

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
March Term of the Court
to be held
March 18 through March 20, 2013
University of South Dakota School of Law
Vermillion, South Dakota



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 18, 2013

To our Guests Observing the
March Term Hearings of the
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

This brochure has been prepared as part of the continuing effort of the Supreme Court to promote increased public knowledge of the state judicial system. We hope it will assist you in understanding some of the functions of the Supreme Court, and make your observation of the Court hearings a more valuable and enjoyable experience.

Sincerely yours,

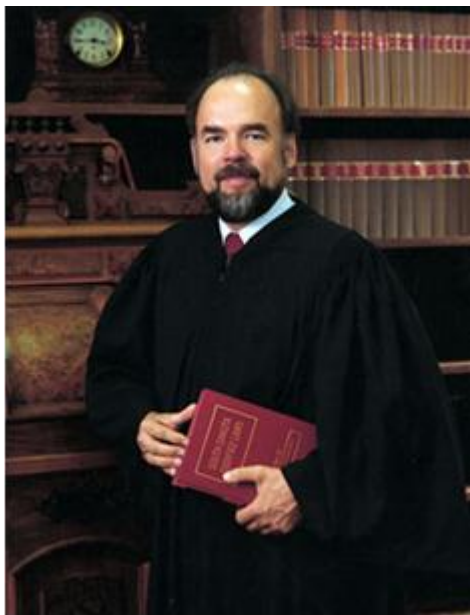
David Gilbertson
Chief Justice

A handwritten signature in cursive script that reads "David Gilbertson".

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The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to insure the well-being of all who attend its proceedings and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought, and other bags and purses are subject to inspection and search by security personnel.



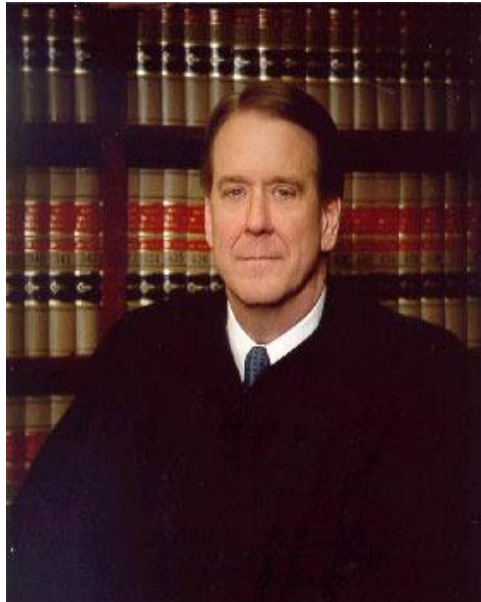
Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001, was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005 and a third 4-year term in June 2009. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 general election and the 2006 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as a deputy state's attorney and as an attorney for several municipalities and school districts. He is past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He was a member of the Board of Directors of the National Conference of Chief Justices from 2005-2007. In 2006, he was the recipient of the distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah have four children.



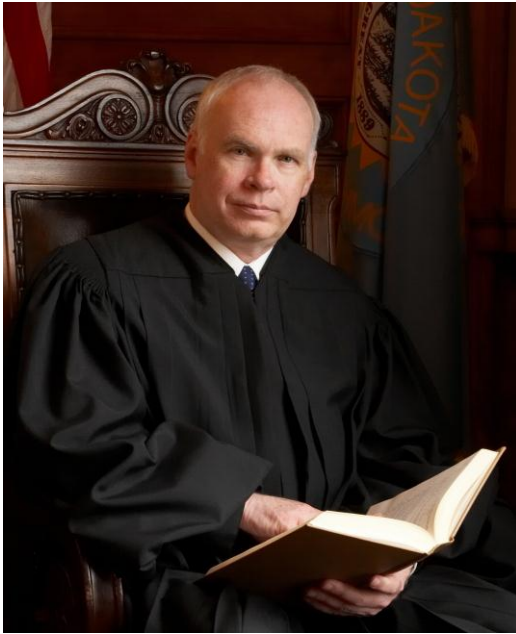
Justice John K. Konenkamp

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, Fall River, Lawrence, Meade and Pennington counties. After serving in the United States Navy, he attended the University of South Dakota, School of Law, graduating in 1974. He practiced in Rapid City as a Deputy State's Attorney until 1977. He then engaged in private practice until 1984 when he was appointed Circuit Judge. In May 1988, he became Presiding Judge of the Seventh Circuit. He was appointed to the Supreme Court in 1994 after ten years on the trial bench and was retained by the voters in the 1998 and 2006 general elections. He is a member of the National Advisory Council of the American Judicature Society, an organization devoted to addressing the problems and concerns of the justice system. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp has served on a number of boards advancing the improvement of the legal system, including the South Dakota Equal Justice Commission, the Alternative Dispute Resolution Committee, and the Advisory Board for the Casey Family Program, a nationwide foster care provider. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew and four grandsons.



Justice Steven L. Zinter

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002. He received his B.S. degree from the University of South Dakota in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. Upon graduation from law school, Justice Zinter practiced law as an Assistant Attorney General for the State of South Dakota. From 1978 to 1986 he was engaged in the private practice of law in Pierre. Justice Zinter also served as the Hughes County State's Attorney. He was appointed as a Circuit Judge in 1987 and served in that capacity until 1997. In 1997 he was appointed Presiding Judge of the Sixth Judicial Circuit and served in that capacity until his appointment to the Supreme Court. Justice Zinter is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He was a past President of the South Dakota Judges Association and a past member of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife Sandra have three grandchildren.



