

SOUTH DAKOTA SUPREME COURT

Term of Court | October 4-5, 2023



University of South Dakota
Knudson School of Law
Vermillion, South Dakota



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Steven R. Jensen
CHIEF JUSTICE



Supreme Court
STATE OF SOUTH DAKOTA

October 4, 2023

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October Term
of Court.

This booklet has been prepared as part of the continuing
effort of the Supreme Court to promote increased public
knowledge of the South Dakota Unified 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,

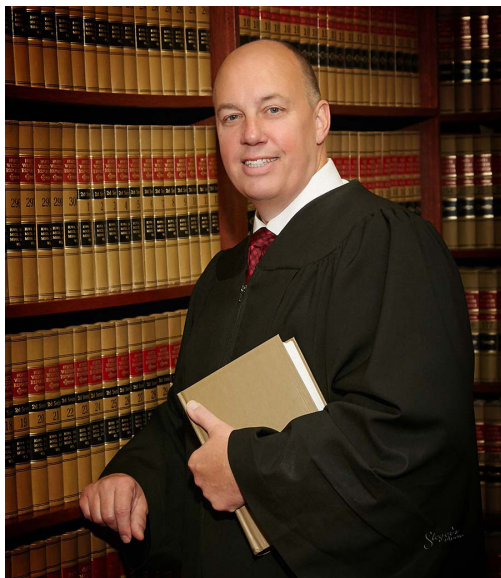
A handwritten signature in blue ink, appearing to read "Steven R. Jensen".

Steven R. Jensen Chief Justice

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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 ensure 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 STEVEN R. JENSEN

Fourth Supreme Court District

Chief Justice Steven R. Jensen was appointed to the Supreme Court by Gov. Dennis Daugaard and sworn in on Nov. 3, 2017. He was elected to a four-year term as Chief Justice by members of the Supreme Court in 2021.

Chief Justice Jensen grew up on a farm near Wakonda, S.D. He received his undergraduate degree from Bethel University in St. Paul, Minn., in 1985 and his juris doctor from the University of South Dakota School of Law in 1988. He clerked for Justice Richard W. Sabers on the South Dakota Supreme Court before entering private practice in 1989 with the Crary Huff Law Firm in Sioux City, Iowa, and Dakota Dunes, S.D. In 2003, Chief Justice Jensen was appointed a circuit court judge for the First Judicial Circuit by Gov. M. Michael Rounds. He became the presiding judge of the First Judicial Circuit in 2011.

Chief Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the SD Judges Association, and has served on other boards and commissions. In 2009, Chief Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C. He and his wife, Sue, have three children and three grandchildren.



JUSTICE JANINE M. KERN

First Supreme Court District

Justice Janine M. Kern was appointed to the Supreme Court on Nov. 25, 2014, by Gov. Dennis Daugaard.

Justice Kern received a bachelor of science degree in 1982 from Arizona State University and a juris doctor degree from the University of Minnesota Law School in 1985. Justice Kern worked in the Attorney General's office from 1985 to 1996 serving in a variety of capacities including the Appellate Division, Drug Prosecution Unit and as director of the Litigation Division. She was appointed a circuit court judge for the Seventh Judicial District in 1996 and served 18 years on the trial court bench.

Justice Kern is a member of the American Law Institute, National Council of Juvenile and Family Court Judges, State Bar Association, Pennington County Bar Association, American Bar Association Fellows and past president of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004 to 2013, Federal Advisory Committee on Juvenile Justice from 2004 to 2008, and on numerous other boards and commissions. Justice Kern and her husband, Greg Biegler, make their home in the beautiful Black Hills.



JUSTICE MARK E. SALTER

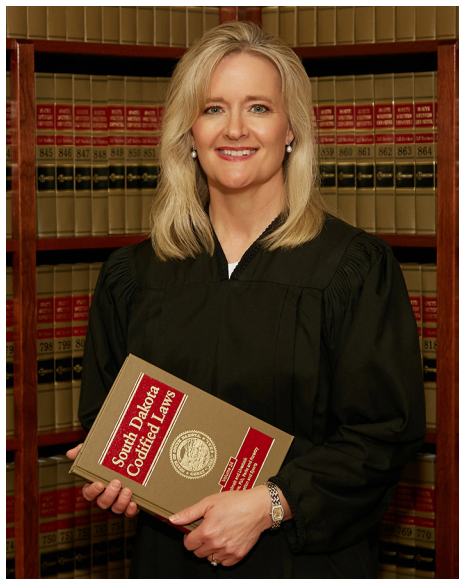
Second Supreme Court District

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Justice Mark E. Salter became a member of the Supreme Court on July 9, 2018, following his appointment by Gov. Dennis Daugaard.

Justice Salter received a bachelor of science degree from South Dakota State University in 1990 and his juris doctor degree from the University of South Dakota School of Law in 1993. After clerking for a Minnesota state district court, he served on active duty in the United States Navy until 1997 and later in the United States Naval Reserve. Justice Salter practiced law with the Sioux Falls firm of Cutler & Donahoe, where he became a partner before leaving in 2004 to return to public service with the United States Attorney's Office for the District of South Dakota. As an assistant United States attorney, Justice Salter focused on appellate practice and became the chief of the office's Appellate Division in 2009. He was appointed as a circuit court judge by Gov. Daugaard for the Second Judicial Circuit in 2013.

