

State of the Judiciary  
Chief Justice David E. Gilbertson, South Dakota Supreme Court  
Message to the Legislature  
January 14, 2015, in Pierre, South Dakota

Governor Dugaard, 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.

These are exciting times. In its 125th year, this State's judicial system, officially known as the Unified Judicial System, continues to move forward on many fronts. Some projects are well on their way to successful completion. Others, such as the 2013 criminal justice reforms and the rural attorney recruitment program, enjoyed their first full year of existence.

For projects to succeed we need three things: (1) a solid plan; (2) a solid team; and, (3) the expertise to deal with the challenge. I believe the UJS possesses all three. This is a far cry from the observation of the political humorist Will Rogers on the performance of a previous President, "the country wanted nothing done and he done it." Clearly the citizens of South Dakota want problems addressed and the UJS is honored to do so.

#### ALTERNATIVE SENTENCING PROGRAMS

Alcohol and drug addiction are not among the list of items kids ask for on their birthday wish list. "Addiction" is also not on the bucket list of things people want to do before they die, just to experience it. While addiction is not forced upon a person, neither is addiction a knowing, voluntary and intelligent choice at the beginning of that sad path. To address addiction one DUI Court graduate noted, "You don't get sober without divine intervention. My divine intervention showed up in a squad car."

The notion that the State can jail itself out of addiction problems has proved untenable. We now have 18 months of experience under the new concepts which are generically referred to as "alternative sentencing." A brief review of why they were enacted is helpful.

A December 2013 study by the PEW Foundation showed that from 2007 through 2012 South Dakota's crime rate rose at a greater rate than any other state in the nation. This statistic is more alarming when one considers that only five of the 50 states experienced any increase in their crime rate; 45 states did not. Of the five states experiencing an increase, South Dakota had the dubious distinction of leading the list with a 20% increase. At the same time, we tied with Alabama for having the fourth largest percentage increase in prison population. This increase was five percent and is a clear validation that more people in prison does not equal less crime outside of prison. What South Dakota proponents for alternative sentencing had been advocating since our first drug court program started in 2008 was verified statistically by numbers showing that South Dakota was heading for a fiscal financial cliff.

The "Crime in South Dakota" report for 2013 informed us that drug arrests were up 40% from

the previous year and drug use had a ripple effect on other areas of crime. Aaron McGowan, State's Attorney for Minnehaha County, said, "In my experience, roughly 70 to 80 percent of our serious crime is chemically propelled. This includes illegal drugs, prescription drug abuse, and alcohol abuse." This view is consistent with my personal experience as a Circuit Judge in the 1980's and 1990's except that the percentage was even higher, perhaps over 90%.

Drug and DUI Courts continue to expand since this Legislature passed Senate Bill 70 in 2013. Our history is a positive one in the area of expansion

YEAR	CLIENTS SERVED
FY08	6
FY09	18
FY10	22
FY11	29
FY12	78
FY13	49
FY14	100
Total	302

From FY08 to FY14, 302 clients have been accepted statewide by South Dakota Drug and DUI Courts. These are not just mere numbers. Had all of these people gone directly to the penitentiary, the cost to the State would have been substantial because of direct incarceration costs, DSS costs to support the children due to the inmate's lack of employment, and health care costs. In FY14, the taxpayers were saved the expense of 55,000 potential prison days which were sentenced by a judge, but never served by the addict or paid for by taxpayers. If one calculates that figure times the estimated cost of \$62.50 per day for penitentiary incarceration there is a potential savings of nearly three and one-half million dollars in just FY14 alone because of Drug and DUI Courts. In 2013, 247 children were not placed with DSS because of their parent's alternative sentence. The average cost for each placement with DSS, assuming no special needs, is \$10,000 per year per child.

Last June I spoke at the first DUI Court graduation in Aberdeen. Prior to graduation, I had the opportunity to privately visit with and get to know the three graduates. Each of them told their life's story. One looked me in the eye and blurted out, "If it were not for this program, I would be dead by now." Another graduate said, "This program has given me the tools to be an example for my family instead of an embarrassment." Another graduate commented, "Drug Court teaches you to live in society and stay clean. Prison cannot do that." One graduate later wrote and told me that "a person who gets this opportunity is greatly blessed and should be truly grateful that

we have a program to help learn to live a better life. There aren't any words to describe how blessed I am that I got my life back. A life I have longed for, for so long."

