

State of the Judiciary  
Chief Justice David E. Gilbertson, South Dakota Supreme Court  
Message to the Legislature  
January 9, 2008, in Pierre, South Dakota

Governor Rounds, Lt. Governor Daugaard, Speaker Deadrick, members of the Legislature, Constitutional Officers, my fellow Justices, Circuit Court Judges, employees of the Unified Judicial System, and citizens of the State of South Dakota:

It is my pleasure as Chief Justice of the South Dakota Supreme Court to present you with an oral and written report of the state of the South Dakota judiciary. I am pleased to report to you that the Unified Judicial System is strong and working well to meet the challenges that face it.

### DRUG TREATMENT AND THE COURTS

All of us, hopefully, have a method of getting away from the pressures and pace of everyday life. For me it is a summer weekend trip to my lake cabin in Marshall County. There I can contemplate the handiwork of nature that created glacial lakes many thousands of years ago. For me it is my "Garden of Eden."

At my lake cabin, I often come into contact with a neighbor who possesses an uncanny ability to view and assess the human situation. He once told me "David, all kids are good kids; the trick is to keep them alive." Since becoming a prosecutor in 1975 and a judge in 1986, I have had occasion to doubt the positive nature of my friend's observation. However, what he is telling us is that it is crucial to focus on humanity. Does society interact with troubled juveniles in a positive manner, which may or may not bear fruit, or in a manner that does not focus on their humanity? The devil is in the details. Unfortunately, while we focus on keeping the kids alive, we cannot, in all cases, mold them into productive citizens. We must protect society from those individuals who cannot be reformed. We rely on our judges to make that crucial and often very difficult determination.

Nationwide we are advised by experts that the pace of life is exceeding our ability to cope both personally and as a society. For all of us there are days the pace of life seems to be beyond control. Unfortunately, for some in this state, the escape from life's problems is the world of illegal drugs. In the past few years we have become increasingly aware that the drug problem is not just somewhere else, but also on our own doorstep. We recognize this and have taken important steps to combat illegal drugs and to reverse their effects.

This Governor and this Legislature supported the establishment of a drug court in the Northern Black Hills. This drug court's main focus is on methamphetamine addiction. It began operation on July 1, 2007 and its success or failure will be realized in increments over time. In a society hooked on instant results, patience is needed so that this tree we have planted can bear fruit. A few years ago a Western journalist asked a Chinese Premier if he thought there were any positive results from the bloody French Revolution of 1789. The Chinese Premier's serious reply was, "it is too soon to tell." Fortunately, we will not have to wait as long to assess the effects of the drug

court.

We were the 50th state and thus the last to establish this type of treatment program. The drug court program is based upon successful models from other states so we have every reason to expect a positive outcome. We estimate that we will be able to gauge the permanent effectiveness of the drug court program in the next twelve to eighteen months. At that time, we will know whether the first citizens who enrolled in the program have successfully graduated. After completing the program there is the underlying question of whether the recovered addict can remain "recovered." This program is designed to ensure that result.

Participation in the drug court is not a "get out of jail free" card. Those allowed into the program are screened to identify their potential for successfully completing it. Besides intensive probation, they are expected to get jobs, maintain their own homes, and take care of any children they have. They are also expected to appear in front of the judge once a week dressed in their "Sunday best."

Recently a participant in the program arrived for drug court one hour late. Rather than accepting excuses, the judge emphasized the consequences of not appearing on time by immediately placing the participant in jail for two days. According to the participant's attorney, "Upon her release she was angry with the judge, the team and the court service officer. However, today in court she admitted that it was her fault and accepted full responsibility. We believe that this is a good sign."

In other areas of the state the drug problem continues unabated. If the UJS establishes that the Northern Hills pilot program is a success, I anticipate I will be asking this Legislature to consider funding of a drug court program in central South Dakota. Presiding Judge Lori Wilbur identified her circuit as an area in need of this type of program. While the current Northern Hills Program focuses primarily on methamphetamine, Judge Wilbur proposes a program that deals not only with meth, but also other illegal drugs and alcohol.

In Minnehaha County, the Second Circuit has opted for a third approach that takes advantage of the various treatment programs already available in an urban area. In these programs, more time is spent treating the addict outside of the courtroom rather than in a courtroom setting such as a drug court. The availability and use of local resources created as a result of the urban growth of this circuit is commendable.