Justice Glen A. Severson

Justice Severson, born March 9, 1949, represents the Second Supreme Court District, which includes Minnehaha County. He served in the South Dakota Air National Guard from 1967-1973. He attended the University of South Dakota receiving a B.S. in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1992 and a Beadle County Deputy States Attorney in 1975. He was appointed as Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court. Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He was a member South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two adult children, Thomas and Kathryn.



Justice Lori S. Wilbur

Justice Wilbur represents the Fourth Supreme Court District, which includes the counties of Aurora, Bon Homme, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, McCook, Turner, Union and Yankton. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 – 2011. Justice Wilbur, and her late husband Brent, have two adult daughters and one grandson.



Clerk of the Supreme Court

Shirley Jameson-Fergel is the Clerk of the South Dakota Supreme Court. It is the function of this office to assist the Supreme Court, and especially the Chief Justice, in the organization of the correspondence, exhibits, and other documentation related to the formal activities of the Supreme Court. This includes monitoring the progress of appeals; scheduling oral arguments before the Court; recording Court decisions, orders and directives; and controlling their release and distribution. The Clerk's office is also responsible for the management of all legal records of the Court, compiling appellate statistics, and documenting and disseminating Court rules.



Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the Justices with research and writing of opinions on the cases under consideration. In the photograph above, from left to right, Ellie Bailey (Supreme Court Law Clerk), Krista Tschetter (Justice Wilbur), Stephanie Chase (Justice Severson), Morgan Brekke (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), Stacy Hegge (Justice Zinter) and Kari Mouw (Supreme Court Law Clerk).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

Five Justices appointed by the Governor from judicial appointment districts are subject to statewide electoral approval three years after appointment and every eight years thereafter. Retirement at age seventy.

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

Has original jurisdiction in cases involving interests of state. Issues original and remedial writs.

Has rule-making power over lower court practice and procedure, and administrative control over the Unified Judicial System.

Renders advisory opinions to the Governor, at his request, on issues involving executive power.

Circuit Court

Circuit Court services available in each county seat.

Counties grouped into seven circuits, served by forty-one judges elected from within their circuits for eight-year terms. Vacancies filled by the Governor, who appoints replacements from a list of candidates recommended by the Judicial Qualifications Commission.

Trial courts of original jurisdiction in all civil and criminal actions. Exclusive jurisdiction in felony trials and arraignments, and civil actions involving damages of more than \$10,000. Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.

The Supreme Court Process

The judicial system of South Dakota has two levels. The circuit courts are the lower courts through which criminal prosecutions and most civil lawsuits are processed. The South Dakota Supreme Court is the state's highest court and the court of last resort for parties who seek to change adverse decisions of the circuit court. The Supreme Court is the final judicial authority on all matters involving the legal and judicial system of South Dakota.

When an individual involved in a legal action is convinced that the judge in the circuit court has made an error in deciding the law of the case, that party may bring the case to the Supreme Court for a remedy. This is called an "appeal" and the court hearing the appeal is called the "appellate" court. The party bringing the appeal is an "appellant" and the other party - usually the party who was successful in the lower court - is the "appellee." Most of the work of the Supreme Court involves its appellate jurisdiction.

In an appellate action, the Court may decide to hear "oral arguments" in the case, in which both parties are permitted to come before the Court and give a short presentation (an argument) to support their position in the case. There is no trial, the lawyers do not confront each other, and the Court does not take testimony from witnesses. Usually, the attorneys for the parties involved stand before the Court and speak for twenty minutes to emphasize or clarify the main points of the appeal. The members of the Court may ask questions or make comments during the lawyer's

presentation. After hearing the oral arguments, the Court discusses the case and one justice is assigned to write the opinion in the case. Other justices may write concurring or dissenting opinions to accompany the majority opinion, all of which are published as formal documents by the West Publishing Company in the North Western Reporter. The Court's opinions are also available online at: <http://ujs.sd.gov/>

In addition to its appellate jurisdiction, the Supreme Court has its own area of "original" jurisdiction. It is also responsible for a wide range of administrative duties involving the personnel and procedures of the court system and the professional conduct of attorneys throughout the state.

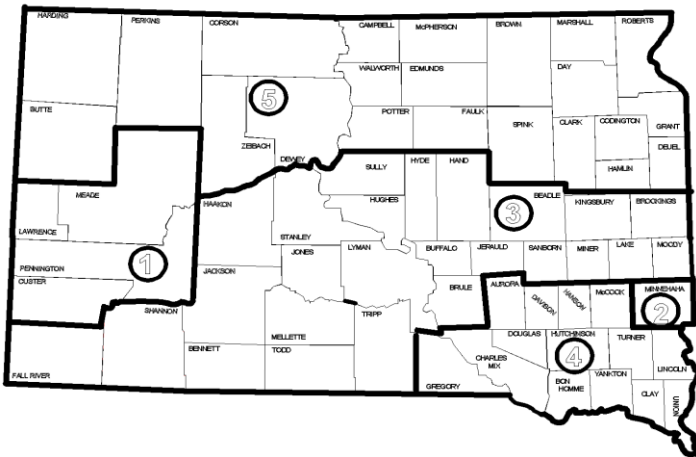
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have a conflict or personal involvement in a case, or if there is a vacancy on the Court caused by the illness or departure of a justice.

All of those who sit on the Supreme Court must be licensed to practice law in the state and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory requirement that a justice must retire shortly after reaching the age of seventy. A retired justice, if available, may be called back to temporary judicial service in any of the state's courts.

Under the terms of a constitutional amendment passed by the voters in November 1980, vacancies on the Supreme Court are filled by Governor's appointment. This appointment must be made from a list of two or more candidates recommended by the Judicial Qualifications Commission. All Supreme Court justices must stand, unopposed, for statewide approval or rejection by the electorate in a retention election. For newly appointed justices, the retention vote is held at the next general election following the third year after appointment. After the first election, justices stand for retention election every eighth year.