It is clear their life experiences along with successful participation in this program have provided them with hard-earned profound knowledge to now succeed in life. This is not a "get out of jail free" card; it is the law of the second chance, but nevertheless a criminal law with serious consequences for failure in the program. These successful graduates are proof that our programs not only save money, and reduce the crime rate; they instill a sense of personal responsibility. These individuals are now examples of the observation of President Reagan that "we must reject the idea that every time a law's broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions."

While our current programs show positive signs of success, they do not guarantee total or immediate success. A person is not weaned from addiction to drugs or alcohol overnight. However, to continue to do "business as usual" as we had done prior to the passage of Senate Bill 70 was a guarantee of continued expensive failure. We also can draw from the experience of dozens of other states that have lowered their crime rate while reducing their cost of corrections by alternative sentencing.

## VETERANS COURT

Several thousand years ago, the Biblical prophet, Isaiah, asked: "Whom shall I send? And who will go for us?" Back came the response which is fitting to those who are in our all-volunteer military services, "Here am I. Send me." We send them to defend us in harm's way and put lives on the line for us.

Since 1990 veterans have returned to us in large numbers. President Lincoln defined our obligation to them in his Second Inaugural Address. It is our duty "to care for him who shall have borne the battle..."

For all too many veterans the stress of combat was not left behind, but brought home. It is a constant companion which sadly affects their lives. For some, it brings them into our criminal justice system through self-medication by the abuse of alcohol or drugs. It also manifests itself through assaults, DUI's, or domestic violence.

Unless we successfully address the underlying problem instead of only the criminal charge, we accomplish nothing more than warehousing people for a period of time in jail. They are released untreated to repeat the same, sad cycle. This is not a battle they win.

On July 7, 2014, Codington County became the first county in South Dakota to implement a Veterans Court. Circuit Judge Robert Timm leads a dedicated group of volunteers who seek to successfully provide treatment to the veteran who has come into our court system.

Participation in the program is voluntary. If accepted into the program, the veteran agrees to a regimen which includes a weekly appearance in court, frequent meetings with Court Service Officers, and compliance with a Veterans Administration plan of treatment. To provide this

treatment we have partnered with the South Dakota Veterans Administration which has been enthusiastic about fully participating in the project.

At the end of the program we hope the veterans will be able to put behind the demons that came home with them. At the end of the Civil War, Lincoln said, "Thank God I have lived to see this day. It seems to me that I have been dreaming a horrid dream for four years and now the nightmare is gone." Hopefully veterans who complete our program will be able to say the same.

We hope to use the Codington County program as a model for implementing Veterans Courts in the rest of the state. As I mentioned earlier, 2014 was the 125th anniversary of South Dakota and its judicial system. What better way to commemorate this anniversary than with a program such as this? It is better than a statue, plaque or other inanimate object. It is a living memorial. To make a long story short, as was said two thousand years ago, "Their sins and lawless deeds I will remember no more."

### THE HOPE PROGRAM

Drug and Alcohol Courts require a treatment component that is not always available in rural areas of South Dakota. Yet, drug and alcohol problems are as serious there as in our urban areas. To address this rural problem we piloted a HOPE Program in the Walworth County area this year. It has gotten off to an excellent start. Eighteen people are enrolled in the program. Each faced prison time for drug offenses or other felonies which were the result of drug use. After an evaluation, the participants accepted into the program are required to call in each day to find out if they are subject to random testing that day. Failure to show up for testing or testing "dirty" results in jail time to reinforce the negative consequences of failure to follow the rules of the program. Participants are also heavily monitored by a specially trained Court Services Officer.

To date we have had three people successfully complete the program. All spoke highly of the value of the program to their personal lives. Circuit Judge Scott Myren, who originated the program, wryly told me it is a "low dollar deal." Beyond the UJS personnel, the only cost to the State is the minimal drug testing costs. Thus, 18 people who would have been in the penitentiary at taxpayer expense are instead remaining in their home community and participating in this program. In fiscal year 2015 we will expand the HOPE Program into the Aberdeen, Sioux Falls, and Winner areas.

