

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
October Term of the Court
to be held
October 1 through October 3, 2012
University of Sioux Falls
Sioux Falls, South Dakota



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

October 1, 2012

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October 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,

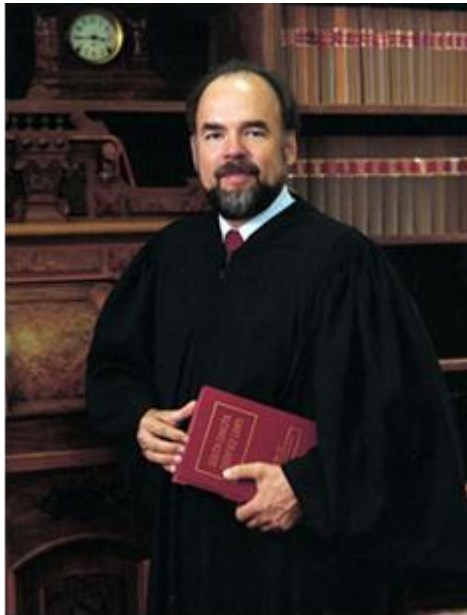
A handwritten signature in cursive script, reading "David Gilbertson".

David Gilbertson
Chief Justice

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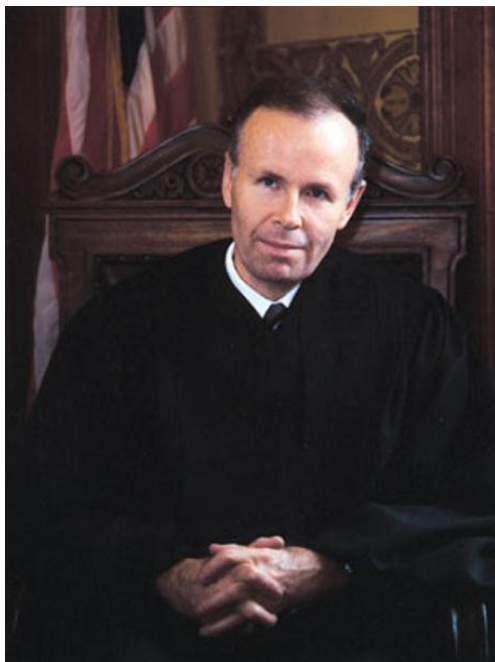
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The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to insure 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.



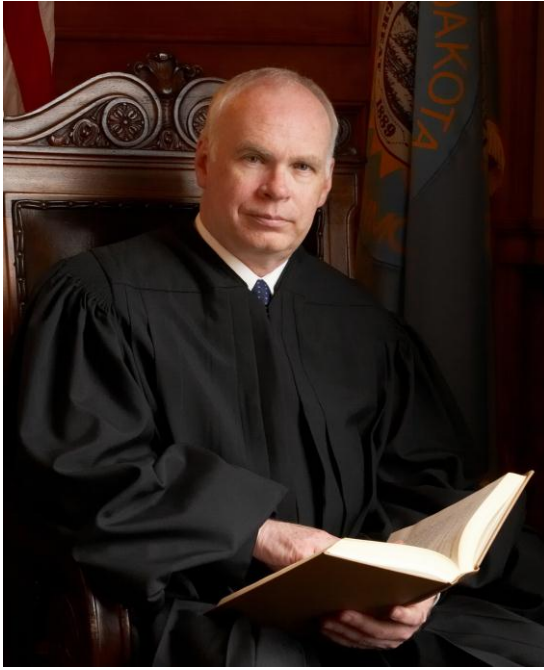
Justice John K. Konenkamp

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 and the Northwest portion of Lincoln 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.



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.

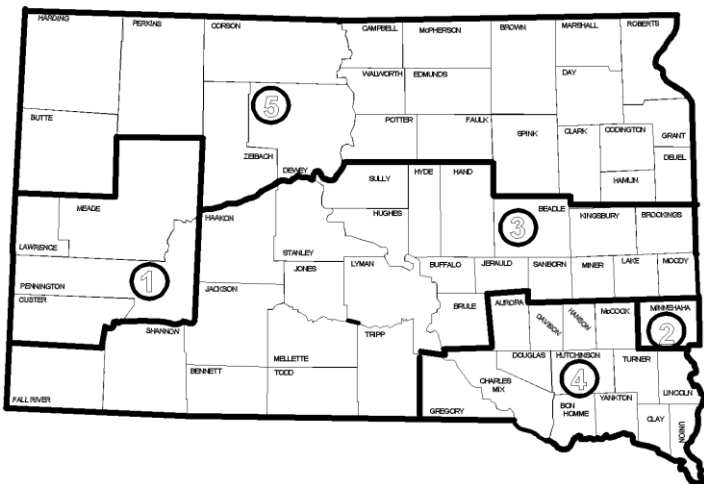
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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.

