

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 13, 2016, 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.

I suspect there is an expectation when I present my annual message that it will fall along predictable lines and topics. Admittedly, after 13 years of presenting these messages to you in an oral and written manner, one might think there are no new issues to discuss. Yet when I reviewed the first message I delivered to you in 2003, there was not one subject I then addressed which will be covered in today's message. Clearly, times change and the South Dakota Unified Judicial System changes with them to provide necessary judicial services to the citizens of South Dakota. As Vince Lombardi once noted, "perfection is not attainable, but if we chase perfection we catch excellence."

In 1972, then Chief Justice of the United States, Warren Burger, gave a speech to the American Bar Association. In it he mused that if the legendary fictional figure Rip Van Winkle woke from his 20-year-sleep and wandered into a courtroom, the only changes he would notice were that the ties had gotten wider and the air conditioning worked better. Times do change. Sometimes they change a lot. There have been more changes in the past twelve months than in any one-year period since I became the Chief Justice in 2001.

Major problems are rarely identified, addressed, and overcome within the span of a year. A long-term commitment is required. These programs do not result in a "one and done." Reforms are often achieved by continuous improvement

The front of the National Archives in Washington D.C. magnificently proclaims, "The Past is Prologue." When asked by a United States Senator what that meant, a cab driver is reported to have said, "You ain't seen nothing yet."

JUDGES AND JUSTICES

In 1975, the Unified Judicial System came into being with new circuit judges elected by the citizens of South Dakota. Since then judges or justices at various times have left the system and new ones have been elected by the people or appointed by the Governor. Last year the combination of judicial retirements and the 2014 judicial election resulted in the largest turnover of circuit judges since 1975. In addition, this Legislature authorized additional circuit judgeships in recognition of the increased caseloads in the Second Circuit and the Seventh Circuit.

On January 5, 2015, at the Supreme Court, Justice Janine Kern replaced Justice John Konenkamp, who retired. Judicial administration also changed. New presiding circuit judges administer three of the seven judicial circuits.

So what does all of this mean? Obviously judges come and go. Of all the justices and judges who were in the UJS when I became a judge in 1986, only one remains. Yet the system goes on. It is a better system than when it began in 1975 due to the hard work and efforts of all those who held judicial positions during those intervening years. They set a fine example that the present and future holders of South Dakota's judicial offices must strive to build upon.

I want to recognize the efforts of all employees of the UJS – both past and present. At one point, Andrew Carnegie, the 19th Century industrialist, was the richest and arguably the most powerful man in the world. He later gave away most of his fortune to build libraries. On his tombstone is an epitaph he personally wrote that applies to me as Chief Justice – “Here [is a person] who knew how to enlist the service of better [people] than himself.”

ALTERNATIVE SENTENCING PROGRAMS

Our state-wide network of drug and alcohol courts continues to grow and expand. We now have 12 alternative sentencing programs. Five are DUI courts and seven are drug courts. This past year we obtained funding from this Legislature to expand drug courts into Brown County and Beadle County. An alcohol court was authorized for Meade County. Today they are up and running.

The alternative sentencing program continues to enjoy steady growth. During the three years of FY08 through FY10 we accepted 48 new clients. For the three-year time period of FY11 through FY13, 129 new clients were accepted. In FY14 alone there were 105 new clients and in FY15 there were 170 new clients.

We served a total of 293 clients in FY15. Factoring in the number of unsuccessful completions, in one year's time, 261 people were not in the penitentiary that would otherwise be there. They are succeeding in overcoming the addiction that brought them into the criminal justice system.

Depending on various factors, the cost of a year of incarceration in the penitentiary is in the area of \$25,000 per year. The cost of a year in a drug or alcohol court program is about \$9,000. The math favors the taxpayers.

In addition, there have been 588 dependent children of program participants in the last two years. These children have not been in the custody of the Department of Social Services at taxpayer expense of \$10,000 per year, per child. As the book of Proverbs admonished thousands of years ago, “train up [children] in the way [they] should go, and when [they] are old they will not depart from it.”

Through the vision of Governor Daugaard, this Legislature, and all who have worked on these types of programs since their inception in the Northern Black Hills, we are now approaching a point where all the cities in South Dakota that are large enough to provide the necessary services for a drug or alcohol court have one or the other, or, in some instances, both types of courts. There remains an opportunity to set up drug and alcohol courts in the Brookings area. I am requesting that this Legislature consider funding such a proposal.

Where do we go from here with the drug and alcohol courts? I see two additional opportunities to keep addicts out of the penitentiary and restructure their lives so that they become useful citizens who pay taxes and support their families.