### JUVENILE JUSTICE REINVESTMENT INITIATIVE

There is a certain comfort level when you proceed with a plan that worked in the past. At a minimum it takes some of the uncertainty out of the situation. As we know, all three branches of South Dakota state government plus many distinguished South Dakotans came together to address the problem of alternative sentencing for adults. With that planning process successfully behind us and the programs authorized by SB 70 up and running, the same study process is looking at how we deal with juveniles in our court system. All three branches of state government are cooperating in this endeavor. There is a saying that if you are driving down the road and see a turtle on top of a fence post, you know it got there with some help. The goals are the same as we had with adults in SB 70 - - to hold youthful offenders more accountable,

improve public safety, and save the taxpayers money.

We have had second highest per capita commitment rate of juveniles of any state in the nation. For too long our circuit judges have had two alternatives, either place the juvenile on probation, which may not give sufficient oversight, or place the juvenile in a state institution, a drastic alternative. There is no middle ground especially in the rural areas of this state. A year at the STAR Academy in Custer, South Dakota for one juvenile exceeds the cost of housing three adults for that year in maximum security in our penitentiary. We are hopeful that the state-wide implementation of the Juvenile Detention Alternatives Initiative (JDAI) is a promising start in the reduction of these high numbers.

With all the branches of government and other experts combining their experience and foresight we can produce a proposal which merits serious consideration.

### PROBATION

In 2014, the UJS experienced the most significant increase in supervision of persons placed on felony probation in its history. During this year the number of people supervised at some time during the year climbed to 7148.

The numbers for the past five 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 PENITENTIRARY
FY10 4824	7.0%
FY11 5130	5.8%
FY12 5307	5.2%
FY13 5892	4.4%
FY14 7148	4.4%

The number of people under felony probation this past year increased by over 1250. With the additional resources provided by the Governor and Legislature we were able to hold the revocation rate to the same rate as the year before - - an all-time low of 4.4%. We were also able to continue to provide the taxpayers with not only effective, but cost-effective supervision at a cost of \$3.00 per day per probationer. The cost of penitentiary incarceration is about \$62.50 per day.

### THE SILVER TSUNAMI

On the portico of the United States Supreme Court building are carvings of history's great law

givers. Central is Moses holding the Ten Commandments. The Fifth Commandment is “honor thy Father and thy Mother.”

On July 24, 2014, a headline in our largest state newspaper read, “Guilty plea: Theft from grandmother [of \$62,000].” The grandmother was 89 and suffered from dementia. One might think this sad, but unusual. Unfortunately national experts tell us the only thing unusual about this case is that the thief got caught. Most abuse of the elderly, whether it be physical, emotional, or financial goes unreported. In fact, only one in fourteen cases are reported nationally when it occurs in a domestic setting. While we see television commercials showing an anonymous criminal preying on a senior over the telephone or Internet, sadly 90% of these crimes are perpetrated by someone within the victim’s family. Often a victim can be abused in more than one manner. This is not just a family dispute over family funds. We must recognize it for what it is -- felony theft. As to physical abuse, it is also a crime and may also be a felony. A federal study concluded that elder abuse can occur in any community and involve seniors in any socioeconomic, racial, or ethnic group. Two-thirds of the victims are women.

This issue has been called the Silver Tsunami. If so, this is only the first wave. Several factors combine to result in a growing problem. The most obvious is the number of senior citizens is increasing. By 2025 there will be more Americans over the age of 65 than in grade school. Not only are there more of us, but we are living longer. When Social Security was implemented in the 1930’s the retirement age of 65 was selected because the life expectancy was only 66. I would guess today that most adult South Dakotans know at least one person who has reached the age of 100.

In former decades seniors moved in with their adult children. The family home commonly housed three generations. Now a senior may not have a spouse or any adult children. If there are adult children, they may live anywhere in the world instead of next door. This situation is due to increased mobility, divorce, declining birth rates, increased life spans, and other factors which have done away with the family stability of former years.

There are many factors fueling the rapid increase in financial crime against seniors. Seniors are the fastest growing segment of our population and are “where the money is.” This generation is known as a trusting generation. There is a lack of oversight for seniors who either live at home, are assisted by a paid caregiver, or who live in a long-term care facility. There is no cure for diseases of the brain such as Alzheimer’s. Moreover, often the thief or abuser is the caregiver and the senior is worried about losing independence by the caregiver’s arrest because it could result in the senior being placed in a nursing home for lack of an alternative.