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 October 2012 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.

<h3>Case Summaries</h3>

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. Rolfe

In May 2009, the Pennington County Internet Crimes Division conducted an undercover investigation, looking for persons distributing or possessing child pornography. By using special software to conduct the investigation, law enforcement officers found a person who appeared to possess child pornography at a specific IP address. The person officers suspected of possessing child pornography used LimeWire, a person to person file sharing program, to share files. Investigators used a software program to locate and download three files containing child pornography.

In June 2010, using the same software, Pennington County investigators again made contact with a person using the same IP address. Investigators located and downloaded additional files containing child pornography. They also determined that the IP address was assigned to a Midcontinent Communications subscriber.

Also in June 2010, Pennington County investigators briefed a Deputy State's Attorney on their investigations. The investigators asked the Deputy State's Attorney to issue subpoenas to Midcontinent requesting the email address and personal information of the subscriber using the IP address that officers suspected of possessing child pornography.

Shortly after receiving the subpoenas, Midcontinent contacted investigators and provided them with a phone number and email address for the account in Rapid City. Using the phone number provided, investigators found that the number was registered to John Rolfe, who resided at the address provided by Midcontinent that was associated with the specific IP address. Another subpoena was issued by the Deputy State's Attorney, directing Midcontinent to provide information on the owners of all of the accounts associated with the original account.

On July 19, 2010, the circuit court granted a search warrant for the residence in Rapid City. Investigators executed the search on July 20 and seized cell phones, letters, cameras, memory flashcards, and two laptop computers. Investigators conducted a forensic analysis of these items. On the laptop found in Rolfe's bedroom, investigators discovered child pornography involving A.F., the 12-year-old daughter of Rolfe's son's live-in girlfriend. A.F. later told investigators that Rolfe had drugged her, sexually assaulted her, and filmed and photographed her over several years at his home and on various travels around the state and country.

On August 19, 2010, a Pennington County Grand Jury indicted Rolfe for three counts of first-degree rape and 12 counts of possessing, manufacturing or distributing child pornography.

Prior to trial, Rolfe's counsel filed a motion to suppress the evidence found in this case via the search of Rolfe's home and computer. Rolfe argued the subpoenas ordering Midcontinent to release the name and contact of information of the IP address were issued in violation of the law. Rolfe further argued that information collected as a result of the improper subpoenas was used to obtain search warrants and collect evidence at Rolfe's home. As a result, Rolfe argued that the evidence collected was "fruit of the poisonous tree" and should be excluded from use at trial.

The circuit court denied Rolfe's motion to suppress. The court found that an IP address is a unique number that identifies a computer and its location in connection to the internet. The court also found that Rolfe had no Fourth Amendment expectation of privacy in his IP address subscriber information because he publicly disseminated the information. Finally, the court found that even if the method of subpoenaing the IP address and records from Midcontinent was invalid, the court would not sanction the State's Attorney by suppressing the evidence in the case.

The circuit court conducted a jury trial in this case from April 18-21, 2011. At the beginning of the third day of trial, the State invoked SDCL 23A-24-6, a statute that allows for the partial closure of a courtroom when a child testifies about a sexual offense involving a child. The statute allows for the exclusion of the general public except for the parties' attorneys, victim or witness assistant, the victim's parents or guardians, officers of the court, and representatives of the media. Rolfe's counsel objected to the exclusion as a violation of Rolfe's Sixth Amendment right to a public trial. The circuit court overruled the objection and allowed the courtroom to be partially closed during A.F.'s testimony.

The jury found Rolfe guilty of three counts of first-degree rape of A.F. and 12 counts of possession, manufacturing or distribution of child pornography. The circuit court sentenced Rolfe to three concurrent life sentences without parole and 12 consecutive 10 year sentences in the South Dakota State Penitentiary.