These three approaches to dealing with the problems of substance abuse show us that in this land of infinite variety, no single approach works because of differences in geography, population and resources. A Justice of the United States Supreme Court viewed the individual states as experimental labs for government improvement. So too, are the various substance abuse programs in South Dakota. If we are fortunate enough to find a magic answer, the "magic" will be the ability to tailor a cure to local needs and resources. In time we will find the answer. However, time, noted Dr. Martin Luther King, Jr. is neutral and it alone changes nothing. People either make changes during time or they do not.

I am fully aware it is a privilege on this State occasion to address the Legislature and the

Governor on important subjects. When addressing you I do not speak solely for myself as Chief Justice, the judiciary, or the legal profession. On this subject I simply speak for those mothers and fathers who have seen their children fall into the torment of drug abuse and who, for the most part, remain helpless. Since these parents cannot be here today, on their behalf I thank Governor Rounds and members of this Legislature for helping these parents and their troubled children. As Henry Ford observed, "Coming together is a beginning. Keeping together is progress. Working together is success."

My friend near my lake cabin builds houses for wood ducks to nest in. As wood ducks nest in these tree houses, we are able to watch the ducks work to hatch and raise their young. It is a thrill to see the young ducks leave my friend's houses with their mothers for the first time and to watch them start their lives outside in nature's world. My friend explained he constructs and maintains these wood duck houses "because families can use a little help now and then."

### PROBATION SERVICES

South Dakota courts deal with a wide spectrum of criminal conduct and defendants. At one end of the spectrum are defendants who were in the wrong place at the wrong time and made a wrong choice. They are easy to rehabilitate and are not likely to repeat their crimes. At the other end of the spectrum are those who commit crimes of such a serious magnitude that justice calls for incarceration, often for lengthy periods of time.

There remains, however, a middle group who could be salvaged or who could continue a downward spiral. It is a good monetary investment in our state's future to put these people in a type of supervised probation that stresses the error of their ways and that assists them in avoiding the trap of repetition.

While we have had a supervised probationary program for a long time, its success is directly tied to the number of clients served by each probation officer. A probation officer who supervises over one hundred and twenty-five individuals can do little more than greet each client when they report in. We need to offer more supervision and advice than the attention one would receive from a greeter when entering a discount store. In our intensive probation program, however, each officer has substantially fewer clients. That is the reason why the program has been so successful. Without intensive probation the only reasonable alternative for society is to incarcerate these individuals.

Gone are the days when a stern lecture or a kind word would straighten out most wayward adult or juvenile offenders. Unless the root problems are successfully addressed, the person under supervised probation and society, which pays the bills, are doomed to a cycle of repeated trips to the courthouse.

In an attempt to break this cycle, I am asking this Legislature for increased funding for community based services for adults and juveniles. These services are provided in the community where the person lives, saving significant costs of incarceration. These services identify the risks and needs of the client and provide the resources to overcome or solve the underlying problem. These resources include mental health treatment, chemical dependency

treatment, and other needed services. Remember the old oil filter commercial? "You can pay me now or pay me later." That also applies here.

## FISCAL MATTERS

To accomplish these goals, as well as the constitutional and statutory duties placed upon it, the UJS will request a budget increase of 5.8 percent in general fund appropriations and an overall budgetary increase of 4.4 percent, excluding salary policy and health insurance. Even with this requested increase, the UJS budget will represent only a little over one percent of the state's total budget.

I call to your attention the fact that the judiciary is an instrument of the state that actually collects revenue. In the past fiscal year we collected 25.3 million dollars as compared to our general fund budget of 30.2 million dollars. We returned the entire 25.3 million dollars to various units of government. Approximately 15.5 million dollars went to counties and school districts, 8.9 million to the state and just under one million to the cities.

## COURTHOUSE IMPROVEMENTS

Last spring my neighbor at the lake spent several months trying to save his shoreline from record high waters. This involved day and night sandbagging and pumping out water in very foul weather. I asked him why he went to all that trouble. He looked out over the lake and replied "God is not making any more shoreline these days. What he gave to me I have an obligation to protect."

Besides shoreline, there are other finite resources in South Dakota that we must manage to the best of our ability. The citizens of rural counties want and expect the kind of local access to the courts that they have always enjoyed. This is not a luxury. It is a right. One of our smallest counties, Corson, was faced with the sudden loss of its entire courthouse due to arson. The day after the fire its citizens began making plans to rebuild this symbol of justice to once again not only provide justice, but provide it locally.