Justice Konenkamp was appointed in 1994 from District One. Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Zinter was appointed in 2002 from District Three. Justice Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Chief Justice Gilbertson and Justices Konenkamp and Zinter were each retained in the November 2006 general election. Justice Severson was retained in the November 2012 general election.

South Dakota Supreme Court Appointment Districts
Effective January 23, 2012



**In the Supreme Court
of the
State of South Dakota**

Courtroom Protocol

The following list of Do's and Don'ts was prepared for the benefit of anyone attending one of the Court's sessions. Your cooperation in observing proper Courtroom protocol will assure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained.

Your cooperation is appreciated.

DO

- Remove caps/hats before entering the Courtroom
- Enter the Courtroom prior to the commencement of an argument
- Stand when the Justices enter and leave the Courtroom
- Listen attentively
- Turn cell phones off before entering the Courtroom

DO NOT

- Bring food, drinks, cameras or recording equipment into the Courtroom
- Enter or leave the Courtroom during the course of an argument
- Chew gum or create any distraction
- Engage in any conversation once an argument begins

Supreme Court of South Dakota
March 2013 Term

Nine cases are scheduled for oral argument during this term. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case and respond to the Court's questions. In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar. After hearing oral arguments each day, the Court will consider several non-oral cases.

Case Summaries

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

State v. Piper

In 2000, Briley Piper was charged with the murder of Chester Allan Poage and four other non-capital offenses. After initially pleading not guilty, Piper pleaded guilty to felony murder and the four other non-capital offenses. The trial court determined that he waived sentencing by a jury. Following a three-day hearing, the judge sentenced Piper to death.

Thereafter, Piper's co-defendant, Elijah Page, pleaded guilty to the same charges and was sentenced to death by the same judge. Another co-defendant, Darrell Hoadley, maintained a not guilty plea to the same charges and proceeded to a jury trial. The jury found Hoadley guilty but did not impose the death penalty.

This Court affirmed Piper's conviction and sentence in *State v. Piper*, 2006 S.D. 1, 709 N.W.2d 783 (*Piper I*). Piper filed an application for writ of habeas corpus claiming that his waiver of his right to have a jury determine whether the death penalty should be imposed was not knowing and voluntary. The trial court denied the writ. In *Piper v. Weber*, this Court granted the writ, vacated the death sentence, and remanded for a new sentencing proceeding. 2009 S.D. 66, 771 N.W.2d 352 (*Piper II*).

Upon remand, Piper filed a motion to withdraw his guilty pleas. The trial court denied Piper's motion and the case proceeded to a jury sentencing in July 2011. The jury found the existence of aggravating factors and sentenced Piper to death.

In addition to this Court's automatic review of the death sentence pursuant to SDCL 23A-27A-9, Piper raises the following issues for our review:

1. Whether Piper's motion to withdraw his guilty pleas was improperly denied.
2. Whether Piper's death sentence is disproportionate to the life sentence imposed on co-defendant Hoadley.

Mr. Marty J. Jackley, Attorney General and Mr. Paul S. Swedlund, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Steve Miller, Attorney for Defendant and Appellant
Briley Wayne Piper

Englund v. Vital

On July 7, 2008, twelve-year-old K.V. threw a soft-ball size rock that struck nine-year old G.E. in the head. The rock struck G.E. in the forehead and her skull was severely damaged. Following the incident, G.E. was taken to the hospital where a titanium plate was inserted to repair her skull. G.E.'s parents indicated that her behavior changed following her injury.

Prior to the incident, G.E. had been playing with K.V.'s younger sister, M.V. G.E. and M.V. had been building a "fort" in M.V.'s backyard. The parties disagree as to the circumstances whereby the rock was thrown. G.E. told her mother that she was running away from K.V. because he was chasing her with a rock. G.E. further told her mother that when she turned around to see if K.V. was still chasing her, she was hit with the rock. Alternatively, K.V. indicated that he was throwing rocks between two trees. He reported that after he threw the rock, he noticed G.E. run out from behind one of the trees. K.V. indicated that he yelled G.E.'s name to get her attention, but that when she turned around, she was hit by the rock.

At the time of the incident, G.E. and K.V. were neighbors. G.E. lived with her parents, the Englunds. K.V. lived with his parents, the Vitals. The Vitals and their landlord, Robert Smith, lived in two separate homes directly behind the Englunds. Smith owned his home, as well as the property he rented to the Vitals. All three properties were unfenced. There was evidence that the children had permission to play in Smith's backyard, which contained a swing-set.

The parties disagree where the incident took place. G.E. indicated that she was on Smith's property when she was struck. K.V. stated that G.E. was running toward the side of her house when she was struck. K.V. indicated that a few weeks before the accident Smith told him not to throw rocks toward his house. The Englund's claim that Smith knew of K.V.'s propensity for rock throwing and that Smith agreed to remove landscaping rocks from both his home and the Vitals' rental property. The Englund's indicated that Smith had purchased a skid loader for the purpose of removing the rocks. Smith, however, indicated that the skid loader was purchased to assist with snow removal.

The Englund's brought suit, individually, and as guardians ad litem for G.E., against K.V., the Vitals, and Smith. The claims against Smith included: negligence, negligent rental, and punitive damages. Smith moved for summary judgment, which the trial court granted. The trial court held that Smith owed no duty to G.E. The order granting summary judgment in favor of Smith was certified as final under SDCL 15-6-54(b). The Englund's now appeal the grant of summary judgment in favor of Smith. Accordingly, this appeal is limited to the Englund's' claims against landlord Smith.