Rolfe appeals, raising the following issues:

1. Whether the circuit court violated Rolfe's right to a public jury trial when it excluded the general public from the courtroom during A.F.'s testimony.
2. Whether the circuit court erred in refusing to impose sanctions against the State regarding the State's issuance of subpoenas prior to Rolfe's indictment.

Mr. Marty J. Jackley, Attorney General and Ms. Ann C. Meyer, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Ellery Grey, Attorney for Appellant and Defendant John Rolfe

Veldheer v. Peterson

Jered Mandel (Father) and Angela Peterson (Mother) met in Mitchell and had a four-year relationship. They never married, but had two children: P.D.M., born December 29, 2005, and P.J.M., born January 18, 2007. The children's maternal grandparents, the Veldheers (the grandparents), were involved in taking care of the children. Mother, Father, and the children lived together until January 2008, when Mother and Father separated and Mother moved into an apartment. Mother and Father then shared custody. When the children were with Mother, she often took them to the grandparents.

In July 2008, Mother was awarded sole legal and physical custody of the children. That same summer, the grandparents took the children to stay with them in Piedmont, SD. The grandparents became heavily involved in the day-to-day care of the children. Throughout periods in 2008, and for most of 2009 and 2010, the children spent the majority of the time with the grandparents. In 2009, Mother and Father gave the grandparents a power of attorney to make medical decisions regarding the children. Father did, however, remain in contact with the children.

In July 2010, the grandparents, through their attorney, requested Father to give the grandparents guardianship or take the children back into his care. Father subsequently filed a motion in circuit court to obtain custody of the children.

In September 2010, Mother and Father started a custody suit, and were awarded temporary joint physical custody, which alternated on a weekly basis. Prior to the trial involving permanent custody, the grandparents moved to intervene and obtain custody. The trial court allowed the grandparents to intervene.

Following a trial on all parties' requests for custody, the court ultimately awarded sole legal and physical custody to the grandparents. Father was awarded visitation in accordance with the South Dakota Visitation Guidelines. Father's motion for attorney's fees was denied.

Father appeals, raising the following issues:

1. Whether the trial court erred in allowing the grandparents to intervene in the parents' custody proceeding.
2. Whether the trial court erred in determining that Father's presumptive right to custody was rebutted under SDCL 25-5-29 (2), (3), and (4).
3. Whether the trial court erred in determining that it was in the best interests of the children to grant sole legal and physical custody to the grandparents.
4. Whether the trial court erred in determining that each party was responsible for its own attorney's fees.

Ms. Tressa L. Zharbock Kool, Attorney for Plaintiffs and Appellees Doug and Kari Veldheer

Ms. Donna L. Bucher, Attorney for Defendant and Appellee Angela Peterson

Ms. Dava A. Wermers, Attorney for Defendant and Appellant Jered Mandel

State v. Berget

On April 12, 2011, while an inmate in the South Dakota State Penitentiary, Rodney Scott Berget participated in the murder of correctional officer Ronald Johnson. On November 17, 2011, Berget pleaded guilty to First Degree Murder, a Class A felony. Berget waived his right to a jury determination of whether he would receive the death penalty or life in prison. A presentence hearing was conducted before the circuit court. The circuit court found the existence of two of the aggravating factors from SDCL 23A-27A-1. Specifically, the court found that “the offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person’s official duties” and “the offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement.” The court also considered evidence presented in mitigation and aggravation of punishment. After considering this evidence the circuit court imposed the death penalty.

Berget appealed the circuit court’s imposition of the death penalty. Berget raises several issues for our review:

1. Whether imposition of the death penalty violated the United States and South Dakota Constitutions in that:
 - a. The death penalty was imposed based on improperly considered extra-record evidence;
 - b. Berget did not receive an individualized sentencing determination; and

- c. Several of the circuit court's evidentiary rulings were erroneous. Berget specifically alleges that: the circuit court's evidentiary rulings violated Berget's right to confront witnesses against him; the circuit court received improper evidence regarding Berget's prior record and the circumstances of that behavior; the court improperly considered inadmissible victim-impact evidence; the circuit court did not make a proper record regarding its evidentiary rulings; evidence of Berget's troubled history establishes that imposition of the death penalty violates the United States and South Dakota Constitutions.
2. Whether Berget knowingly and intelligently waived his right to a jury determination of the appropriate sentence.
3. Whether the death penalty was excessive or disproportionate to the penalty imposed in similar cases.