Justice Salter served as the presiding judge of the Minnehaha County Veterans Treatment Court from its inception in 2016 until 2018. He also serves as an adjunct professor at the Knudson School of Law, where he has taught advanced criminal procedure and continues to teach advanced appellate advocacy. He and his wife, Sue, have four children.



JUSTICE PATRICIA J. DEVANEY

Third Supreme Court District

Justice Patricia J. DeVaney was appointed to the Supreme Court by Gov. Kristi Noem and sworn in on May 23, 2019.

Justice DeVaney was born and raised in Hand County and graduated from Polo High School. She received her bachelor of science degree in 1990 from the University of South Dakota and her juris doctor degree from the University of Virginia School of Law in 1993. Justice DeVaney began her career of public service as an assistant attorney general in the South Dakota Office of Attorney General, where she practiced law from 1993 to 2012. She began her practice in the Appellate Division, then moved to the Litigation Division where she spent 17 years as a trial lawyer, prosecuting major felony offenses as well as representing the state in civil litigation in both state and federal trial and appellate courts. She also handled administrative matters for state agencies and professional licensing boards. Justice DeVaney was appointed by Gov. Dennis Daugaard as a circuit judge for the Sixth Judicial Circuit in 2012.

Justice DeVaney is currently president elect of the South Dakota Judges Association. She has served on various other committees and boards in her professional capacity and in the Pierre community, where she resides with her husband, Fred, and their three children.



JUSTICE SCOTT P. MYREN

Fifth Supreme Court District

Justice Scott P. Myren, who was sworn in to the Supreme Court on Jan. 5, 2021, was appointed by Gov. Kristi Noem.

Justice Myren grew up on his family farm in rural Campbell County and graduated from Mobridge High School. He received a bachelor of science degree from the University of South Dakota in 1985 and earned his juris doctorate from Rutgers University in 1988. Justice Myren practiced law in Denver before returning to South Dakota to work as a staff attorney for the South Dakota Supreme Court. He served as an administrative law judge for the Office of Administrative Hearings and magistrate judge for the Sixth Judicial Circuit. In 2003, he was appointed as a circuit judge for the Fifth Judicial Circuit by Gov. M. Michael Rounds. He was re-elected by the voters in 2006 and 2014 and was appointed presiding judge in 2014.

Justice Myren served as chair of the Unified Judicial System's Presiding Judges Council, president of the South Dakota Judges Association and has served on numerous committees. He was selected as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C., in 2009. He and his wife, Dr. Virginia Trexler-Myren, have two daughters.

CLERK OF THE SUPREME COURT



Shirley Jameson-Fergel is the clerk of the Supreme Court. This office assists the Supreme Court, and especially the Chief Justice, in the organization of correspondence, exhibits and other documentation related to formal activities of the 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 office is also

responsible for 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 opinions on the cases under consideration.



L-R: Rex Schlicht, Supreme Court's law clerk; Benjamin Schroeder, Justice Myren's law clerk; Gabrielle Unruh, Justice Salter's law clerk; Connor McCormick, Chief Justice Jensen's law clerk; Leo O'Malley, Justice Kern's law clerk; and Jennifer Williams, Justice DeVaney's law clerk

SOUTH DAKOTA COURTS

The South Dakota Unified Judicial System consists of the Supreme Court, circuit courts and State Court Administrator's Office. The Supreme Court is the state's highest court and final decision maker on South Dakota law. The circuit courts are the state's trial courts where criminal proceedings and civil litigation are handled. The State Court Administrator's Office provides centralized administrative assistance and support services for the South Dakota judiciary.



SUPREME COURT

The South Dakota Supreme Court is the state's highest court and the court of last resort for state appellate actions.

The Supreme Court is comprised of the Chief Justice, who is the administrative head of the Unified Judicial System, and four justices who are entrusted to deliver the final judicial authority on all matters involving the legal and judicial system of South Dakota.

Supreme Court justices are appointed by the Governor from a list of nominees selected by the South Dakota Judicial Qualifications Commission. One justice is selected from each of five geographic appointment districts. Permanent justices must be voting residents of the district from which they are appointed at the time they take office. Justices face a nonpolitical retention election three years after appointment and every eight years after that.

The Supreme Court:

- Holds court terms throughout the calendar year.
- Has appellate jurisdiction over circuit court decisions.
- Has original jurisdiction in cases involving interests of the state.
- Issues original and remedial writs.
- Has rule-making power over lower court practice and procedure and has administrative control over the Unified Judicial System.
- Renders advisory opinions to the Governor, at their request, on issues involving executive power.



