

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 15, 2014, in Pierre, South Dakota

Governor Daugaard, Lieutenant Governor Michels, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, Unified Judicial System (UJS) employees and all citizens of the State of South Dakota.

This marks the 12th year I have been privileged to come before you to present the State of the Judiciary. In reviewing past messages, I noticed I discussed problems facing the UJS and suggested options to solve them. This year, however, I am delighted to present a message to you which focuses on programs undertaken to remedy the problems. At least one nears completion. Others are just getting started. As Churchill said: "It is not the beginning of the end, but the end of the beginning." All show when the three branches of government partner together to address a problem, progress toward resolving that problem happens. A retired judge friend of mine was fond of saying we are all in life's rowboat. If we row together, the boat moves forward. However, if we row at our own pace and not in sync with the others, no matter how hard we row, the boat goes in circles or goes nowhere.

In life we have a lot of options. Options broaden our opportunities. However, options do not amount to anything without some type of decision and action. If we arrive at the end of our term in office or life with nothing accomplished the options are still there, just being options.

Alternative sentencing, Veterans Courts, the rural attorney recruitment program along with the Odyssey software upgrade, now possess statutory authorization. However, the legislation passed last year is only a map to a goal, not the goal itself. The goal will be achieved only by successful implementation of those statutes. That is our challenge.

ALTERNATIVE SENTENCING

Over the years I have discussed the subject of alternative sentencing more than any other subject. This is because of its importance. In 2013, we turned the corner with the passage of Senate Bill 70, the Criminal Justice Initiative. Overwhelming legislative and public support, together with adequate funding, got the process off and running. Since passage, the UJS has moved forward with its obligations under the bill and has adopted rules of implementation.

On July 1, 2013 Senate Bill 70 went into effect and we started to look at potential sites to expand the drug court and alcohol court programs. It takes about two years to select a city, gain local community and public official support, and train staff. We are also looking to expand existing programs in Sioux Falls and the Black Hills.

In rural areas that lack counseling and other professional services, we are piloting the HOPE Program, which comes from Hawaii. This program aims to reduce probation violations by drug offenders and others at high risk of recidivism. Pilot programs are planned for the Selby and

Sioux Falls areas.

These programs are not “get out of jail free” cards. The focus is changed from imprisoning non-violent felons to giving each felon with addictions the personal responsibility to be in charge of his or her destiny. The felon is literally walking around with the key to the penitentiary in his or her pocket. That felon decides by his or her actions whether the key gets used. As the Governor declared last year, we as a state need to not only be tough on crime, we need to be smart on crime and tough on criminal justice spending. Senate Bill 70 puts this state on a path that espouses our traditional conservative principles of personal responsibility by the perpetrator, and limited government and fiscal restraint by the state.

VETERANS COURTS

Another important component of the Criminal Justice Initiative is the use of the Veterans Court concept. People who are involved in drug and alcohol courts have pled guilty to a felony and are under a suspended sentence to the penitentiary. Although the data is incomplete, it indicates veterans who come into our legal system often stand accused of misdemeanors, rather than felonies. In cases where the judge, prosecutor and defense attorney deem it appropriate, the veteran may be directly diverted to a rehabilitation program with the Veterans Administration with the option that the misdemeanor charge will be dismissed if the veteran successfully completes the program. This is a significant advantage to the veteran because he or she will not have a criminal conviction if the program is successfully completed. Employers would rather hire a person without a criminal conviction than a person with one, even if the person is rehabilitated. We are moving forward with pilot projects in Sioux Falls, Watertown and Hot Springs.

JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI)

The Annie E. Casey Foundation created the Juvenile Detention Alternatives Initiative (JDAI) to work within the existing juvenile system to reduce juvenile detention, improve public safety and save money. In many respects, JDAI mirrors what this Legislature did with adult corrections by passing Senate Bill 70.

In 2010 the Governor’s Council of Juvenile Services initiated JDAI in Minnehaha County and Pennington County. The results have been impressive. The use of a Risk Assessment Instrument by JDAI coordinators in Minnehaha County has reduced the average daily population in secured detention from 41.28 in 2009 to 10.59 in 2012. This saved much of the daily costs of detention for Minnehaha County and made discussion of the need for a larger and more expensive facility unnecessary.