We address the following issues on appeal:

1. Whether South Dakota should partially abrogate the tripartite system of premises liability by eliminating the distinction between invitee and licensee, which would require that all lawful entrants upon land are afforded a duty of reasonable care.
2. Whether the trial court erred in granting summary judgment based, in part, on its determination that Smith owed no duty of care because he did not maintain a common area.

3. Whether the trial court erred in granting summary judgment, in part, based on its determination that Smith did not undertake a duty to repair or have a legal duty to remove the rocks.
4. Whether the trial court erred in granted summary judgment based, in part, on its determination that Smith owed no duty to protect G.E. from the alleged reckless or intentional conduct of K.V.

Mr. Daniel K. Brendtro and Mr. Jeff Cole, Attorneys for Plaintiffs and Appellants Russell and Mary Englund, individually, and as Guardians Ad Litem for G.E.

Mr. Richard L. Travis and Ms. Lindsay K. Edwards, Attorneys for Defendant and Appellee Robert Smith

State v. Riley

On October 20, 2009, Derek Kuchenreuther, a detective with the Minnehaha County Sheriff's Department who is assigned to the Internet Crimes Against Children Task Force in Sioux Falls, conducted an undercover investigation to locate persons distributing or possessing child pornography. Using special software, Kuchenreuther identified an IP address, which appeared to possess child pornography. The person associated with the IP address used LimeWire, a publicly available peer-to-peer file-sharing program, to download and share files. Kuchenreuther used a software program designed by the FBI to view and download files that a particular file-sharing network user makes available for download by other users.

Using that software, Kuchenreuther determined that the IP address was assigned to a Mt. Rushmore Telephone Company subscriber located in Hermosa, South Dakota. Kuchenreuther also determined that 79 video files, which had titles containing terms related to child pornography, were located in a shared folder associated with the IP address. Of the 79 video files, Kuchenreuther downloaded an entire video and confirmed that it contained child pornography. Kuchenreuther also downloaded a portion of a video depicting an adult female removing the pants of a female child. Although the partial video file did not portray child pornography, based on prior child pornography investigations, Kuchenreuther recognized the video file as one that contained child pornography.

Kuchenreuther issued a subpoena to Mt. Rushmore Telephone Company requesting the name, email address, and location of the subscriber using the IP address that Kuchenreuther suspected possessed child pornography. Mt. Rushmore Telephone Company provided the location of the IP address and informed Kuchenreuther that the IP address

was registered to James Riley. Kuchenreuther then briefed Brent Gromer, an agent with the South Dakota Division of Criminal Investigation in Rapid City, on his investigation. Based on the information he received from Kuchenreuther, Gromer applied for and obtained a warrant to search Riley's residence.

On January 15, 2010, Gromer and several other investigators executed the search warrant. When investigators arrived at Riley's residence, Lori Wenzlick, Riley's girlfriend, was the only person home. Wenzlick informed investigators that Riley was out-of-state, had his computer with him, and would return home around midnight. In response, Gromer advised Wenzlick that they would return the next day to execute the search warrant and instructed Wenzlick not to tell Riley. Riley returned home at approximately 1:00 a.m. on January 16, 2010. Contrary to Gromer's instructions, Wenzlick informed Riley that investigators had been at the residence and that they would be returning at 6:00 a.m.

At approximately 6:30 a.m., investigators executed a second search warrant. Riley was visibly intoxicated when the investigators arrived. During the search, Gromer interviewed Riley, a former system software engineer for IBM. Riley denied seeing the complete video, but admitted he had seen the downloaded portion of the partial video. Riley also conceded he "glanced" at pornography, and indicated that the files on his computer were gone. Investigators seized a laptop computer, two thumb drives, an MP3 player, and three DVDs.

Paul Eisenbraun, a detective with the Rapid City Police Department, conducted a forensic analysis of these items; however, no child pornography was found on any of the items. Eisenbraun's evaluation revealed that the

operating system on Riley's computer had been reinstalled at approximately 5:37 a.m. on January 16, 2010. Using a screen shot from Kuchenreuther's investigation, Eisenbraun performed a text-string search, which searched Riley's computer for text strings corresponding to file names generated during Kuchenreuther's investigation. Eisenbraun's text-string search produced several hits, meaning that file names existing on Riley's computer matched a file name or a variation of a file name generated during Kuchenreuther's investigation. Eisenbraun claimed these text strings, or file names, suggested child pornography had existed on Riley's computer.

On July 26, 2010, a Custer County Grand Jury indicted Riley for two counts of possession of child pornography in violation of SDCL 22-24A-3(3). Count I alleged possession of the complete video and Count II alleged possession of the partial video. A jury trial was held on January 25, 2012. Riley moved for a judgment of acquittal at the close of the State's case-in-chief and renewed the motion prior to closing arguments. Both motions were denied. The jury ultimately found Riley guilty of Count I, but failed to reach a verdict as to Count II. Riley was sentenced to eight years in the penitentiary.

Riley appeals, raising the following issue:

Whether the trial court erred in refusing to grant Riley's motion for judgment of acquittal.

Mr. Marty J. Jackley, Attorney General and Mr. Timothy J. Barnaud, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Paul R. Winter and Mr. Matthew L. Skinner, Attorneys for Defendant and Appellant James Duane Riley

In re: Ibanez

In 2000, Jessica Ibanez married Jared Miller. Three children were born during the marriage: K.S.M., K.L.M., and D.F.M. In 2007, after Jessica learned that Jared was having an affair, the parties divorced. Jessica was not represented by counsel and stipulated to a property settlement. She retained custody of the children and Jared paid child support. After the divorce, Jessica experienced financial difficulties and was diagnosed with depression. In March 2007, Jessica asked Jared to share physical custody of the children and a new stipulation was executed. Jessica was ordered to pay child support.