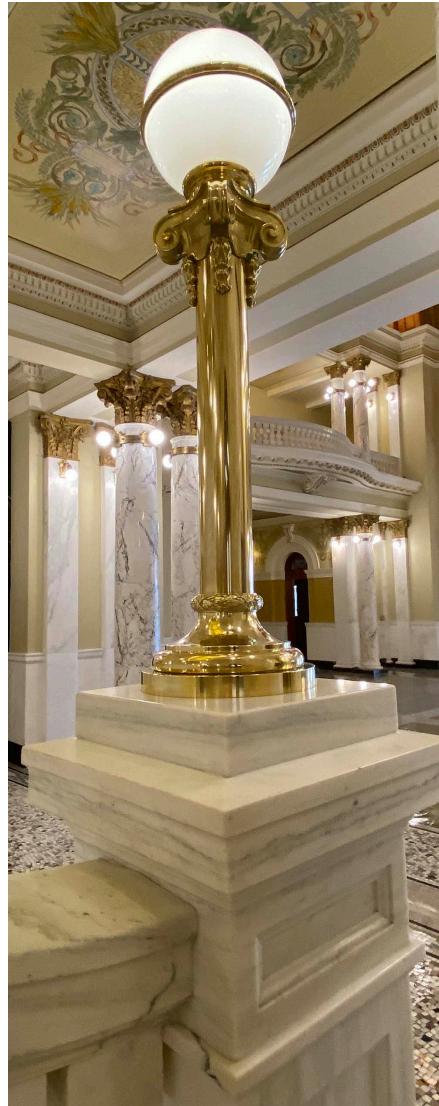
CIRCUIT COURTS

Circuit courts are the state's trial courts of general jurisdiction through which the bulk of criminal proceedings and civil litigation are processed.

South Dakota has seven judicial circuits, 44 circuit judges and 17 magistrate judges. Circuit court services are available in each county seat.

Circuit court judges are elected by the voters within the circuit where they serve. The judges must be voting residents of their circuit at the time they take office. In the event of a vacancy, the Governor appoints a replacement from a list of nominees selected by the Judicial Qualifications Commission.

- Circuit courts are trial courts of original jurisdiction in all civil and criminal actions.
- Circuit courts have exclusive jurisdiction in felony trials and arraignments and civil actions involving damages of more than \$12,000.
- Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.



SUPREME COURT

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.



Appellate Jurisdiction

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.

SUPREME COURT

- 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 15 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 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. Opinions are also available online at: <http://ujs.sd.gov>.



Original Jurisdiction

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.



Justices

The five members of the Supreme Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business.

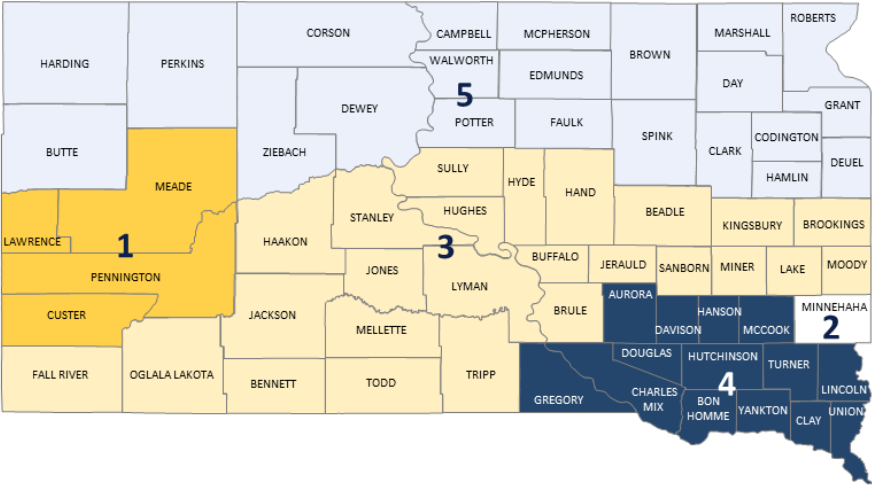
It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have 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.



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 70. 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 1980, vacancies on the Supreme Court are filled by the 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.

SUPREME COURT DISTRICT MAP



- **Chief Justice Steven R. Jensen**
Appointed to the Supreme Court in 2017 from district four.
- **Justice Janine M. Kern**
Appointed to the Supreme Court in 2014 from district one.
- **Justice Mark E. Salter**
Appointed to the Supreme Court in 2018 from district two.
- **Justice Patricia J. DeVaney**
Appointed to the Supreme Court in 2019 from district three.
- **Justice Scott P. Myren**
Appointed to the Supreme Court in 2021 from district five.

Our Mission

Justice for All

Our Vision

We are stewards of an open, effective and accessible court system, worthy of the public's trust and confidence.

COURTROOM PROTOCOL

The following list of do's and do not's was prepared for the benefit of anyone attending one of the Supreme 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.

TERM OF COURT CASE SUMMARIES

Eight cases are scheduled for oral argument during the Supreme Court's October 2023 Term of Court. 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.

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.



CASES

Case #30277

Wednesday, Oct. 4, 2023—Number 1

Love's Travel Stop v. City of Wall

Love's Travel Stops & Country Stores, Inc. (Love's) entered into a conditional purchase agreement to buy a portion of land owned by One Shot, L.L.C. in Wall, South Dakota (City). Love's purchased the property with the intent to develop it into a new travel stop. In October 2019, Love's submitted a rezoning request to the City and later submitted a building permit application. At a meeting held in February 2020, the City Council denied both the rezoning and building permit applications.