In Pennington County the result was the same. The average daily population in secure detention decreased from 23.47 in 2009 to 9.19 in 2012. An additional benefit to the Department of Corrections during this time period was the reduction of 42 post-adjudication youth commitments ordered by the juvenile courts of this state.

RURAL ATTORNEYS

Given this success, the Unified Judicial System is working to make the benefits of this program statewide by achieving similar reductions in all areas of the state.

If a law was passed evicting the attorneys from South Dakota's 48 most rural counties, universal outrage would follow. If a law was likewise passed forbidding new attorneys from locating in these 48 counties, there would be more justifiable outrage. The reaction would be, in large part, from the result—no access to legal services in these counties. Yet prior to the passage of House Bill 1096 time and circumstances were well on their way to yielding the same result without the necessity of such laws, guards, or barbed wire. I do not want to be the Chief Justice who, on my watch, is charged with permanently turning out the lights in 48 courthouses because they are abandoned for lack of attorneys.

President John F. Kennedy said, "Things do not happen. Things are made to happen." That is what occurred last year with the passage of House Bill 1096, the South Dakota rural attorney initiative. This bill would not have passed without the tireless leadership of Senator Mike Vehle. More impressive than his leadership on this issue is Senator Vehle's lack of connection to the legal profession and his residence in Davison County, a county that does not stand to benefit from the program. As Samuel Johnson said, "The true measure of a man is how he treats someone who can do him absolutely no good."

The rural attorney initiative allows the State of South Dakota to take a giant step forward to stem fifty years of decline in the ability of our citizens in rural areas to have reasonable access to legal services. I have observed that South Dakota is becoming a state with islands of justice provided in the larger cities and a sea of justice denied in rural areas. House Bill 1096 will hopefully reverse this trend. This law will help provide our citizens with access to an attorney and will work to ensure that our rural county governments, school boards, cities and towns have access to legal services in those underserved areas.

The South Dakota Association of County Commissioners is aware of the benefits of the rural attorney initiative and the association's responsibilities, should a county seek to participate. Its initial response is enthusiastic. I have also met with the administration of the University of South Dakota's School of Law and spoken directly with many law students about this opportunity to receive assistance should they opt to set up a law practice in a rural area.

South Dakota is the first state in the nation to undertake a progressive response to overcome this problem. Perhaps the reaction outside of South Dakota is as strong an indication of the initiative's merit and creativity as is the reaction within South Dakota. It has drawn positive national interest because every state, with the exception of one or two, has rural areas in the same situation. Your legislation was the topic of front page articles in the New York Times and the National Law Journal. CBS radio also covered the issue on its national news broadcast.

We plan for orderly growth of our state by zoning. We place special protection where needed such as "drug-free" zones around schools. "No parking" zones protect access to fire hydrants for firemen. However, no one wants to see the growth of "lawyer-free" zones through benign neglect. House Bill 1096 will go a long way toward avoiding the growth of "lawyer-free" zones

in South Dakota.

PROBATION

Overlooked during the debates of the past year on Senate Bill 70 and the costs of penitentiary incarceration are the quiet, yet impressive, results of the UJS probation program.

There is no question that the number of inmates in the penitentiary has been increasing. At that same time the number of individuals placed on felony probation by our Circuit Judges has also increased.

The numbers for the past four years provide an interesting picture. Compare the number of people on probation who were sent to the penitentiary for a serious violation of probation with those who either successfully completed or remained on probation:

FELONS ON PROBATION	% SENT TO THE PENITENTIARY	
FY 2010	4824	7.0%
FY 2011	5130	5.8%
FY 2012	5307	5.2%
FY 2013	5892	4.4%

The number of people sent to the penitentiary for probation violations dropped from 388 in FY 2010 to 260 for FY 2013. The number of individuals under felony supervision increased by 1,000. Thus, while the number on probation significantly increased, we were able to reduce the number sent to the penitentiary for violations by one-third. The cost of penitentiary incarceration is \$62.50 per day. Given the cost of probation is about \$3.00 per day our probation program provides a financial bargain and a program that works.

