning of 2004, the Supreme Court has also embarked upon another program to achieve its goal of equal protection for all persons. The Court has created an Equal Justice

Commission. It will be co-chaired by Justice Konenkamp and the Honorable Patrick Lee, a retired tribal judge from the Oglala Sioux Tribe. The eleven-member commission will conduct a series of public hearings throughout the state. It will then make recommendations to the South Dakota Supreme Court. The commission will be composed of citizens, lawyers and judges. We hope to have the balance of the commission selected and hearings commence within the next few months.

Many fine words have been written about the sanctity of the family home and the home being a person's castle. For all too many people, home is instead a place of fear due to mental, physical, sexual or emotional abuse. Some acts that are committed in the home verge on depravity. For many years the crime of domestic abuse, and we should call it a crime because that's what it is, did not receive the attention it deserved to adequately deal with the problem. Nevertheless, progress, while slow, has been made.

When I was a prosecutor, and later when I was a circuit judge in my home county, it was apparent that bordering two states together with a checker-boarded state/tribal jurisdiction created additional challenges for dealing with domestic abuse. The perpetrator often avoided the legal consequences of his or her acts of abuse by simply going into another jurisdiction or state. Recently, when I was visiting with a tribal judge, she identified the inability to enforce domestic protection orders between the tribes and the State of South Dakota as her number one judicial problem.

This past year, the Legislature in cooperation with the Governor, the Attorney General and my office, passed what is now SDCL 25-10-12.1. This statute allows South Dakota courts to enforce protection orders issued by other states or tribal courts to the same extent as orders issued by a South Dakota court under South Dakota law. In a crisis situation that calls for immediate action, a South Dakota law enforcement officer may enforce a foreign protection order and make an arrest as though the order was issued by a South Dakota court.

Only when domestic tranquility is protected can we successfully move forward and accomplish other worthy goals such as racial, ethnic and religious toleration and reconciliation. Such lofty goals probably do not mean as much to those who fear for their lives and safety or for family members simply because they return to their homes or a perpetrator-abuser returns. As the United States Supreme Court has said on numerous occasions, "The right to be let alone is indeed the beginning of all freedom." While this doctrine applies to many situations, the Court has made clear that the "right to be let alone" includes the right "to live one's life as one chooses, free from assault, intrusion or invasion...."

While I am not naïve enough to think that legislation of this type will resolve the causes of domestic violence and it will cease to exist as a problem in our society, it nevertheless fulfills a basic need provided by governmental protection. As Dr. Martin Luther King wisely noted, "It may be true that the law cannot make a man love me. But it can keep him from lynching me, and I think that's pretty important." I predict that this simple piece of legislation that you wisely passed will have a significant positive effect in the future. Thank you for giving law enforcement and the courts this additional tool to assure justice for all.

## FAMILY—STATE RELATIONS

There are those who because of their tender years or other circumstances are unable to report neglect or domestic abuse inflicted upon them. Since they cannot defend themselves or even leave home, they are often in the most potential danger. The Department of Social Services and law enforcement cannot be everywhere at all times. Citizen involvement is essential. Like the Priest and the Levite in the parable of the Good Samaritan, it may be easier to quietly pass by on the other side of the road, but such an attitude does not solve the problem; it only makes the problem worse. To those of you South Dakotans who have come forward to respond to the needs of a disabled adult or to the cry of an abused child by reporting it, or who have even gone beyond that by going to court with them, testifying as a witness, becoming foster parents, or adopting them, I salute you.

The history of Dakota Territory and the State of South Dakota is for the most part not a history of individual persons, be they good or evil or somewhere in between. In large part, our history is a history of families. That is why this address has in large part dealt with family issues. As I told you last year, South Dakota judges identified the disintegration of the family as their number one problem. Good families produce more good families. Some do it on their own; some need help from the government, church, schools or other organizations. Unfortunately, bad families may have a tendency to produce more bad families. As the philosopher Santayana said, "Those who ignore the lessons of history are doomed to repeat them." He did not exempt domestic relations from this observation. If we are to achieve a positive future for this state, it is our challenge to do so by helping those who are struggling to be good families to achieve that goal.

## CONCLUSION

Once again this year as we discuss the State of the Judiciary in South Dakota, American servicemen and women are in combat conditions defending our system of government and our way of life. Those who were your paper carriers and cheerleaders a couple of years ago now defend you in combat. In many instances, they are members of your family or my family. It strikes me that when asked why they do it, they do not quote Montesquieu or Locke on the theory of government. Rather, they share sentiments like those written in a diary on December 25, 1944, at Layte Island in the Philippines by a young army nurse. She had been involved in surgery and caring for wounded soldiers under combat conditions for the past two years:

Got a letter from home today which was more welcome than any gift. Do miss them all so much and yet Christmas here is something I really wouldn't miss. Spirit is the important thing after all and it's here.

That lonely, but very focused young nurse would later become my mother. She, like the rest of those who served in the armed forces then and now, missed her family greatly but knew the defense of her family and her country was worth the sacrifice. May God keep all those who currently serve safe and return them home to their families.