We also have counties that are experiencing a population explosion. Lincoln County, Minnehaha County, and Yankton County have started to significantly expand their court facilities to fulfill present needs and anticipate future growth. They are to be congratulated for recognizing these needs and for making the financial commitment to address them.

Increased population brings new pressures on the court system. These pressures are not simply caused by increased caseloads. Different cultures with diverse ways of life and different languages must be accommodated. Soren Kierkegaard observed, "Life can only be understood backward; but it must be lived forward." The Unified Judicial System continually strives to provide equal access and justice to all.

## PROVIDING LEGAL SERVICES TO ALL

I see the judicial system in the shape of an hourglass. The top chamber contains the many claims

for relief, which are represented by the grains of sand in the hourglass. Some claims never make it to the slender waist of the hourglass let alone through it. The bench and bar of South Dakota are committed to broadening meaningful access to the courts for all of our citizens.

With limited staffs and even more limited budgets East River Legal Services and Dakota Plains Legal Services do a superb job of providing legal services to the poor. To augment their efforts, the State Bar created a program called Access to Justice. Its purpose is to provide legal services to those who cannot afford to pay for an attorney and who do not qualify for legal assistance from the existing legal service programs. Over two hundred South Dakota lawyers have agreed to accept referral cases from the legal service programs. I thank those lawyers for their participation. Their service is greatly appreciated.

The Supreme Court recently approved a rule allowing retired attorneys and judges to take emeritus status in the State Bar and pay reduced bar dues. They are then allowed to provide free legal services to clients referred by an approved legal services program. This encourages those who wish to volunteer to do so, and provides yet another way to make legal services available to people who are unable to afford them.

Last year, domestic relations filings rose once again, this time by ten percent. An increasing number of citizens are not represented by an attorney when involved in divorce and child custody cases. To assist these individuals, the UJS has published a packet of divorce forms as well as a guide for representing yourself in South Dakota courts. These are designed for use by those who do not possess a legal education and who cannot afford an attorney. They are available for free at [www.sdjudicial.com](http://www.sdjudicial.com). In their first four months of availability, the Web site forms averaged seven hundred hits per month. They are also available at clerk of courts offices for a nominal fee.

## JUDGES

Judging is serious business. My friend, the late Governor and Judge Sigurd Anderson used to say with a twinkle in his eye, it is so serious it is the only profession that has its own book in the Bible. He pointed out there is no book of doctors, dentists, or car dealers, just judges.

Judges have a daunting task. All litigation feeds toward the slender waist of the hourglass. The judges who hear cases, adjudicate them and decide them are the narrow opening in the legal hourglass. They work diligently to ensure that cases flow into the bottom chamber of the hourglass.

I have been a judge for twenty-two years. When I was younger and was asked why I became a judge, I did not have a satisfactory answer. Two years ago, however, I heard the best answer to that question from Justice Stephan G. Breyer who sits on the United States Supreme Court. He said a person becomes a judge "because it is important work worth doing." After twenty-two years on the bench I understand his words.

Robert Tarver was an author as well as a long-time trial lawyer and judge. In his best selling novel "Anatomy of a Murder," Tarver defines four classes of judges: "judges with neither head

nor heart - they are to be avoided at all costs; judges with head but no heart - they are almost as bad; then judges with heart but no head – risky but better than the first two; and finally those judges who possess both a head and heart." South Dakota is richly blessed with judges who possess both a head and heart.

Judging is a difficult and complex task for those in South Dakota who undertake it. Given this fact, and in the spirit of cooperation, the UJS has extended an invitation to tribal judges to partner with us and attend our judicial training sessions. The response from the tribal judges has been most welcome and in our mutual fellowship we have learned much from each other. We have also learned that many of the problems we face as state judges are common to those who serve as tribal judges.

Last year South Dakota's judiciary received nation-wide recognition as the recipient of the Distinguished Service Award from the National Center for State Courts. The award was given for our commitment to a fair and impartial judiciary. In accepting the award at the Conference of Chief Justices, I noted that I was accepting it on behalf of the 294,747 South Dakotans who stood for a fair and impartial judiciary by casting a vote against proposed Amendment E, commonly known as "JAIL for Judges," in the 2006 general election.