It is not my purpose to bash caregivers. The vast majority do their job in a compassionate and honest manner. My father was able to avoid nursing home care for many years solely because of a dedicated individual who cared for him to the end of his life.

In an effort to determine more accurately if South Dakota has a problem in this area and if so, to what extent, a few years ago I polled South Dakota’s judges to find out their experiences with senior abuse. About half of the judges identified the issue as “rare” or “only see about one case a year.” However, the other half indicated they had seen instances of improper management of

assets by guardians, personal representatives of an estate, joint tenants, a relative, a family friend, a power of attorney, or an attorney-at-law. One judge mentioned concern over improper solicitation of incapacitated seniors for what were purported to be “religious contributions.” Another judge described the abuse she had witnessed as “horrendous.” Yet another mentioned a power of attorney “improperly cleaned her out in 60 days - - \$400,000.” One judge sadly concluded, “Blood is thicker than water. Money is thicker than blood.” If there is good news in the survey it is that none of the judges saw evidence of physical abuse of the seniors who came before them. However, judges cautioned that if a senior had been physically abused, it was highly unlikely that the perpetrator would bring the senior into the courtroom. Several judges added they saw more of this type of misconduct when they were practicing law than after they became a judge. The bottom line is that the abuse of seniors exists in South Dakota although the extent of the abuse is unknown.

This issue is a major cause of concern for all of us. It is worthy of a partnership between the three branches of this government similar to what we did to secure the passage of the alternative sentencing program. The problem needs to be addressed in a coordinated, not piecemeal, manner. The Unified Judicial System stands ready to work on such a project.

#### THE RURAL ATTORNEY PROJECT

For a town to survive, it must maintain a certain infrastructure. This is more than churches, schools, grain elevators, and places of business. Those by themselves are simply buildings. It is the ability of the community to provide its citizens and those who live near it with the basic services to maintain the community as a community. This infrastructure is maintained and enhanced by the presence of an attorney or attorneys in the community. All too many of our towns once provided legal services but these services have withered with the passage of the years. A partnership of the three branches of this government seeks to restore legal service to many rural communities in South Dakota. The South Dakota Rural Attorney Recruitment Program has been in effect for a little over a year. I am very pleased with the results.

The Rural Attorney Recruitment Program was authorized by this Legislature. It seeks to assist rural counties in South Dakota that need access to local attorneys and to assist an attorney in locating in that county. It is a partnership between the county, the State, and the State Bar of South Dakota by providing a five-year program of financial incentives to an attorney who locates in an eligible rural county. It reminds of me of day when a friend of mine and I were watching an eagle majestically flying over our lake. My friend commented the eagle was able to fly in such a glorious manner because its wings worked together.

May 7, 2014, was a monumental day for the program. On that day Jake Fisher became the first attorney, not only in South Dakota, but in the nation, to enroll in such a program by opening a law office in Corsica. This came about through the cooperation of Corsica’s Development Corporation and the Douglas County Commissioners. Jake was raised on a farm near Corsica but had gone to law school in Minnesota and practiced law in the Minneapolis area. The bill you passed allowed him to “come home” with his family and set up a law practice for his friends and neighbors in the Corsica area.

To date, six counties have taken advantage of the program and now enjoy the benefits of the program. They are Douglas, Lyman, Hand, Haakon, Tripp, and Perkins counties. Eight attorneys are involved. Four are men; four are women. Other counties have shown interest and we are attempting to match each geographical area with a law student at the University of South Dakota School of Law. A few months ago, my staff and I met with 21 first and second year law students. They all had an interest in a rural law practice and their geographical interests covered virtually every portion of South Dakota.

The Supreme Court is charged with administration of this program. We are willing to make on-site visits with an interested county and set up a meeting between that county's commission and law students who may be interested in that locale. We still see some of the same reluctance you would find at a junior high dance - - the boys on one side, the girls on the other, and nobody quite sure how to make the first move.

We stress the program is of limited duration and that after the sixteen allotted slots are filled or five years has elapsed, the program will terminate. To wait invites the same result as an intentional decision not to participate. That result contributes to stagnation and decline.

A major reason for the program's current success is the active cooperation of local attorneys in the area. Many want to retire from the full-time practice of law, but recognize their obligation to their clients and do not want to leave them without access to legal services. We are available to visit with these veteran attorneys to explain the specifics of the program and how it applies to their locale.