On March 26, 2020, Love's filed a writ of mandamus seeking an order that the City's zoning ordinances do not apply to its property along with an order requiring the City Council to issue a building permit to Love's. On August 12, 2021, the Seventh Judicial Circuit granted Love's writ of mandamus in part ordering the City Council to reconsider Love's commercial building application. In addition, prior to the City Council's reconsideration, it was ordered to analyze and determine whether any of its members had conflicts of interest that would disqualify them from voting on and discussing the building permit application pursuant to SDCL 6-1-17.

On September 20, 2021, after conducting a conflict-of-interest analysis, the City Council determined that no member had a conflict of interest under SDCL 6-1-17. On October 18, 2021, the City Council held a public hearing regarding Love's building permit application. After the hearing, the City Council denied the application in a 4-2 vote.

On November 12, 2021, Love's filed a motion to show cause which sought to hold the City in contempt for its failure to comply with the court's earlier order. On August 16, 2022, the circuit court held that the City Council had willfully and contumaciously disobeyed its final order resolving Love's mandamus petition because its conflict-of-interest analysis was less than comprehensive. As a result, the circuit court ordered the City to issue Love's a building permit as a remedy for its failure to comply with the court's order.

CASES

The City raises the following issues on appeal:

1. Whether the circuit court erred in finding the City in contempt of the circuit court's final order by failing to consider whether any of its city council members had a conflict of interest under SDCL 6-1-17.
2. Whether the circuit court abused its discretion in ordering the City to issue Love's a building permit as a remedy for its finding of civil contempt.

Mr. Ronald A. Parsons, Mr. Kent R. Hagg, and Ms. Stephanie Trask, Attorneys for Appellants City of Wall, South Dakota; City Council for Wall, South Dakota; and Planning and Zoning Commission for Wall, South Dakota

Mr. Michael F. Nadolski, Mr. Jeffrey D. Collins, and Ms. Dana Van Beek Palmer, Attorneys for Appellees Love's Travel Stops & Country Stores, Inc. and One Shot, L.L.C.

CASES

Case #30023

Wednesday, Oct. 4, 2023—Number 2

State v. O’Neal

Christina Guggenberger called law enforcement on December 7, 2018, and reported that she found a photo of a topless 10- or 11-year-old girl on Michael O’Neal’s cellphone. Guggenberger, O’Neal’s then-fiancé, informed law enforcement of O’Neal’s phone number, the passcode to his phone, and the colors of the phone and phone case. Guggenberger also told law enforcement where O’Neal and the phone could be located.

Officer Ryan Hansen of the Sioux Falls Police Department was dispatched to O’Neal’s workplace and told to secure the phone. After Officer Hansen arrived at the workplace, he located O’Neal and explained that he would be taking O’Neal’s phone because of an allegation regarding photos it contained. Officer Hansen described the phone he was looking for. O’Neal informed Officer Hansen that his phone was in the back employee area and that it did not contain any concerning photos. The description of the phone given by Guggenberger was consistent with the phone O’Neal retrieved and handed to Officer Hansen. Without a warrant, Officer Hansen then seized O’Neal’s phone, placed it in airplane mode, and transported it to the Department’s evidence bureau. Officer Hansen did not search the contents of the phone.

The State obtained a warrant on December 11, 2018, to search O’Neal’s phone. The subsequent search revealed photos alleged to be child pornography. Guggenberger later contacted law enforcement, this time explaining that O’Neal had other property at her apartment. With her consent, law enforcement retrieved hard drives, SD cards, and a pillowcase of printed photographs from Guggenberger’s apartment. The State obtained a second search warrant on January 2, 2019, to search the contents of these items. One of the hard drives obtained from Guggenberger’s apartment also contained photos alleged to be child pornography.

O’Neal was indicted on February 13, 2020, for 15 counts of possessing, manufacturing, or distributing child pornography under SDCL 22-24A-3. O’Neal requested a bill of particulars from the State to identify

CASES

the specific photos corresponding to each count. The State provided O'Neal with a list of hash values identifying each photo associated with a particular count in the indictment.

Prior to trial, O'Neal filed a motion to suppress the December 7, 2018 seizure of his phone, arguing that the warrantless seizure without his consent violated his Fourth Amendment rights. He also filed a motion to suppress the evidence obtained from the search of his phone pursuant to the December 11 search warrant. O'Neal claims that the warrant was issued without probable cause because the affidavit submitted in support did not contain sufficient information regarding the reliability of the informant or corroboration of the information provided. The circuit court determined the warrantless seizure of the phone violated O'Neal's Fourth Amendment rights but concluded that the evidence later obtained from the phone via the search warrant was admissible under the attenuation doctrine. The court also concluded there was probable cause to support the warrant.

O'Neal also filed a motion to dismiss the case because a 13-month delay between the investigation and his indictment violated his due process rights. The circuit court concluded O'Neal had not shown actual and substantial prejudice from the delay and denied the motion.