Additionally, this Court is required by statute to review each death penalty imposed in South Dakota. SDCL 23A-27A-12 requires this Court to determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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

Mr. Jeff Larson, Ms. Cassandra McKeown and Ms. Cheri Scharffenberg, Attorneys for Defendant and Appellant Rodney Scott Berget

Schieffer v. Schieffer

On September 22, 2007, Carmen Schieffer and Kevin Schieffer were married. Prior to the marriage, Carmen worked for an international insurance and investment company in New York City, New York, while Kevin served as the CEO of Dakota, Minnesota, and Eastern Railroad (DM&E) in Sioux Falls, South Dakota. Kevin amassed a considerable amount of wealth throughout his career. As a result, neither Kevin nor Carmen worked outside of the home after Kevin stopped working for DM&E in October 2008.

At the time the parties were married, Carmen was pregnant with the parties' first child. The parties' daughter (AC-AS) was born on March 6, 2008. AC-AS was born with Down syndrome. Following her birth, AC-AS has received various services and therapies to help treat the symptoms of her Down syndrome. Some of these services are provided by the State of South Dakota. However, Kevin and Carmen have continuously supplemented these services with "private pay" therapy services for AC-AS.

On October 15, 2009, Carmen notified Kevin that she intended to relocate from Sioux Falls to New York City because she believed facilities in New York City could provide better services to AC-AS. Carmen was pregnant with the parties' son (AE-VS) at this point in time. Kevin disagreed with the proposed relocation. Thus, in response to Carmen's complaint requesting separate maintenance, custody, permission to relocate, and attorney fees, Kevin counterclaimed for a declaratory judgment based on the parties' prenuptial agreement. A hearing on the interim issues of child support, visitation, and attorney fees was held on February 11-12, 2010. AE-VS was born on May 4, 2010.

On October 11, 2010, Kevin amended his answer and counterclaim, seeking a divorce from Carmen on the grounds of irreconcilable differences. Prior to trial, the parties stipulated to the enforceability of their prenuptial agreement. The parties' divorce trial was held on November 15-19, 2010. On March 4, 2011, the trial court entered its Findings of Fact and Conclusions of Law. However, both parties moved for reconsideration/clarification/amendment of the trial court's findings. The trial court addressed these motions at a hearing held on May 23, 2011. On July 12, 2011, the trial court entered an order on the parties' Motions for Reconsideration, a Judgment and Decree of Divorce, and Amended Findings of Fact and Conclusions of Law.

In its Judgment and Decree of Divorce, the trial court granted Kevin a divorce based upon irreconcilable differences and denied Carmen's request to relocate to New York City. The trial court found the parties' prenuptial agreement was enforceable, and ordered Kevin to pay Carmen \$3,971,973.90 to satisfy the \$5,000,000 total Carmen was entitled to under the prenuptial agreement. In addition, the trial court awarded Kevin and Carmen joint legal and physical custody of AC-AS and AE-VS. The trial court also ordered that the recommendations of AC-AS's doctor (Dr. Blake) would control matters in which the parties disagreed about the healthcare needs of the children, including disputes about AC-AS's therapy. Further, the trial court ordered that Kevin be permitted to take part in determining the appropriate financial terms for certain services Carmen specifically wanted AC-AS to participate in, assuming Dr. Blake found these services to be appropriate.

Additionally, the trial court rejected Carmen's request for child support of more than \$25,000 per month, and instead ordered Kevin to pay Carmen \$2,815 per month as child support. The trial court also ordered Kevin to pay for health insurance for the children, 95% of AC-AS's therapy costs, 95% of the supplemental costs associated with AC-AS's

special needs, and 95% of the children's uncovered medical expenses. Finally, the trial court denied Carmen's request for attorney fees of more than \$370,000.

Carmen appeals, raising the following issues:

1. Whether the trial court abused its discretion in adopting a modified version of the custody schedule recommended by Dr. Price (Kevin's expert) instead of adopting the custody schedule proposed by Dr. Ackerman (Carmen's expert).
2. Whether the trial court's Amended Findings of Facts regarding the custody determination factors were clearly erroneous, causing the trial court's joint legal and physical custody award to be an abuse of discretion.
3. Whether the trial court abused its discretion in allowing Kevin to participate in determining the financial terms of certain services for AC-AS.
4. Whether the trial court abused its discretion in ordering Kevin to pay \$2,815 per month as child support.
5. Whether, in dividing the property, the trial court abused its discretion in rejecting Carmen's request for reimbursement of \$6,000 she claims she paid Kevin.
6. Whether the trial court abused its discretion in denying Carmen's request for attorney fees.