#### UNIFIED JUDICIAL SYSTEM 125TH BIRTHDAY PROJECT

As I have mentioned, 2014 was the 125th birthday of the State of South Dakota. It was also the 125th birthday of the State's judicial system.

At one point we hoped to restore the Law Library of the Supreme Court to its original splendor as a fitting birthday project. We believe it is the last room in the Capitol open to the public which has not been restored to its original grandeur. The cost of other projects such as the restoration of the stained glass in the Capitol put the Law Library restoration on hold.

The Supreme Court opted for an oral history project. Since 1889, 48 South Dakotans have served as Justices of the South Dakota Supreme Court. Those not on the current court left behind legal opinions but little else other than an eventual obituary. This oral history project provides a snapshot in time for future generations to review and study.

The South Dakota Supreme Court is entrusted by the citizens of South Dakota with being the final arbiter of legal disputes of the state's court system. It literally decides issues which determine liberty and property rights and even life itself. Yet most citizens know little on how those decisions come about or who the five individuals are who make up the South Dakota Supreme Court. For example, very few citizens know that I was a volunteer fireman for twenty years including some of my early years on the Supreme Court. I doubt today many can envision me driving a fire truck down the street. It taught me the value of teamwork, a vital lesson for

later leading a judicial system.

The five current Supreme Court Justices participated in this oral history project. They sat for individual oral interviews to allow the public to get to know them as individuals and how they undertake their judicial duties. To add additional historical background, former living Justices of the Supreme Court have been interviewed about their time on the Court. Additional context has been provided by interviews with three veteran attorneys who gave their perspective of the Court's history. This project provides a permanent record of the Court at this 125th anniversary date. It also provides information on the Constitutional Revision of the Judicial Article in 1972 and the Court's history since that time. Funding costs were kept down for this project by generous contributions from other public and private entities.

### ELECTRONIC FILING

Electronic filing for criminal cases began statewide on January 29, 2014 and statewide for civil cases on June 25, 2014. The use of electronic filing supports our continuing efforts to move toward electronic records. On July 1, 2014 our Clerk of Courts' offices became paperless on a statewide basis. Now courts utilize electronic records to conduct the majority of the courts' business. This allows us to continue to work to allow the public access to case records through electronic means. Currently, the public can access court records through computer terminals located in a courthouse. We will be moving toward electronic web-based access in 2015.

What does this mean to the average person? It is a very real possibility that in 2015 an officer will issue a citation and the documents will be electronically filed with the court. The judge will be able to view those documents electronically and issue a decision such as a search warrant, electronically. If a fine is eventually assessed, the individual can simply pay the ticket online.

### JUDICIAL ELECTIONS

This year the voters in three South Dakota judicial circuits elected one or more circuit judges from a field of two candidates for each judicial seat where there was a contested race. These non-partisan elections strike a middle of the road approach by having the public selection of judges. Partisan politics is kept out of the process. Justice should not be rationed on the basis of politics.

Three members of the South Dakota Supreme Court stood for a retention election. The Justices ran on their record and the voters by a simple "yes" or "no" vote indicated whether each Justice earned an additional term on the Court. A pundit said that the Supreme Court grades the papers of the circuit judges when an appeal occurs. This retention election was an opportunity for the voters to grade the papers of these Supreme Court Justices.

### COURTHOUSE UPGRADES

The UJS partners with the various counties in the operation of a judicial system in each county courthouse. The counties' contribution, in part, is the construction and maintenance of the courthouse building. Many are stately structures which have served the public for decades. However times and needs change and expand. Buildings age. Populations increase. For example

when the Pennington County Courthouse was built in 1922, the county population was 12,000. Today it is 105,000. Beadle, Brookings, Meade, and Pennington Counties have completed or are undertaking major renovations of their courthouses. This should serve the public in those counties for many decades to come.

### CONCLUSION

Thus, we close the book on the first 125 years of South Dakota. But the tasks go on. Those who started our judicial system in 1889 would be dumbfounded to look at the scope of the system today as well as the problems it confronts. Those individuals in 1889 had to be optimists by nature to venture into this land and carve a state out of it. They are gone now but their optimistic spirit lives on. We should apply that same optimism to the challenges that we face. I close with this thought: the best is yet to come.

Respectfully Submitted,

David Gilbertson  
Chief Justice