Finally, O'Neal moved to preclude the State from introducing any images other than those that had been identified via hash values in the bill of particulars. This motion was heard on the first day of trial, prior to any witnesses being called. In response to the motion, the State advised the court and defense counsel of its intention to offer as exhibits larger images of some of the photos discovered on O'Neal's phone that did not correspond to the hash values provided in the bill of particulars. Some of the initial hash values provided were for thumbnail-size images of these same photos. The State offered the additional images to show that O'Neal had clicked on the thumbnails and viewed them as larger images in order to refute O'Neal's claim that he did not knowingly possess child pornography. The circuit court denied O'Neal's motion with respect to these particular images and admitted them under Rule 404(b) as other acts evidence relevant to show intent, knowledge, or lack of accident.

CASES

After considering the evidence admitted at trial, the jury convicted O'Neal on all 15 counts. O'Neal raises the following issues on appeal:

1. Whether the circuit court erred by applying the attenuation doctrine in admitting the evidence obtained from O'Neal's cell phone and by determining that the warrant to search the phone was supported by probable cause.
2. Whether the circuit court erred when it denied O'Neal's claim that preindictment delay violated his due process rights.
3. Whether the circuit court abused its discretion when it admitted additional images under Rule 404(b) that the State had not identified in the bill of particulars.
4. Whether the evidence presented at trial was sufficient to sustain the jury's verdict that O'Neal knowingly possessed child pornography.
5. Whether the indictment was duplicitous and violated O'Neal's right to jury unanimity.

Ms. Loranda K. Kenyon and Ms. Katheryn Dunn, Attorneys for Appellant Michael A. O'Neal

Mr. Marty J. Jackley, Attorney General, and Ms. Erin E. Handke, Assistant Attorney General, Attorneys for Appellee State of South Dakota

CASES

Cases #30152 and #30167

Wednesday, Oct. 4, 2023—Number 3

Avera St. Mary's Hospital v. Sully County

In 2015, while working a seasonal job in Sully County, J.R. experienced a medical emergency. He was transported to Avera St. Mary's Hospital in Hughes County, where he received an emergency appendectomy. J.R. is a Mexican national who worked temporarily in Sully County on a work visa. J.R. has since returned to Mexico. Avera sought reimbursement for J.R.'s medical treatment from Sully County under SDCL 28-13—the chapter on county poor relief. This case involves the application of two sections from that chapter. Section 37 provides:

It shall be the duty of the county commissioners, on complaint made to them that any person not an inhabitant of their county is lying sick therein or in distress, without friends or money, so that he is likely to suffer, to examine into the case of such person and grant such temporary relief as the nature of the case may require.

Section 38 provides:

Whenever any person entitled to temporary relief as a poor person shall be in any county in which he has not established residency, the commissioners thereof may, if the same is deemed advisable, grant such relief by providing the same relief as is customary in cases where persons have established residency in the state and county. The county furnishing relief shall be entitled to reimbursements from the county in which said poor person has established residency.

The Sully County Board of Commissioners denied Avera's claim for reimbursement, concluding J.R. was not a resident of Sully County. Avera appealed the denial to the circuit court. The circuit court remanded the matter to the board of commissioners to develop a factual record to support their application of SDCL 28-13-37 and 38.

Upon remand, the commission considered an affidavit, testimony and arguments and again denied the request for reimbursement. The commission premised its denial on its determination that J.R. was not

CASES

a resident of Sully County and was indigent by design. Avera appealed again. The circuit court affirmed the commission's decision. The circuit court relied on *Roane v. Hutchinson County*, 40 S.D. 297, 167 N.W. 168 (1918). In reaching its decision, the circuit court described its interpretation of the holding in *Roane* and how this case was similar:

The current law as it stands is that the individuals were removed from the county at the time that the temporary relief was sought, and as a result, that county could not be held responsible for the medical bills pursuant to statute 28-13-37 which is nearly identical to what it was in 1918. Based on J.R. not being in Sully County, the fact that he was removed for medical attention, that would not render Sully County liable on the grounds of statutory duty.

Avera appeals the circuit court's decision and raises two issues:

1. Whether the circuit court erred in its reliance on *Roane*.
2. Whether the circuit court erred in its interpretation of SDCL 28-13-37.

Mr. Robert R. Nelson, Attorney for Appellant Avera St. Mary's Hospital

Mr. Ryan S. Vogel, Mr. Zachary Peterson, and Mr. Jack H. Hieb,
Attorneys for Appellee Sully County

CASES

Case #30252

Wednesday, Oct. 4, 2023—Number 4

Barr v. Cole

Doug Barr was injured in a car accident near Tea, South Dakota, on December 21, 2016, when Stuart Hughes ran a stop sign and collided with Barr. Hughes was a law clerk for the First Circuit and was stationed in Yankton. While Hughes, who lived in Vermillion, was stationed in Yankton, he was required to travel to hearings throughout the First Circuit when requested by a judge. Hughes was reimbursed when he was required to travel to hearings outside of Yankton or Vermillion.

Hughes had attended a hearing in Parker on the day of the accident, and records show he was reimbursed for travel from Vermillion to Parker, and then back to Vermillion. Once the hearing had concluded, Hughes began traveling towards Sioux Falls for a family dinner at his parents' home. Hughes's accident with Barr occurred while Hughes was enroute to the family dinner.

Barr sued Hughes to recover for damages sustained in the accident and was represented by Jeffrey Cole, William Sims, and Gregory Brewers. Barr's damages were in excess of \$1,000,000; however, the liability coverage through the two available insurance policies amounted only to \$500,000. The parties ultimately settled the case for the \$500,000.