INTERACTIVE TELEVISION

Not long after I became Chief Justice in 2001, I saw a demonstration of what generically could be called a “two-way” television system. Having burned up literally weeks of my yearly circuit judge time in “windshield time” and battling the all too frequent blizzards of northeast South Dakota, I decided to start a pilot project to determine the utility of such a system in our courthouses.

The pilot project proved an immediate success and allowed access between judges, attorneys and their clients, and law enforcement. A five minute bond hearing, with the use of this system, cut down hundreds of miles in travel time preceding and following such a short, but necessary, hearing. Access for emergency matters needing the attention of a judge was also vastly improved.

We moved forward and installed television units in about six counties per year. Along the way we discovered the advantages of larger counties having a unit in a county jail and another unit in their courthouse. This system eliminated travel time, expense and security risks between the two buildings. By 2010 approximately half of our courthouses enjoyed the benefits of this system.

With the budget cuts of a couple of years ago we were forced to end the expansion of the program, although it continued to be highly successful where it existed. I am pleased to report that with improvements in technology, we can now purchase a smaller unit which will do the job for around \$3,200 per unit as compared to the \$15,000 purchase price for an original unit. This will allow us to move forward with the installation of systems in 11 additional counties.

Duel, Miner, Sanborn, Corson, Dewey, Ziebach, Campbell, Edmunds, McPherson, Mellette, and Lyman counties will now be connected and their citizens can enjoy the advantages and financial tax savings of this system. Upon completion of this expansion nearly every courthouse in the state will be connected to this system. Such a blizzard-proof system is preferable to the hands-on “thrill” of sliding into the ditch, which I experienced more than once in my circuit judge days.

ODYSSEY

The Odyssey program, a paperless filing system in the circuit and magistrate courts, is well on its way to completion and success. The UJS has now converted every judicial circuit from a paper filing system to the paperless Odyssey program. As we move forward, we anticipate a day when electronic filing is a reality and court records can be viewed online. We are already experimenting with it in the 7th Circuit. The UJS has worked for years to assure the program’s success. In future years, I look forward to standing before you with the good news the program is fully implemented.

Once full implementation is achieved, the Supreme Court’s records will be converted to a paperless format. While Odyssey deals with circuit and magistrate courts, the same format will be needed at the Supreme Court level to assure the same high level service to the bar and the public.

THE SUPREME COURT LAW LIBRARY

One of my enjoyable duties as Chief Justice is to visit with students of various ages and explain to them how the Supreme Court works. When talking to a group of third graders from Madison several years ago, one observed, “Your job doesn’t sound like much fun. What do you do for fun in your job?”

I now have an answer. We are on a hunt to discover the original beauty of the Supreme Court’s Law Library. The Law Library is open to the public and is probably the only remaining portion of this gorgeous Capitol Building which has not been restored to its original beauty. The reason was simple: we needed shelving for the ever-increasing amount of law books we received. Now, with the advent of computerized legal research, the need for physical books is reduced and we can consider decreasing the amount of shelf space in the law library.

For years we had heard rumors of a long-lost mural hidden behind the book shelves. After a little snooping on my part, and with the aid of some hand tools, I removed shelving flush with the library wall and found original stenciling from 1911. We then brought in an expert painter who worked on the original Capitol restoration decades ago. To our surprise, when he removed some paint, he found a word on the wall. It was not a legal term. A check in Kingsbury's History of Dakota Territory found it was the name of a territorial judge. Every four feet, the expert painter removed paint and found the name of another judge stenciled in large letters on the wall. The names of nine territorial and early state judges have been found. We believe more are concealed behind the bookshelves.

We have a picture of how the library looked the day it was opened in 1911 and are working with the Bureau of Administration and the Capitol Restoration Commission on various options for restoration. Not all is what we suspected it to be however. We found names, stenciling and other early memorabilia, but discovered the rumored long-lost mural never existed. I invite you to stop by the Law Library on the second floor of the Capitol to see the hidden treasures for yourself.