In 2008, Jared remarried. Tension existed between Jared's new wife and Jessica regarding the children. Jessica also continued to suffer from emotional and financial difficulties. Although employed, Jessica did not have the means to pay her child support obligation. According to Jessica, Jared and his wife asked her to terminate her parental rights. Jared, however, asserted that Jessica first presented the idea. Regardless, in 2009, Jessica agreed to terminate her parental rights. She claimed that the agreement was contingent on her being able to have continued contact with the children, Jared forgiving her child support arrears, and the children being able to have visitation with Jessica's parents. On December 8, 2009, Jessica signed a petition requesting the voluntarily termination of her parental rights. She was not represented by counsel. After a hearing on February 24, 2010, during which the court questioned Jessica, the circuit court entered an order terminating Jessica's parental rights.

After the termination hearing, Jessica tried to visit her children, but claimed that Jared refused her requests for contact. Her calls were blocked, and the children were not allowed to visit Jessica's parents. Jessica retained counsel

and, on February 23, 2011, moved to vacate the order terminating her parental rights relying on SDCL 15-6-60(b). She argued that the termination agreement was obtained through fraud due to the parties' side agreements related to her past-due child support and a promise of continued visitation.

After an evidentiary hearing, the circuit court issued findings of fact and conclusions of law on January 4, 2012. The court found no evidence of fraud. Rather, the court concluded that Jessica made a reasonable and informed decision, doing what she believed was in the best interests of her children. The court denied Jessica's motion to vacate the termination order.

Jessica appeals asserting the circuit court erred when it denied her motion to vacate.

Mr. Thomas J. Welk and Mr. Jason R. Sutton, Attorneys for
Appellant Mother Jessica L. Ibanez

Mr. Clint L. Sargent, Attorney for Appellees Jared and Amy
Miller

State v. Medicine Eagle

On the evening of September 23, 2000, 15-year-old M.E.H. was walking home in order to make her 11:00 p.m. curfew. M.E.H. alleges 23-year-old Gabriel Darryn Medicine Eagle, Jr., approached her in his van and offered to give her a ride. Instead of taking her home, M.E.H. claims Medicine Eagle drove to a desolate field outside of Winner, South Dakota. M.E.H. alleges she tried to run away from the van to get help, but Medicine Eagle caught her and dragged her back to the van by her hair. M.E.H. alleges Medicine Eagle then forced her into the van and raped her. M.E.H. claims Medicine Eagle threatened her throughout the incident. Medicine Eagle disputes these allegations.

When M.E.H. arrived at home, she told her mother she had been raped. M.E.H. was taken to the hospital and was later interviewed by law enforcement. In 2001, Medicine Eagle was indicted on charges stemming from the alleged rape. However, the charges against Medicine Eagle were eventually dismissed after forensic testing failed to implicate Medicine Eagle and instead revealed the presence of DNA from an unidentified male.

The case was reopened in 2008 after law enforcement learned that M.E.H. had been sexually involved with her teenage boyfriend, Patrick Red Bird earlier on the day of the alleged rape, and a criminalist from the South Dakota State Forensic Laboratory made inquiries about whether a new DNA-testing method might produce additional results. The evidence obtained in 2000 was then retested using the new method. This time, the testing revealed the presence of Medicine Eagle's DNA. Additionally, the DNA evidence associated with the previously unidentified male was matched to Patrick Red Bird. On December 3, 2009, the

grand jury indicted Medicine Eagle on four counts of second-degree rape, three counts of third-degree rape, one count of sexual contact with a child under age 16, and four counts of kidnapping as a result of the incident that allegedly occurred between Medicine Eagle and M.E.H. in September 2000. Additionally, on July 14, 2010, the State filed a Part II Information for Habitual Offender pursuant to SDCL 22-7-7, because Medicine Eagle had a prior felony conviction. Medicine Eagle was arraigned on the charges on August 3, 2010, and pleaded not guilty.

Prior to trial, the parties filed various motions. On July 21, 2011, the State filed a motion to introduce other acts evidence pursuant to SDCL 19-12-5 (Rule 404(b)), based on an incident that allegedly occurred between Medicine Eagle and thirteen-year-old S.M. on January 29, 2003. S.M. had alleged that Medicine Eagle offered to give her a ride to her mother's work, but instead drove S.M. into the country. When she tried to run away, S.M. claimed Medicine Eagle grabbed her, dragged her back to his vehicle by her hair, and engaged in sexual contact with her. S.M. alleged Medicine Eagle stopped and drove her home after she became physically ill. S.M. asserted Medicine Eagle threatened to kill her if she told anyone about the incident. The trial court granted the State's motion, and the State was allowed to present this evidence to the jury.

On September 29, 2011, the State filed a notice of its intent to offer witness testimony regarding the DNA evidence. In addition to other witnesses, the State sought to introduce testimony from Barbara Leal, a forensic DNA analyst, regarding the results of DNA testing performed in 2008 and 2011. Medicine Eagle objected to this testimony, arguing it violated his Sixth Amendment right to confront the witnesses against him because other analysts that performed various steps of the DNA testing in 2008 and 2011 were not called as witnesses. The trial court rejected Medicine Eagle's objections to this testimony.

Medicine Eagle's jury trial commenced on October 11, 2011. On October 18, 2011, the jury returned a verdict finding Medicine Eagle guilty of one count of rape in the second degree, one count of rape in the third degree, sexual contact with a child under age 16, and kidnapping. On October 24, 2011, the State filed an Amended Part II Information, alleging a second prior felony conviction. However, the State later dismissed the Amended Part II Information. The State then proceeded to trial on the original Part II Information, to which Medicine Eagle made no objection. The jury returned a verdict on January 27, 2012, finding that Medicine Eagle was a habitual offender.