Barr and his wife, Dawn (collectively the Barrs), then initiated a malpractice suit against Cole, Sims, and Brewers (collectively the Attorneys), claiming negligence, breach of fiduciary duty, breach of contract, and fraud, as well as seeking punitive damages. The Barrs argued Doug could have obtained an additional \$500,000 from the Public Entity Pool for Liability (PEPL) fund. The PEPL fund is a secondary liability coverage that pays damages on behalf of a state employee when the employee becomes legally obligated to pay because of an "occurrence." Occurrence, under the PEPL, is defined as "an accident, act, error, omission or event, during the Coverage period, which results in damages and arises within the scope of the employee's duties for the State." Further, to be eligible to receive damages from the PEPL fund, the State must receive notice of the

CASES

injury within 180 days after the injury occurs. The Attorneys did not make a claim for damages under the PEPL fund and did not give notice to the State.

The Barrs filed a motion for summary judgment, and the Attorneys filed cross motions for summary judgment. The Barrs argued summary judgment was proper because Hughes was acting within the scope of his employment and there was no dispute as to the facts underlying the Barrs' claims. In contrast, the Attorneys argued that PEPL coverage was not available because the accident occurred outside the scope of Hughes's employment, and, therefore, none of the Barrs' claims against the Attorneys could be successful. The circuit court concluded Hughes deviated from his employment and granted summary judgment in favor of the Attorneys.

The Barrs now appeal, raising the following issues:

1. Whether a plaintiff, when asserting a legal malpractice claim, must show the underlying claim would have been successful but for the alleged malpractice.
2. Whether the circuit court erred when it granted summary judgment in favor of the Attorneys, concluding Hughes was acting outside the scope of his employment.

Mr. Lee Schoenbeck and Mr. Joe Erickson, Attorneys for Appellants Doug Barr and Dawn Barr

Mr. Jeffrey G. Hurd and Ms. Emily M. Smoragiewicz, Attorneys for Appellees Jeffrey A. Cole and William D. Sims

Mr. Jason R. Sutton, Attorney for Appellee Gregory T. Brewers

CASES

Cases #30247 and #30248

Thursday, Oct. 5, 2023—Number 1

Redlin Trust v. First Interstate Bank

On December 14, 2004, Helene Redlin established a trust with her daughters, Kim and Kelly, as the beneficiaries. The Trust's primary asset was a \$3 million life insurance policy on Helene. Upon Helene's death, any trust assets in excess of \$3 million were to be distributed to the Terry A. Redlin and Helene M. Redlin Dynasty Trust. Kim and Kelly could then, at the discretion of the trustee, receive income and principal distributions from the remaining assets "for their health, support and education, taking into consideration their other financial resources of any kind." In the event of Kim and Kelly's death, Helene's son Charles could also receive income and principal distributions from the trust under identical conditions.

Helene first appointed Robert M. Ronayne as general trustee. However, in October 2016, he was removed by Helene's sister, Jill Fahnhorst, pursuant to her powers as Trust Protector. Helene simultaneously designated a plan for succession of trustees, which appointed Great Western Bank, the predecessor to First Interstate Bank, "as the successor and sole Trustee of the Trust, to serve without bond and be vested with all authority set forth in the Trust." In December 2016, Helene appointed Charles as a trustee and appointed Great Western Bank, "as an administrative trustee to exercise such powers and authorities as the co-trustees may, from time to time, direct."

After Helene's death in January 2020, the resulting \$3 million insurance payout was distributed to the trust. These funds were placed into a money market account at Kovack Securities, a Florida financial firm. Over the next fourteen months ending on April 30, 2021, the account yielded \$843.23 in interest. However, according to a financial expert retained by Kelly, aggressively investing the \$3 million from March 31, 2020 through December 31, 2021 would have resulted in a total investment return of 79.65%, or \$2,388,768. In June 2021, Kelly sued Charles and First Interstate Bank, alleging breach of fiduciary duty and seeking their removal as trustees.

CASES

Charles and First Interstate Bank subsequently moved for summary judgment, which was granted by the circuit court. The court first determined that, while Charles did have a fiduciary duty as a trustee to invest the trust assets, this duty was limited by the terms of the Trust. Specifically, the Trust purported to “grant the trustee the broadest possible discretion in determining what constitutes an appropriate investment, acceptable level of risk and proper investment strategy.” According to the court, the Trust language waived the Prudent Investor Rule, which generally requires trustees to “invest and manage trust assets as a prudent investor would.” See SDCL 55-5-6. The court determined that SDCL 55-5-7, which permits elimination of the Prudent Investor Rule, and SDCL 55-5-12, in conjunction, shielded Charles from liability for “investment decisions made reasonably and in good faith.” The court granted Charles’ motion for summary judgment because it saw no indication that Charles had acted in bad faith regarding the investment of the Trust assets.

Turning to First Interstate’s motion, the court determined that Helene’s December 2016 appointment of First Interstate as administrative trustee had removed the bank from its previous status as a general trustee. Thus, in the court’s view, First Interstate did not have any duty to invest the Trust assets on its own initiative. In addition, the court noted that “[t]he record is devoid of any evidence that Charles directed [First Interstate] to invest the Trust’s assets.” Because First Interstate, as administrative trustee, was in a “position of inferiority to Charles,” it was also not liable for any alleged negligence on his part. On this basis, the court granted First Interstate’s summary judgment motion.