First, I would like to see both alcohol and drug courts offered in each of the locations where there is one or the other. You treat an alcoholic differently than a drug addict so, like a railroad, twin rails for the track are necessary. A circuit judge who has been active in these programs for years defined the difference between drug addicts and alcoholics this way: "Alcoholics, although they are addicted to alcohol generally, maintain a home and have some form of employment. Drug addicts are "couch potatoes." They generally have no job, no home, and nothing more than the clothes on their backs. Thus, a key component in getting drug addicts into a drug court program is finding them a place to live and a job."

Second, I would like to see the existing programs expanded to accommodate more participants. A lack of personnel is not holding us back from expansion. Rather, it is mainly the lack of dollars for addiction treatment by trained professional counselors. We currently have a capacity of 290 people. If we were to fund the Brookings program, that capacity would increase to 310. From there if we were to add just one additional Court Services Office in Minnehaha County and expand the use of existing personnel with increased treatment dollars we could, in one year, potentially increase our capacity from 290 to 445. That is more than currently are housed in the women's penitentiary. The total cost of the increased treatment program would be an additional \$590,041 - a small fraction of the cost of constructing of a new prison and staffing it.

These alternative sentencing programs are not easy. Every program graduate I have ever talked to said it would have been easier to go to the penitentiary, do the time, and leave still an addict. It is a proud day for each individual when he or she graduates from the program and can move on to a productive life. The value of the program became evident when Governor Daugaard announced that the state was able to avoid the construction of a new women's prison, which would be on-going now, and the construction of a new men's prison, in the near future. Several years ago a friend gave me a judicial gavel with a claw hammer on its head instead of a normal cylindrical head. He said judges should use their authority to "build things." Such a gavel can be used by judges in alternative sentencing programs to build lives, not additional prisons.

Drug and alcohol courts take people who are not at high risk to the public and provide them with the tools necessary to reduce their risk both to themselves and the community. However, we do not bring individuals into our drug and alcohol courts with a guarantee of success. Addiction is a lifelong, relapsing, chronic disease that can only be treated, not cured. What we accomplish is to give individuals the opportunity to achieve success. In the end the burden falls on the individual. With the leverage of the criminal justice system and the partnership of treatment, he or she can succeed or fail with corresponding consequences. Simple fifteen minute lectures do not work. Intensive twenty-four month rehabilitative programs do. As Benjamin Franklin observed, "Tell me and I forget. Teach me and I remember. Involve me and I learn."

HOPE PROGRAMS

Drug and alcohol addiction are not the exclusive domain of our urban areas. In June 2015, Attorney General Jackley reported that the amount of meth seized in rural counties of South Dakota more than doubled. Eight rural counties saw a meth arrest for the first time. In Buffalo County, one of South Dakota's most rural counties, Sheriff Wayne Willman reports, "meth is continuing to be a greater and greater problem."

The Unified Judicial System started a local program called HOPE to combat drug and alcohol addiction in rural areas. The pilot project was in Walworth County. It worked so well we started additional programs in Tripp, Charles Mix, and Brown counties.

The HOPE program requires random drug or alcohol testing of participants. It also involves intense supervision by specially trained UJS Court Services Officers. It is not a modified drug or alcohol court program; rather, it is a form of intensive probation.

In a pilot program, we are starting a HOPE program in Aberdeen that already has a drug court and an alcohol court. Since the HOPE program does not include the intensive professional counselling and other components of a drug court, it is less expensive per client. We are going to see if those who are not as addicted to alcohol or other drugs but are involved with the legal system can benefit from the HOPE program and save the openings in the drug and alcohol court programs for those who more severely suffer from the disease of addiction. I hope to report to you next year on how this experiment works.

The Fifth Judicial Circuit is also expanding its HOPE program. Presiding Judge Scott Myren plans to have a HOPE program in every county of that circuit by the end of 2016.

VETERANS COURTS

Judge Robert Timm retired this year after a distinguished judicial career. He left us a farewell present. He organized and started the first veterans court in South Dakota. That program is running in the Watertown area and has six participants. We are on the verge of expanding the program to the Sioux Falls area. We stand ready to expand this fine program into other areas of the state when funding is available.

RURAL ATTORNEY PROGRAM

When one looks at a map of South Dakota the counties form a bit of a checkerboard. However a map is just printed symbols and words on a piece of paper. In reality, the counties are very unique in many respects that impact its citizens' lives. As the checkerboard has 64 squares, we have 64 counties with courthouses. The access to legal services on our checkerboard of counties should not be dependent on whether legal services are available in one colored square county with a large population, or unavailable in the other colored square county with a small population. On the checkerboard all the squares are the same. Access to legal services, no matter the county, should also be the same.