On February 13, 2012, Medicine Eagle filed a motion to vacate the Part II proceedings, arguing that the trial court had no jurisdiction over the Part II proceedings. Medicine Eagle claimed the State's filing of the Amended Part II Information dismissed the original Part II Information. Thus, he asserted that because the State failed to file a Second Amended Part II Information or refile the original Part II Information, no Part II Information even existed at the time of the habitual offender jury trial. The trial court denied the motion. Medicine Eagle received sentences of 25 years in the South Dakota State Penitentiary for rape in the second degree, 15 years for sexual contact with a child under age 16, and life imprisonment for kidnapping.

Medicine Eagle appeals, raising the following issues:

1. Whether the trial court abused its discretion in admitting evidence of the incident involving S.M. as other acts evidence pursuant to SDCL 19-12-5 (Rule 404(b)).

2. Whether Medicine Eagle's rights under the Sixth Amendment's Confrontation Clause were violated when the trial court allowed Barbara Leal to testify about the 2008 and 2011 DNA testing even though several steps of the testing were performed by non-testifying analysts.
3. Whether the trial court erred in denying Medicine Eagle's motion to vacate the Part II proceedings.

Mr. Marty J. Jackley, Attorney General and Ms. Kirsten E. Jasper, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Paul E. Jensen, Attorney for Defendant and Appellant Gabriel Darryn Medicine Eagle

Langlois v. Schreiber and Kinney

Over several years, Barbara Langlois lent approximately \$521,000 to her daughter, Kimberly Thomason, and her son-in-law, Kenneth Dale Thomason, Jr. The Thomasons used the money to purchase and operate the Gold Town Hotel in Lead, South Dakota, as well as several other businesses on the same or adjacent property. The debt was secured by a quitclaim deed for the Gold Town Hotel, given to Langlois by the Thomasons.

In November 2007, Langlois retained Attorney Brad Schreiber to assist her in the collection of the debt. At that time, on Schreiber's advice, Langlois recorded the quitclaim deed. Schreiber then worked with Langlois to negotiate repayment of the loan with the Thomasons. Schreiber drafted a letter of intent, which described the agreement between Langlois and the Thomasons and was signed by Langlois and the Thomasons. The letter of intent stated that the Thomasons would apply for a loan of \$350,000 and partially repay Langlois in the amount of \$200,000 from that loan. In exchange, Langlois was to prepare a quitclaim deed for the Thomasons for the Gold Town Hotel and associated properties. The letter of intent also stated that the Thomasons were to execute a promissory note and mortgage in favor of Langlois for the remainder of the debt, but not less than \$300,000. Schreiber advised Langlois that the transaction should be structured so the bank issuing the loan could provide a \$200,000 check to Langlois at closing. However, Langlois and the Thomasons did not arrange to use a bank for the closing.

On January 7, 2008, Langlois executed a quitclaim deed for the Gold Town Hotel and associated properties in favor of the Thomasons and Kenneth's son, Dale Thomason. Schreiber delivered the quitclaim deed, but the Thomasons never obtained a loan or paid Langlois. Instead, the

Thomasons forged Dale Thomason's signature, transferred the property to Christopher M. and Shalece M. Vinson, took the proceeds from the sale, and fled the country.

In December 2008, Langlois and Dale Thomason filed suit in Lawrence County against the Thomasons, the Vinsons, and Minnwest Bank of Sioux Falls. The complaint alleged breach of contract and fraud against the Thomasons and sought compensatory and punitive damages. Against the Vinsons and the Minnwest Bank, the complaint sought declaratory action to determine the parties' rights, title and interest in the property. When the complaint was filed, Langlois and Dale Thomason were represented by Schreiber, but Schreiber later withdrew from representing Langlois and Dale Thomason because Schreiber believed he was a potential witness in the suit. Schreiber referred the case to Attorney Matthew Kinney.

In November 2010, Kinney, on behalf of Langlois and Dale Thomason, settled with the Vinsons. The settlement agreement was drafted by the Vinsons' attorney and signed on November 12, 2010. The agreement included a release of joint tort-feasors other than the Thomasons.

In late 2010, Langlois filed suit against Schreiber for legal malpractice, alleging that he failed to properly protect her interests with the letter of intent and delivery of the quitclaim deed to the Thomasons in early 2008. Schreiber answered the complaint denying malpractice or negligence and alleging that Langlois was contributorily negligent and assumed a known risk.

In August 2011, Langlois amended her original malpractice complaint against Schreiber to include Kinney as an additional defendant. The amended complaint included the original claims against Schreiber and alleged negligence against Kinney because Langlois did not intend for Schreiber to be released by the settlement agreement.

Against Kinney, Langlois also alleged that if the settlement agreement did release Schreiber, then Kinney would be liable to her for improperly advising her to sign the agreement releasing Schreiber.

Schreiber moved for summary judgment based on the release contained in the settlement agreement. Schreiber claimed status as a joint tort-feasor and argued that the agreement released the claims against the Vinsons and against him because of the agreement's joint tort-feasor language. Thus, he argued that the settlement agreement is a complete defense to Langlois' legal malpractice claim.

Kinney also moved for summary judgment. He argued the settlement agreement did not release Schreiber because the Vinsons and Schreiber were not joint tort-feasors. Kinney also argued that Schreiber cannot qualify as a joint tort-feasor under South Dakota's uniform contribution among tort-feasors law.

On February 23, 2012, Judge James Anderson heard arguments from Kinney, Schreiber, and Langlois. The trial court found that Schreiber was a joint tort-feasor with the Vinsons and that Kinney failed to show a genuine issue of material fact that the settlement agreement should be modified or reformed.