EARLY COURTHOUSE POSTCARDS

Another project I would put in my personal "fun" category comes through a gift from the Hon. William J. Srstka who for 20 years searched for picture postcards of courthouses in South Dakota. When he retired in 2013, Judge Srstka donated his collection to the Supreme Court. The collection is complete and has at least one courthouse picture from every county that has a courthouse. While we have postcards of current courthouses, we also have postcards of thirty-five courthouses which at one time served the public, but no longer stand. The collection dates from about 1900 to the 1950s. The postcards are framed and mounted outside the doors into the Supreme Court's courtroom. This allows the public to see the pictorial history of their local county courthouse. I invite you to stop by and see what your county courthouse looked like.

JUSTICE JOHN K. KONENKAMP

This year will mark the 20th and final year of Justice Konenkamp's distinguished service to the citizens of South Dakota as a South Dakota Supreme Court Justice as he reaches the mandatory retirement age of 70. I came on the Court a few months after him and have had the privilege of working with him throughout that time.

I have never met a more dedicated public servant who has spent countless hours undertaking his judicial duties. There is no area of the Court which has not benefitted from his efforts. Legal scholars are well aware of his well-written and thoroughly researched opinions which cover the entire range of legal subjects.

In 2005, Justice Konenkamp became concerned some South Dakota citizens were not being allowed to equally participate in our legal system. He convinced the Supreme Court to create the Equal Justice Commission which he co-chaired with Judge Pat Lee of the Oglala Sioux Tribal Court. After holding hearings on every reservation in the State and elsewhere throughout South Dakota, the Commission wrote a detailed report. All recommendations which fell within the jurisdiction of the Supreme Court were enacted and implemented within the following year. An

example of what was accomplished is the requirement the South Dakota bar exam test on Indian Law. At the time it was initiated, South Dakota was only the second state in the nation to do so. We continue that policy to assure the public new lawyers admitted to the South Dakota Bar possess a working knowledge of Indian Law.

Justice Konenkamp was also the leading force behind the Odyssey project which, as I have reported to you, will bring our court records and filing into the 21st century and allow better access by the bar and the public.

My father once said it is humbling to think that the world could have gotten along quite nicely without us if we had never been born. He said it was the few, the very few, who have risen to the point where the world would have been a poorer place without them. Justice John Konenkamp is one of those very few.

JUDGE MILDRED RAMYNKE

Leaders come and go. Few leave a lasting difference after they depart the scene. Judge Mildred Ramynke, one of those who did make a monumental and permanent contribution, passed away this year. It is unusual to call a person who was five feet tall a “giant” but she stands as a “giant” in the South Dakota legal profession.

Judge Ramynke’s list of accomplishments is impressive by any standard, but even more so when one considers all were accomplished as a first for a woman in our state’s legal profession. When she graduated from the University of South Dakota School of Law in 1939 as one of only two women in her class, she was one of the few female attorneys in the state.

She interrupted a legal career during World War II to serve her country. Instead of supportive tasks many women were relegated to, she was a pilot of such skill she trained male bomber pilots for combat missions.

After resuming her legal career, Judge Ramynke became the first woman to serve as a District County Judge, a Circuit Judge, a Presiding Circuit Judge and sit, by designation, with the South Dakota Supreme Court. She held these offices with a dignity and fairness which was a hallmark for anyone who aspires to become a judge. She treated the town drunk with the same courtesy and fairness as a senior member of the Bar.

Today 50% of the enrollment at our law school is female. There are 664 female members of the South Dakota State Bar. That is one-third of the membership of the state bar. Thirteen wear the robe of a judge and one wears the robe of a justice. All owe a significant debt to this woman from Peever, South Dakota who paved the way.

JUDICIAL ELECTIONS

2014 is an election year. This year a majority of the South Dakota Supreme Court justices will seek retention and every circuit judge position is up for election. Judicial elections are different than the partisan political elections held for the offices of the executive and legislative branches.