The Rural Attorney Recruitment Program continues to be an outstanding success. It is a program

that encourages attorneys to locate in rural counties with a population of fewer than 10,000 people. It provides a financial incentive spread over a five-year period to off-set the costs of setting up a rural law practice. The original allotment was sixteen slots. We were given five years to fill those slots. Since we were the first state in the nation to try this program there was no assurance it would work. However, the program is so popular that in about half of that time we are very close to locating 16 attorneys in rural counties. This is a good problem to have. We currently have contracts with Douglas, Hand, Perkins, Haakon, Lyman, Marshall, McPherson, McCook, Bennett, Tripp, Harding, Minor, Charles Mix, and Grant counties. With these successful results, the program has received positive national recognition.

Last year, this Legislature allowed the UJS to shift funds to set up a second group of sixteen slots. Because there are 48 counties eligible for the program, we are excited to move the program forward into its second phase.

I recently hosted a seminar for attorneys who are already practicing law in the program and law students and attorneys who are interested in the program. The attorneys who are already practicing reported that they were doing very well. One attorney already argued a case before the South Dakota Supreme Court. Another reported he was “swamped” with clients who needed his legal services. One attendee observed, “If you practice in an urban firm you live on ‘their’ terms. If you practice in a rural setting you live on ‘your’ terms.”

Each county that participates in the program or has shown an interest in participating has individual needs. Clearly this is not a case of one size fits all. As Speaker Tip O’Neil once quipped, “all politics is local.” We work individually with each county to try to match an attorney to the needs of that county.

ELDER ABUSE TASK FORCE

South Dakota is both blessed by its experienced human capital and challenged by the unique concerns of a rapidly growing elder population. The United States Census Bureau currently estimates that 14.4% of South Dakotas are over the age of 65, compared to a national average of 12.8%. By 2020, the prediction is that South Dakota’s percentage of seniors will rise to 16.4%. The Department of Social Services estimates that by 2025 there will be over 200,000 South Dakotans over the age of 65 and the number of disabled elders will reach 85,000.

Elder abuse can be generally divided into physical, emotional, or financial abuse. According to the United States Department of Justice only one in 23 cases of elder abuse is reported to a reporting agency. Of particular concern to me is that while we have laws to protect seniors from physical and financial abuse, we have no explicit mental anguish or mental health components in our abuse and neglect statutes. While the risk of emotional abuse may be less than an epidemic of perpetration by third parties, keep in mind that 90% of elder abuse is perpetrated by family members. Given the fact that 38 states do address the issue of emotional abuse by statutory protection it certainly merits our attention.

In my message to you last year I reported my concerns over physical, emotional, and financial abuse of the elderly in South Dakota. I was delighted my public concerns became the catalyst for

a law this Legislature passed to set up a task force to study the issue. This task force had an organizational meeting in July and worked throughout the remainder of the year. It is comprised of a group of outstanding South Dakota citizens who possess great knowledge in the areas under study. Justice Steven Zinter of the South Dakota Supreme Court chairs the task force. The UJS provides staffing and funding.

The task force issued a thorough report this past fall which is available for your review. The core of the report indicates the following subjects were considered by the task force:

1. Incorporating emotional and psychological abuse into our criminal abuse and neglect statutes for elders;
2. Recognizing the predominantly domestic or family nature of elder abuse, create a civil right of action for elder abuse similar to our existing protection order proceedings;
3. Considering the creation of a central registry for substantiated reports, convictions, and civil judgments of abuse and neglect of elders, but concluding adequate reporting systems are already in place;
4. Increasing the criminal penalty for theft by exploitation of an elder from a misdemeanor to a felony;
5. Clarifying abuse, neglect, and exploitation reporting by financial institutions;
6. Employing a new prosecutor in the Office of the Attorney General to specialize in prosecuting the financial exploitation of elders;
7. Creating a civil right of action against financial exploiters who, if a family member or heir, could be disinherited from the from the elder's estate;
8. Creating enhanced protections in the execution of a power of attorney for financial and health care decisions;
9. Providing educational resources to assist public officials and the general public to better identify and report elder abuse;
10. Creating an educational handbook to assist guardians and conservators; 40 states have already done this;
11. Authorizing the UJS to actively monitor guardians and conservators and notify them of pending filing dates for accountings and reports;
12. Requiring background checks for proposed guardians and conservators and generally prohibiting felons from serving in those positions;
13. Terminating a conflicting power of attorney when a guardian or conservator is appointed by the court, and precluding such conflicting powers of attorney thereafter;
14. Requiring notification by a bonding company when a bond posted by a conservator or guardian is about to lapse;
15. Clarifying arbitration clauses in long-term care contracts, and
16. Encouraging DSS efforts to consider revising of the definition of "severe mental illness" for involuntary mental commitments with focus on the treatment of elderly dementia.

The report proposes legislation to address these subjects.

While this will not cure all aspects of the problem, it will not make it so easy to prey on a vulnerable senior. Since those elders needing protection cannot be here today, on their behalf I

wish to thank this Legislature for giving its time and attention to this most important work.