I note with concern the increasing tendency by some in the national media who profess to report or analyze the news but instead engage in what can only be described as "judge-bashing." They may condense a trial of several weeks into a thirty second sound-bite and then castigate the judge for his or her decision. Even if a mistake was made, judges are human and make mistakes like anyone else. Appellate courts exist to correct these mistakes. We also have an active Judicial Qualifications Commission which imposes discipline for judicial misconduct both on and off the bench. This can include a forced retirement or removal from the bench. Additionally, there are regular judicial elections that allow the removal of judges who no longer meet with public approval. Based upon a single judicial decision, calls from some in the national media for a judge's immediate impeachment, suspension or firing by the Executive or Legislative branch show a disregard for the constitutional separation of powers and for a fair and impartial judiciary.

I commend the media within South Dakota for not engaging in such conduct. I realize that many decisions we make can be controversial and the First Amendment guarantees the right to state a contrary view. A close call on a controversial issue by our Court may not result in unanimous agreement as to how the case should have been decided. Given that fact, the media of this state can examine judicial decisions and comment as it sees fit. From time-to-time this will result in criticism of a judicial decision which is the media's right.

For example, our Equal Justice Commission toured the state to invite candid comments from our citizens on how the UJS was doing in dispensing equal justice. This was done with the knowledge that there would not be universal approval of how we have performed. However, there is a wide gap between reasoned in state reporting and the demands from some media outside this state for the immediate removal of perceived incompetent judges from office. Sadly, the result of such howls may be a decline in public respect for the judicial process.

#### BAR EXAM IMPROVEMENTS

To emphasize the important area of Indian Law, the Supreme Court, by rule, now requires the inclusion of an Indian Law question on the South Dakota bar exam. Last July was the first time a bar exam containing an Indian Law question was given. I am pleased to inform you that the students who took the exam did exceptionally well on the Indian Law question. This is due in large part to the Law School at the University of South Dakota. It placed substantial emphasis on Indian Law in its curriculum and offered a review course in that area for students preparing to take the bar exam. This new requirement enhances the knowledge of Indian Law of those entering the bar and it ultimately benefits clients seeking professional assistance.

## THE DEATH PENALTY

The people of South Dakota, through this legislative body, have decided that the death penalty is an appropriate punishment in a limited number of murder cases. The death penalty has been upheld as constitutional by both the United States Supreme Court and the Supreme Court of South Dakota. In 2007 for the first time since 1947, a sentence of death was carried out in South Dakota. In large part that occurred because the defendant chose to abandon his legal avenues of appeal. In the execution chamber he was given every opportunity to change his mind and was asked one final time whether he wished to say anything. He declined and the execution proceeded. I was available during the process by telephone. Even at this point, had he chosen to pursue the legal options guaranteed by the Constitution and statutes, I would have issued an immediate order to stay the execution to allow him to pursue that course.

Because this execution took place, it is helpful to review how the judicial system treats death penalty cases. In South Dakota cases that involve the death penalty are taken most seriously by those in the judiciary and the bar. More than one attorney is routinely appointed for the accused. Capable veteran members of the South Dakota Bar have stepped forward and accepted court-appointments to represent these defendants. The trial courts have provided expert witnesses to assist in preparing a defense. Significant blocks of time are allocated for preparation and trial of death penalty cases to avoid a "rush to judgment." If a conviction results, the South Dakota Supreme Court allows two hundred pages for briefing on appeal by each party rather than the normal forty pages. Three hours are set aside for oral argument instead of the fifty minutes that is allocated in non- capital cases. The Justices spend many months carefully studying the substantial trial record, and our Court gives a detailed opinion on the issues the defendant raises on appeal. The members of the judiciary in this state are fully aware of what is at stake in these cases, and continue to do everything possible to make sure the judicial system works as accurately and fairly as possible.

## CONCLUSION

I would like to close with a return trip to the campfire by my lake cabin. Although now retired, my neighbor once managed the entire assembly line process of a major manufacturing company which required that he travel to many parts of our country and around the world. This brought him into contact with all forms of government. Based on this wealth of experience, he recently told me that government works best when it is the people's servant. It does not work well when it attempts to be the people's master. This is a Twenty-first Century reaffirmation of what our

founders believed in 1889 when they created our State Motto - "UNDER GOD THE PEOPLE  
RULE."