Ms. Linda Lea M. Viken and Ms. Kylie M. Riggins, Attorneys
for Plaintiff and Appellant Carmen Colette Schieffer

Mr. Thomas J. Welk and Mr. Jason R. Sutton, Attorneys for
Defendant and Appellee Kevin Victor Schieffer

State v. Kvasnicka

On July 9, 2010, Tammy Kvasnicka was celebrating her birthday by having several alcoholic drinks at a friend's house and at downtown bars in Sioux Falls, South Dakota. In the early morning hours on July 10, Kvasnicka left the downtown area in her Dodge Intrepid.

At approximately 2:00 a.m., Kvasnicka was traveling southbound in the northbound lane on Interstate 229 when she struck a vehicle carrying five passengers. The front seat passenger suffered a serious injury to his arm and a back seat passenger died at the scene. Kvasnicka was not seriously injured in the collision.

At the hospital, Kvasnicka was read her Miranda rights and placed under arrest. Her blood was drawn at 3:44 a.m., which reflected a blood alcohol content between 0.225 and 0.219. Following a second drawing at 4:47 a.m., Kvasnicka's blood alcohol content was between 0.204 and 0.200.

On the evening of July 10, Kvasnicka was questioned at the Sioux Falls Police Department. After being read her Miranda rights, Kvasnicka admitted to consuming several drinks containing alcohol and smoking marijuana the previous evening.

A Minnehaha County Grand Jury indicted Kvasnicka with a number of charges, including Manslaughter in the First Degree While Engaged in the Commission of a Felony, Driving While Under the Influence of Alcohol, Class C felony, in violation of SDCL 22-16-15(1) and Manslaughter While Engaged in the Commission of a Felony, Driving While Having .08 Percent or More by Weight of Alcohol in the Blood, Class C felony, in violation of SDCL 22-16-15(1).

At trial, Officer Brian Crozier, who is trained in accident reconstruction, testified about the force of the impact of the vehicles. Kvasnicka objected to the scientific basis of Officer Crozier's opinion. The trial judge overruled Kvasnicka's objection and found that Officer Crozier's testimony gave the jury information about force of the impact and was relevant to show that Kvasnicka's Dodge Intrepid was being used as a deadly weapon at the time of the collision. In front of the jury, Officer Crozier was then allowed to opine that it would take the simultaneous firing of 902 40-caliber Glock pistols to equal the same amount of kinetic energy that Kvasnicka's Dodge Intrepid exerted at the time of the collision.

The jury found Kvasnicka not guilty of the two counts of Manslaughter While Engaged in the Commission of a Felony and guilty of Manslaughter in the First Degree by Means of a Dangerous Weapon, Vehicular Homicide, Vehicular Battery, and Driving Under the Influence. Kvasnicka was sentenced to 70 years in the South Dakota State Women's Prison with 18 years suspended provided that she meets a number of court-imposed conditions.

Kvasnicka appeals her judgment and sentence. She raises the following issues:

1. Whether the language "while engaged in the commission of a felony" under SDCL 22-16-15(1) is prejudicial when referring to the crime of driving under the influence.
2. Whether the trial court abused its discretion in admitting the expert testimony of Officer Brian Crozier regarding the kinetic energy of Kvasnicka's vehicle at the time of the collision.

Mr. Marty J. Jackley, Attorney General and Ms. Ann C. Meyer, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Ms. Nicole J. Laughlin and Mr. Marcus Walton, Minnehaha County Public Defender's Office, Attorneys for Defendant and Appellant Tammy Jean Kvasnicka

Young v. Oury

Kathy Young was diagnosed with a heart condition during her treatment for a cancerous tumor in her kidney in 2007 and 2008. After being declared cancer free in July 2008, Kathy consulted with a doctor in Spearfish, who informed her that her aortic valve needed to be replaced, and referred her to Dr. James Oury at Rapid City Regional Hospital.

Dr. Oury recommended that Kathy undergo what is termed a “Ross procedure.” The procedure is a pulmonary autograft, in which a diseased aortic valve is replaced with the patient’s own healthy pulmonary valve, and a pulmonary allograft from a cadaver is used to replace the patient’s pulmonary valve. Kathy underwent surgery in November 2008, at Rapid City Regional Hospital. Her heart stopped during the surgery, and she was placed on life support. The next evening, Kathy was removed from life support and passed away.