Kinney appeals, raising the following issues:

1. Whether the settlement agreement executed by Langlois and the Vinsons released Attorney Schreiber from any potential legal malpractice claim.
2. Whether a legal malpractice claim can be the basis of joint tort-feasor status.

Mr. Lee Schoenbeck, Attorney for Plaintiff and Appellee
Barbara Langlois

Mr. Jerry Johnson, Attorney for Defendant and Appellee
Brad Schreiber

Mr. James S. Nelson and Mr. Kyle L. Wiese, Attorneys for
Defendant and Appellant Matthew Kinney

CANCELLED

Voeller v. HSBC Card Services, Inc.

Julie Tassler was married to Steven Tassler. On December 23, 2008, Julie sued Steven for divorce and had Steven served with the divorce papers. The next morning, Julie reported to work at HSBC Card Services (Employer), where she had been employed since 2002. Around 9:30 a.m., Julie left Employer's building to take her routine morning break in her car located in Employer's parking lot. Steven, who had been waiting in the parking lot, shot and killed Julie near her parked car. Steven then killed himself.

Ronald Voeller, Julie's father, was appointed the personal representative of Julie's estate. After Employer's insurer denied worker's compensation benefits for Julie's death, Voeller filed a petition for benefits with the South Dakota Department of Labor and Regulation.

To recover worker's compensation benefits, Voeller was required to show that Julie's death arose out of and in the course of her employment. SDCL 62-1-1. Neither party disputed that Julie's death occurred "in the course of" her employment, but the parties disagreed whether her death "arose out of" her employment. Voeller argued that Julie's death arose out of her employment because "but for" her being at work that day, she would not have been killed. Voeller asserted that Steven could have only killed Julie on Employer's premises because it was the only time Julie was away from their children, and Steven would not have killed her when their children were present. Further, Voeller argued that Employer facilitated or contributed to Julie's death because Steven had learned of Julie's routine morning breaks taken in her car at Employer's parking lot, the layout of the parking lot, Julie's vehicle model, and Julie's habit of parking in an isolated space. On the other

hand, Employer argued that Julie's death was caused by a domestic assault that was purely private, and there was no connection between the assault and Julie's employment.

On cross-motions for summary judgment, an administrative law judge (ALJ) granted Employer summary judgment. The ALJ concluded that Julie's death "did not 'arise out of' her employment and [was] not compensable[.]" The Department's Secretary affirmed the ALJ's decision. Voeller appealed to circuit court, which affirmed the Department's decision.

Voeller appeals, raising two issues:

1. Whether the Department erred in granting summary judgment because it failed to construe the facts, inferences, and applicable presumptions in a light most favorable to Voeller; and whether the Department improperly resolved genuine material issues of fact.
2. Whether the Department erred in granting summary judgment because it either misapplied the correct legal standard or applied the incorrect legal standard when concluding that Julie's death did not arise out of her employment.

Mr. N. Dean Nasser, Jr. and Mr. Jimmy Nasser, Attorneys
for Claimants and Appellants Ronald Voeller et al.
Personal Representative of the Estate of Julie Diane
Tassler

Mr. Richard L. Travis and Mr. Eric D. DeNure, Attorneys for
Employer, Insurer and Appellees HSBC Card
Services, Inc. and Chartis Insurance

State v. Amick

Around 3:25 a.m., on September 11, 2011, Deputy Sheriff Shane Mentzer stopped a pickup driven by Brian Amick. Before the stop, Deputy Mentzer observed no traffic violations and did not seek to identify the driver because of suspicious illegal activity in the area or the lateness of the hour. Rather, Deputy Mentzer stopped Amick because he could not see Amick's rear license plate.

As Deputy Mentzer pulled behind Amick's pickup, he observed a rear license plate bracket bearing the name and logo of "Vern Eide Ford." When he walked toward Amick's driver's side window, Deputy Mentzer did not see the valid temporary license plate, which was displayed in the rear window. Rather, he initiated contact with Amick and shined his flashlight into the back seat of the pickup. After observing an open container, Deputy Mentzer asked Amick if he had been drinking. Amick answered affirmatively, and Deputy Mentzer began a DUI investigation. Amick was arrested for DUI. Only later during the investigation did the deputy notice the valid temporary permit on the back window.

Amick moved to suppress the evidence obtained as a result of the stop because Deputy Mentzer did not attempt to observe the presence of the validly displayed temporary license plate in the rear window before initiating contact with Amick. At the suppression hearing, Amick's father testified about a demonstrative photo shoot he and Amick conducted on January 31, 2012, purportedly depicting the scene of the stop. Amick sought to admit the photographs to support his argument that Deputy Mentzer would have been able to see Amick's valid temporary license plate prior to initiating contact with Amick. The court admitted the photographs over the State's objection. The court also considered Deputy Mentzer's testimony that he knew from

his ordinary experience that the presence of a dealer logo plate usually meant that the vehicle had recently been purchased, and after seeing the logo plate, Deputy Mentzer did not see the valid temporary permit on the lower right area of the rear window. He testified that he attempted to look for it, but there was a passenger in the bed of the pickup whose head obscured part of the back window.

The court issued findings of fact and conclusions of law. It found that Deputy Mentzer had reasonable articulable facts to justify making the brief investigatory stop of Amick's pickup solely for the purpose of determining whether that pickup properly displayed a valid temporary license plate. However, because Deputy Mentzer could have verified the presence and expiration date of that temporary plate without getting out of his patrol car and without approaching Amick's pickup, the court ruled that Deputy Mentzer unreasonably and illegally expanded the scope of the investigatory stop. The court ordered suppression of the evidence obtained as a result of the stop.

The State appeals asserting the court erred in suppressing the evidence. Amick filed a notice of review asserting that the court erred when it ruled that Deputy Mentzer had reasonable suspicion to warrant the investigatory stop.