JUVENILE JUSTICE ACT (SB 73)

Last year, this Legislature passed a comprehensive act which overhauled the then-existing juvenile system. The stakes were high. South Dakota had the second largest per capita commitment rate of juveniles of any state in the nation. At the local level all too many judges were faced with the two options: inadequate supervision through probation, or sentencing to a Department of Corrections' group home outside the locale.

The law you passed seeks to divert funds from outside placements to local treatment options for the juvenile and for the first time, the juvenile's families. As author Alex Haley observed, "In every conceivable manner, the family is the link to our past, bridge to our future."

The overall goal is the same as with the adult corrections overhaul of a few years ago – to hold youthful offenders more accountable, improve public safety, and save the taxpayers money in the process.

Portions of the law went into effect on July 1, 2015 and other portions went into effect January 1, 2016. Thus by a matter of days the program is becoming operational. It is too soon to draw any comprehensive conclusions about how it is working. Next year I hope to be able to give you a more extensive report.

PROBATION

Probation services continue to be one of the most active and effective programs within the Unified Judicial System. Probation numbers continue to rise each year. Probation keeps our penitentiary numbers from continuing to soar and reduces the need to construct additional penitentiaries and state institutions. Dedicated Court Services Officers quietly work day in and day out to supervise citizens who have broken our criminal or juvenile laws, but who can be rehabilitated within their community. For the price of a large Coke or upgraded cup of coffee we are able to supervise a person for a day.

At one point during FY 15 we had 7,839 adults on felony probation compared with 7,148 in FY 14. Deducting those who successfully completed probation or who violated probation and were sent to the penitentiary, we still had 5,918 on probation at the end of the fiscal year. It was an all-time high for both sets of figures.

The Public Safety Improvement Act seeks to lessen the number of felons sent to prison for non-violent felonies. However, they have to go somewhere. That "somewhere" is often adult probation with the UJS which results in some of the increase. The Act, however, also provides for earned discharge credits for good behavior to reduce the length of probation. The UJS awarded earned discharge credits to over 2,200 probationers last year. That credit can effectively cut an offender's supervision time in half if he or she demonstrates good behavior and compliance with the conditions of probation.

TRIBAL COOPERATIVE PROBATION AGREEMENT

Last July, state and federal representatives from South Dakota and North Dakota met in Ft. Yates, North Dakota, with officials from the Standing Rock Sioux Tribe. The goal was to enter into an agreement to work collaboratively to develop and implement Native American culturally founded and evidence-based strategies to support tribal members returning to the Standing Rock Sioux Reservation as part of probation or parole supervision following sentencing or incarceration. The goal of the participating governmental entities is to enhance public safety on the Standing Rock Sioux Reservation by reducing recidivism through successful community reintegration and the coordinated supervision of offenders. This multi-jurisdictional approach involves the Standing Rock Sioux Tribe, South Dakota's Unified Judicial System, South Dakota's Department of Corrections, South Dakota's Department of Tribal Relations, North Dakota's Department of Corrections, North Dakota's Indian Affairs Commission, North and South Dakota's Federal Probation offices and the United States Attorney's offices in both states. This is a significant step forward in creating a collaborative approach to allow offenders to return home and receive the supervision and services necessary for successful re-entry into the home community. The UJS is hopeful that this approach will serve as a model for how our probation program can work with other governmental entities to address complex multi-jurisdictional issues.

EXPEDITED CIVIL ACTIONS RULE

The American civil legal system has been criticized for being too slow and too expensive. That concern exists in South Dakota. While major litigation obviously requires a lot of preparation prior to trial, there is no reason relatively simple legal disputes should suffer the same fate.

With that in mind the South Dakota Supreme Court enacted a rule which expedites civil actions where the damages claimed are under \$75,000. There is limited discovery using depositions and interrogatories. Each side is allowed two days for trial.

In keeping with the overall goal of a fair trial, the right to trial by jury and appeal to the Supreme Court are preserved. This program has worked well in other states including our neighboring state of Iowa. The rule went into effect on January 1, 2016. The Supreme Court is confident it will succeed in providing a less expensive and prompt way to resolve civil disputes over damages.

CONCLUSION

Our challenges are substantial but hardly insurmountable. The actress Audrey Hepburn observed, "Nothing is impossible; the word itself says, 'I'm possible!'" Or, as Napoleon bluntly observed, "Impossible is a word to be found only in the dictionary of fools."

Nevertheless, we sometimes treat South Dakota's system of justice as if it is indestructible. It has withstood some fierce onslaughts such as "JAIL for Judges" in 2006. In reality, it is not indestructible. It needs our constant attention and concern. Our judicial system rests on our state motto, "Under God the People Rule," on fundamental fairness, and on the principles of Equal

Protection and Due Process. Those principles, however, are often framed by the perception of the beholder. That perception, more often than not, stems from an individual's trust and confidence in our system of justice. That trust and confidence must be preserved.