Kathy’s husband, Greg, brought suit against Dr. Oury on behalf of Kathy’s estate. He alleged that Dr. Oury was negligent for recommending the Ross procedure for a 56-year-old woman with one kidney. He further argued that Dr. Oury failed to obtain Kathy’s informed consent. At trial, Dr. Oury asserted that Kathy was a perfect candidate for the Ross procedure that he had discussed with her the risks and benefits associated with the procedure, and had obtained her informed consent before surgery. The jury returned a verdict in favor of Dr. Oury.

Greg moved for a new trial, asserting, among other things, that the circuit court erred when it admitted an exhibit prepared by Dr. Oury and presented to Greg just before trial. The exhibit, entitled “Patient Survival Comparison (%)” purported to represent the survival rates

for the various heart-valve replacement procedures. Greg argued that he was prejudiced because Dr. Oury's late disclosure left him without time to counter or disprove the information, and the information was used by Dr. Oury to directly support that Kathy gave informed consent and was a candidate for the Ross procedure. While the circuit court ultimately excluded the evidence, it was not until after Dr. Oury had fully testified about it.

Greg also asserted that the court prejudicially excluded Greg's requested jury instruction related to spoliation of evidence. It is undisputed that Dr. Oury videotaped Kathy's surgery and that video has since been lost or destroyed. The court deemed the instruction irrelevant because Greg's case was not based on any negligence performed by Dr. Oury during the surgery, but on his alleged negligence for recommending the procedure and not obtaining her informed consent.

Greg appeals the denial of his motion for a new trial and raises the following issues:

1. Whether Greg was denied a fair trial by admission of Dr. Oury's evidence on patient survival rates.
2. Whether the court erred when it excluded evidence and admissions related to Dr. Oury's lawsuit against Rapid City Regional Hospital, where the surgery was performed.
3. Whether the court erred when it refused to instruct the jury on spoliation of evidence.
4. Whether Greg was denied a fair trial because of the circuit court's improper interjections and commentary in the jury's presence.

Mr. Ronald A. Parsons, Jr., Mr. Steven M. Johnson, Mr. G. Verne Goodsell and Mr. David S. Barari, Attorneys for Plaintiff and Appellant, Greg Young, as Special Administrator of the Estate of Kathy Young

Mr. Lonnie R. Braun and Mr. Gregory J. Bernard, Attorneys for Defendant and Appellee, Dr. James H. Oury

State v. Bonacker

At about 1:00 a.m. on April 3, 2010, South Dakota Highway Patrol Trooper Isaac Kurtz was westbound on 60th Street North in Sioux Falls when he observed an eastbound vehicle approaching with its headlights at what he thought was their high beam position. Kurtz thought the driver of the oncoming car had failed to dim his headlights and initiated a traffic stop. When he approached the driver of the other vehicle, later identified as Andrew Bonacker, Kurtz explained the reason for the stop. Bonacker insisted his headlights were on low beam. A passenger in his vehicle, identifying herself as the owner, told Kurtz other drivers often flashed their lights at her as a signal to dim her headlights when they were already on low beam. Bonacker demonstrated the high and low beams on a nearby wall and Kurtz commented “Okay, they’re really bright huh?” Kurtz then asked Bonacker for his driver’s license and Bonacker replied that he did not have one. A subsequent computer check by Kurtz revealed that Bonacker’s license was revoked.

Bonacker was arrested and charged with driving with a revoked license. During the magistrate court proceedings, Bonacker moved to suppress the evidence from the traffic stop on the basis that Kurtz should have let him go after confirming he had not failed to dim his headlights. Bonacker argued Kurtz’s request for his driver’s license after determining he had not committed the violation for which he was stopped violated the prohibitions against unreasonable searches and seizures in the United States and South Dakota Constitutions. The magistrate court denied the motion and Bonacker was convicted after a court trial. He was sentenced to ninety days in the county jail, with eighty-five days suspended, and to a fine of \$200 plus costs. Bonacker appealed his conviction to circuit court arguing that the magistrate court erred in denying his motion to suppress. The circuit court affirmed the conviction and

Bonacker now appeals to the Supreme Court arguing his constitutional rights were violated when he was detained by law enforcement after it was determined there was no suspicion of criminal activity.