At the Supreme Court level, the South Dakota Constitution calls for a justice to run on his or her record. A justice is literally voted up or down by the voters. At the Circuit Court level, a judge or judicial candidate runs in a non-partisan election. This compromise was implemented when the State was still in its infancy. It allows the election of judges by the people, but keeps partisan politics out of judicial elections. Justice should not be rationed on the basis of partisan politics any more than on the basis of race, religion, national origin or other arbitrary classification.

In order to ensure election rules are followed by judicial candidates, South Dakota is only one of two states which requires all judicial candidates, be they incumbents or challengers, to attend a school on how to legally campaign for judicial office. South Dakota also has a non-partisan committee of distinguished citizens to monitor judicial campaigns. The Committee is chaired by the Hon. Robert A. Miller, a former Chief Justice of our Supreme Court. Any complaints found to be meritorious are promptly reported to the public, through the press, while the judicial campaign is still on-going. Since this program was implemented, I am pleased to report that during the last two judicial elections violations have been few and far between.

From time to time, I am asked why judicial candidates, including me, do not take public positions on the legal issues of the day which rage in the public sector, as well as in other courts. The reason is every person who comes into a court deserves to have his or her case heard by a neutral and fair jurist who will decide the case on the facts presented in court and the existing statutory and constitutional law. How would you feel if you were going into court to protect your freedom or property and you faced a judge who in the last campaign made a point of publicly campaigning on the opposite side of your cause? Depending on which side of the issue you were on, you might say such a system is not all bad if the judge happens to be biased in your favor. However, as with the pendulum on a clock, history shows the majority in power sooner or later becomes the minority and the minority becomes the majority. A biased system would quickly lose credibility with the public. Who among us would tolerate a baseball umpire who called the pitch a ball or a strike before the pitch was thrown?

This does not mean judges do not run on their record. In my home county during the 1930s times were tough and there was quite a problem with chickens being stolen from farmers. The local circuit judge had a policy when a chicken thief was caught. The thief's sentence was one year in the penitentiary per chicken stolen. Simply put, stealing six chickens got you six years in the pen. The judge's justification for this rather harsh sentence was when the male farmer came into town to sell cattle, grain, milk or cream, he got the money from the sale. The money received from the sale of the eggs, by custom, went to the farm wife to purchase what she wanted for herself, such as a new dress. Obviously, a chicken stolen meant less egg money. Apparently this sentencing policy found favor with the voters of the Fifth Circuit. The judge was continually re-elected by handsome margins and ultimately died in office after a lengthy judicial career. Although, there was no post-election polling in Roberts County in the 1930s, the "old timers" told me "local wisdom" had it the judge did very well with the farm wife vote. When he passed away, he was the only judge in the history of the county who would be honored by lying in state in the rotunda of the county courthouse.

Recidivism was also successfully eliminated. During my tenure as a prosecutor and as a circuit judge in Roberts County, I never was called upon to deal with a case of chicken thievery.

CONCLUSION

History shows the path of the South Dakota judicial system is a long and winding road. However, it is in reality a path that never ends. Times and challenges change and we must change to meet them.

In 1787, this was not a country but a collection of states so loosely connected it appeared the entire experiment in democracy might collapse into anarchy. In a last attempt to salvage the victory of the American Revolution, delegates met in Philadelphia. Disagreements between the states threatened this effort. Finally, through timely compromises, our Constitution was drafted.

At the completion of this convention, Benjamin Franklin, then in his 80s, rose and commented on the chair occupied by George Washington, the convention chairperson. The back of the chair contained a carving of a partial sun on the horizon. In reference to the fate of the new "United States," Franklin had studied the carving throughout the convention and pondered whether the partial sun was a rising sun or a setting sun for the new country. With the drafting of the new Constitution, he declared, "But now at length I have the happiness to know that it is a rising and not a setting sun."

Franklin was correct. May we all strive to serve the people pursuant to our constitutional duties to ensure the sun of the United States and South Dakota continues to be a rising sun and not a setting sun. This is not a one-time effort. Each day requires we meet this obligation anew.