Kelly raises the following issues on appeal:

1. Whether First Interstate Bank is a general co-trustee of the Trust.
2. Whether the terms of the Trust waived the Prudent Investor Rule and absolved Charles and First Interstate Bank of any duty to invest the Trust assets.

CASES

3. Whether there are disputed questions of fact regarding whether Charles and First Interstate Bank breached their fiduciary duties by failing to invest the Trust assets.

Mr. Corey T. Denevan, Ms. Shannon R. Falon, and Ms. Meghann M. Joyce, Attorneys for Appellant Kelly J. Redlin

Mr. Lee Schoenbeck and Mr. Joe Erickson, Attorneys for Appellee Charles Redlin

Mr. Vince M. Roche and Ms. Ashley R. Brost, Attorneys for Appellee First Interstate Bank

CASES

Case #30191

Thursday, Oct. 5, 2023—Number 2

State v. Richard

Elias Richard was convicted of second-degree murder for the shooting death of Vernall Marshall. The events leading up to the shooting began on December 24, 2020, when Kaleb Lukkes, Masheka Barnett, Brandi Snowfly, and Brandi's children were at a Walgreens in Rapid City picking up last-minute Christmas gifts. According to the evidence at trial, Barnett became upset when she received a message from her minor daughter saying that Vernall Marshall had sent her a text message that referenced illegal drugs and sex. Around the same time, Vernall had also sent a message to Snowfly via Facebook Messenger, asking to buy methamphetamine. Lukkes saw the drug deal as an opportunity to confront Vernall about the text message to Barnett's daughter, so he arranged a meeting.

After dropping off Snowfly and her children at her apartment, Lukkes and Barnett left in Snowfly's car and picked up Clint Marshall and Elias Richard. Lukkes, Clint, and Richard were members of a gang known as the Dark Side Family, but the State's evidence suggested they were not otherwise closely connected. Lukkes testified he provided Richard with a .25 caliber pistol and instructed him to use the gun to scare Vernall.

With Clint and Richard in the backseat, Lukkes drove to pick up Vernall, purportedly to complete the drug deal. After handing over cash for the drugs, Richard and Clint began assaulting Vernall in the backseat. Lukkes stopped the car and removed Vernall from the car as the group continued to assault him until, according to Lukkes, Richard used the pistol to shoot Vernall twice. Lukkes, Barnett, Clint, and Richard fled the scene and left Vernall who was mortally wounded and later died from his injuries. A few days later, all four individuals were arrested and indicted for their involvement in Vernall's death.

Richard pled not guilty to the charge of first-degree murder, and the case proceeded to trial. The remaining three cooperated with the State and testified against Richard. Each of them eventually pled guilty to other charges pursuant to plea agreements.

CASES

Prior to trial, Richard filed a motion in limine to preclude the State from introducing any evidence that Richard was a member of a gang. The court denied his request, concluding that evidence of the common gang membership among the group that assaulted Vernall was admissible to help explain Richard's involvement in view of the evidence that he was not closely associated with Lukkes or the others.

During defense counsel's opening statement, he told the jury that, along with the two .25 caliber shell casings found in the street where Vernall was killed, police had also found six spent .25 caliber shell casings at the apartment Lukkes shared with Snowfly, in an apparent effort by defense counsel to emphasize Lukkes' control of the gun. But during the State's presentation of evidence, a police detective testified that forensic examination had revealed that the shell casings recovered from the apartment were for a .22 caliber firearm and not a .25 caliber pistol.

Outside the presence of the jury, defense counsel informed the court that he had never seen the forensic report referenced by the detective and was unaware of the examination of the shell casings. Since he had already told the jury that the casings found in the apartment matched the casings found at the scene, defense counsel moved for a mistrial, arguing that his earlier statement was now erroneous and would cause him to lose credibility with the jury. The State responded by arguing that it had produced all of the information in good faith and had also invited defense counsel to the Attorney General's Office to review all the discovery, but defense counsel did not do so.

The court ultimately denied the motion for mistrial. It concluded that any failure to provide the information about the .22 caliber shell casings found in Lukkes and Snowfly's apartment had not been intentional and further that "there are other issues upon which this jury is being asked to focus[.]" At the close of the presentation of the evidence, the jury was given instructions for both first-degree murder and the lesser included offense of second-degree murder. After deliberating, the jury found Richard guilty of second-degree murder.

CASES

Richard raises the following issues on appeal:

1. Whether the circuit court abused its discretion when it denied Richard's motion for mistrial.
2. Whether the circuit court abused its discretion when it allowed evidence of Richard's alleged gang affiliation.