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

Ms. Nichole J. Laughlin and Mr. Michael G. Miller, Minnehaha County Public Defender's Office, Attorneys for Defendant and Appellant Andrew J. Bonacker

In re Prevention of Significant Deterioration Air Quality Permit Application of Hyperion Energy Center – Hyperion Refining, LLC (Hyperion I)

Hyperion Refining, LLC (Hyperion) proposed to construct a petroleum refinery/power plant facility in Union County, South Dakota. Federal and state regulations required Hyperion to obtain a “Prevention of Significant Deterioration Air Quality Permit” before constructing the facility. Among other things, the permit regulates air quality by limiting the contaminants a facility may emit into the ambient air.

In December 2007, Hyperion submitted a permit application to the South Dakota Department of Environment and Natural Resources (DENR). Three citizen groups intervened and contested the issuance of the permit: Save Union County, Citizens Opposed to Oil Pollution, and the Sierra Club (Citizens).

The Citizens requested that a state Environmental Impact Statement be prepared before the permit was issued in order to analyze the facility’s environmental impacts, including the impact on air, water, and soils. DENR, the state agency in charge of preparing such statements and considering such permits, denied the Citizens’ request and recommended approval of Hyperion’s permit with ninety-three pages of conditions.

DENR’s recommendation to grant the permit was considered in a 2009 contested case hearing before the South Dakota Board of Minerals and the Environment (Board). At the beginning of the hearing, the Citizens again requested an Environmental Impact Statement. The Board also denied the Citizens’ request. On August 20, 2009, the Board authorized issuance of the permit.

The permit required Hyperion to commence construction on the facility within eighteen months. Therefore, Hyperion's deadline to commence construction was February 20, 2011. The permit provided that, if construction was not commenced by that time, the permit became invalid. The permit also provided, however, that DENR could grant Hyperion an extension if Hyperion applied for the extension within the eighteen-month time period and demonstrated that the extension was justified.

On June 23, 2010, Hyperion filed a motion in circuit court to order the Board to consider additional evidence on several issues, including a request to extend the commencement of construction deadline. On the same date, the court granted the motion for the Board to hear additional evidence. Also on the same date, Hyperion filed a construction extension application with DENR, requesting an initial extension to August 20, 2012.

DENR proposed a draft amended permit, which was made available for public comment on February 14, 2011. On March 31, 2011, Hyperion filed its comments on the draft amended permit and then requested extending the construction deadline to eighteen months after the Board approved the amended permit.

After further review and public comment, a contested case hearing on the request for an amended permit was held in July 2011. At the hearing, Hyperion indicated that it had not commenced construction for a number of reasons, including a national economic downturn, the need to address new federal regulations regarding sulfur dioxide and nitrogen dioxide emissions, the identification of a new emission source at the proposed facility, and the uncertainty of the permit's status as a result of the ongoing litigation.

The Board authorized issuance of an amended permit in September 2011. The amended permit granted Hyperion's requested extension of the construction deadline. The new deadline allowed Hyperion to begin construction within eighteen months after the effective date of the amended permit. The circuit court affirmed the Board's issuance of the amended permit that included an extended construction deadline.

The Citizens appeal, raising the following issues:

1. Whether the Board should have ordered an Environmental Impact Statement.
2. Whether the permit became invalid because, even though Hyperion's initial extension application was requested within the eighteen-month time to begin construction, the Board did not grant the extension until the initial eighteen-month period had expired.
3. Whether the permit became invalid because, even though Hyperion's initial extension request was made within the eighteen-month time to begin construction, Hyperion's subsequent request for an extension was made after the initial eighteen-month construction deadline expired.
4. Whether Hyperion presented satisfactory justification for its request to extend the commencement of construction deadline.

Mr. Marty J. Jackley, Attorney General, Mr. Charles D. McGuigan, Chief Deputy Attorney General and Ms. Roxanne Giedd, Deputy Attorney General, Attorneys for Appellee South Dakota Department of Environment & Natural Resources

Mr. Frederick W. Addison, III, Ms. Amy L. Rickers and Mr.
Todd Meierhenry, Attorneys for Appellee Hyperion
Resources, LLC

Mr. Robert L. Graham, Ms. Gabrielle Sigel, Mr. John H.
Davidson, Jr. and Mr. Sam E. Khorroosi, Attorneys for
Intervenors and Appellants Sierra Club, Save Union
County and Citizens Opposed to Oil Pollution

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/

NOTES

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