Mr. Marty J. Jackley, Attorney General and Mr. Craig M. Eichstadt, Assistant Attorney General, Attorneys for Plaintiff and Appellant State of South Dakota

Mr. John R. Steele, Attorney for Defendant and Appellee
Brian Dennis Amick

In re Estate of Shipman

Eugene and Arline Shipman were married for over fifty years. In April 2008, Arline moved into a nursing home because she was suffering from dementia and required full-time care. On November 5, 2008, Eugene submitted a Medicaid long-term care application to the South Dakota Department of Social Services on behalf of Arline. The application sought Medicaid assistance for Arline’s nursing home care. After assessing the Shipmans’ financial resources, the Department concluded that Arline did not qualify for Medicaid because the value of the Shipmans’ combined resources exceeded the total allowable limit for long-term care.

After the Department’s denial of Arline’s initial application, Eugene and Arline “spent down” their combined financial resources. In January 2010, Eugene reapplied for Medicaid on Arline’s behalf. The Department reassessed the Shipmans’ resources at that time, and in February 2010, it approved Arline’s application for Medicaid.

Eugene died on July 31, 2010. In his will that had been executed on March 9, 2009, Eugene disinherited his wife because he stated he “ha[d] given her sufficient consideration during [his] lifetime.” Eugene’s will bequeathed half of his estate to the Shipmans’ son, David, and the remaining half to the Shipmans’ four grandchildren.

Although Arline had been disinherited in Eugene’s will, surviving spouses are generally entitled to an elective share of the decedent’s estate under SDCL 29A-2-202. However, on the same day that Eugene had executed his will, David, as Arline’s attorney in fact, had disclaimed on Arline’s behalf “any inheritance that [she] may be entitled to

in the estate of Eugene Shipman . . . due to the fact that he has taken care of [her] and paid for [her] nursing home care[.]”

David was appointed the personal representative of Eugene’s estate. Eugene’s estate notified the Department that Arline was disinherited under Eugene’s will. In response, the Department advised Arline that she must pursue her elective share to continue receiving Medicaid assistance.

A guardian ad litem was appointed to represent Arline’s interests. In October 2010, the guardian petitioned for Arline’s elective share and moved to set aside the disclaimer. Eugene’s estate opposed the petition, arguing that the disclaimer was valid and enforceable. Alternatively, Eugene’s estate argued that if the disclaimer was invalid, Arline had already received her elective share of the estate because Eugene had financially taken care of Arline during his lifetime and had spent down his resources to pay for her nursing home care until she became eligible for Medicaid.

After a hearing, the circuit court denied the guardian’s petition for Arline’s elective share. The court also denied the guardian’s motion to set aside the disclaimer. The court concluded that Arline had validly disclaimed her right to an elective share. The court also concluded that, even if the disclaimer was invalid, Arline had received her “fair share” of Eugene’s estate when, during Eugene’s lifetime, their financial resources were used to pay for her nursing home care until she obtained Medicaid eligibility. The Department subsequently filed a motion to intervene and a petition to reconsider the court’s decision. The court reconsidered its decision but denied the Department relief on the merits.

The Department appeals, raising two issues:

1. Whether the circuit court erred in concluding that Arline was not entitled to an elective share because she had received her “fair share” of Eugene’s estate when Eugene spent down their resources and paid for Arline’s nursing home care until she qualified for Medicaid.
2. Whether the circuit court erred in denying the motion to set aside the disclaimer of Arline’s elective share.

Mr. Marty J. Jackley, Attorney General and Jeremy D. Lund,
Special Assistant Attorney General, Attorneys for
Appellant South Dakota Department of Social
Services

Mr. Jack Gunvordahl, Attorney for Appellee Estate of
Eugene Shipman

Glossary of Terms

Affirm - When the Supreme Court “affirms” a circuit court’s action, it declares that the judgment, decree or order must stand as decided by the circuit court.

Appeal - The Supreme Court’s review of a circuit court’s decision in a lawsuit. The Supreme Court does not consider new evidence or listen to witnesses. Rather, it reviews the record of a case and applies the proper law to determine if the circuit court’s decision is correct.

Appellant - The person who takes an appeal from the circuit court to the Supreme Court. (In other words, the person who does not agree with the result reached in circuit court.)

Appellee - The person in a case against whom an appeal is taken; that is, the person who does not want the circuit court’s decision reversed. Sometimes also called the “respondent.”

Brief - A document written by a person’s attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which his legal position is based. The brief tells the Supreme Court the facts of the case, the questions of law involved, the law the attorney believes should be applied by the Court and the result the attorney believes the Court should reach.

Defendant - The person sued by the plaintiff or prosecuted by the state in the circuit court.

Oral Argument - An opportunity for the attorneys to make an oral presentation to the Supreme Court when the appeal is considered. Oral arguments also give the Court an opportunity to ask the attorneys questions about the issues raised in their briefs.

Plaintiff - The person who brings a lawsuit in the circuit court.

Record - All the papers filed in a circuit court case including any transcripts. This includes the original complaint, motions, court orders and affidavits and exhibits in the case.

Remand - The Supreme Court “remands” an appealed case back to the circuit court for some further action. For example, the Supreme Court might remand a case to the circuit court and require that court to hear additional evidence and make further factual findings that are important in deciding the case.

Reverse - When the Supreme Court “reverses” a circuit court decision, it finds that a legal error was made and requires that the decision be changed.

Transcript - A document that contains a verbatim account of all that was said in a circuit court case by the parties, the attorneys, the circuit judge, and any witnesses. The transcript is prepared by the court reporter and it is reviewed by the Supreme Court as part of the appeal process.

Website for South Dakota Supreme Court Opinions: http://ujs.sd.gov/