Mr. Greg Sperlich and Mr. Kyle Beauchamp, Attorneys for Appellant Elias Richard

Mr. Marty J. Jackley, Attorney General, and Ms. Erin E. Handke, Assistant Attorney General, Attorneys for Appellee State of South Dakota

CASES

Case #30280

Thursday, Oct. 5, 2023—Number 3

Ellingson Drainage, Inc. v. South Dakota Department of Revenue

In general, tangible personal property purchased in South Dakota is subject to a state sales tax. But tangible personal property purchased outside of the state and brought into South Dakota for use or consumption may be subject to a different type of tax, known as a use tax. This appeal presents a challenge to an effort by the South Dakota Department of Revenue (DOR) to impose a use tax upon certain equipment brought into the state by Ellingson Drainage, Inc. (Ellingson).

Ellingson is a Minnesota-based company that installs drain tiles throughout the United States. It completed approximately 30 drain tile projects in South Dakota between 2016 and 2019. In order to complete these jobs, Ellingson brought into South Dakota several pieces of construction equipment that had been purchased in other states. Ellingson also rented a piece of equipment that it brought into South Dakota to complete a drain tile job.

The DOR assessed a use tax of 4.5% upon the value of this equipment. And though the DOR allows a credit against South Dakota use tax based upon taxes previously paid in other states, it is undisputed that the equipment at issue in this appeal had never been subject to state taxation elsewhere. After calculating the value of the equipment, less depreciation, the DOR arrived at a combined value of \$1,228,120, which yielded a use tax amount of \$60,665.44 and \$14,862.88 in interest.

Ellingson objected to the imposition of the tax, arguing that some of the equipment at issue was used in South Dakota only for one day. Ellingson litigated the amount owed unsuccessfully in an administrative proceeding before the DOR and later in an appeal to a circuit court judge, who affirmed the DOR's authority to impose the use tax upon Ellingson's equipment. Ellingson now appeals to the South Dakota Supreme Court challenging the DOR's effort to impose the use tax amount under several different theories.

CASES

Ellingson alleges that the DOR's use tax constitutes an unconstitutional denial of its right to due process of law because, in its view, "the tax is not rationally related to the opportunities, benefits, or protections afforded by South Dakota." Ellingson also claims that the use tax imposed upon its equipment is an "unconstitutional burden on interstate commerce because it is not fairly related to the benefits provided by South Dakota" and is not "fairly apportioned" among the states in which Ellingson operates. In Ellingson's view, the statute used by the DOR to impose the use tax should be read to apply only to tangible personal property that "has come to rest [in South Dakota] and has become part of the common mass of property therein."

The DOR presents opposing arguments in which it asserts the text of the statute which authorized the use tax in this case is clear and unambiguous. The DOR claims this renders any effort to further interpret the language of the statute unnecessary and leaves for the courts the straightforward task of simply applying the law. The DOR disputes Ellingson's claims that the tax it imposed violates Ellingson's due process rights or burdens interstate commerce. In its response to Ellingson's claim that the tax is excessive for the relatively short duration the equipment was in South Dakota, the DOR notes that once the tax is paid Ellingson is free to bring the equipment back to the state for other jobs.

Mr. Shawn M. Nichols and Mr. Andrew S. Hurd, Attorneys for
Appellant Ellingson Drainage, Inc.

Ms. Kirsten E. Jasper and Ms. Ali J. Schaeffbauer, Attorneys for
Appellee The South Dakota Department of Revenue

CASES

Case #30028

Thursday, Oct. 5, 2023—Number 4

State v. Van Der Weide

S.O. accused Keaton Van Der Weide of raping her on June 13, 2021. At the time, although they were living in the same apartment and had a daughter together, their relationship was “basically over.” They were sleeping in separate rooms, and S.O. had planned to move out that day. The night before the alleged sexual assault, S.O. went out with friends and did not return to the apartment until 9 a.m. that morning. S.O. told police that, after she arrived, Van Der Weide sat next to her on the couch and eventually started kissing her. Despite her responding “no” and pushing him away, he pinned her to the floor of the living room. S.O. told police that, after he “tore [her] shorts off,” she attempted to escape into one of the bedrooms. Van Der Weide followed S.O. and once more pinned her to the floor, leading to a physical altercation where S.O. claimed that she slapped Van Der Weide’s face and bit his forearm. When police later interviewed Van Der Weide, there were no bite marks on his arms, scratches, or any other visible signs of injury.

S.O. claimed that, while they were in the bedroom, Van Der Weide penetrated her vagina with his penis and digitally penetrated her vagina and anus. Although she initially denied that any sex toys had been used during the encounter, S.O. eventually disclosed that a sex toy was involved. She also elaborated that, when Van Der Weide “grabbed a toy from the drawer. . . she grabbed it away from him and threw it at his face.”

When questioned by police, Van Der Weide presented a different version of the events, claiming that the sexual encounter had been entirely consensual. Van Der Weide told police that, after talking with S.O. on the couch, he and S.O. jointly removed her shorts and began to have sex in the living room area. Van Der Weide admitted that he had penetrated S.O.’s vagina with both his penis and “her toys.” He also disclosed that the use of sex toys was normal in their relationship and that two toys had been used during their encounter. Van Der Weide claimed that this all took place in the living room and that he only entered the bedroom to retrieve the toys.

CASES

Van Der Weide was arrested and indicted on one count of second-degree rape. Prior to trial, he moved to admit evidence of the sex toys allegedly used during the encounter in addition to testimony concerning the couple's sexual history. According to Van Der Weide, this information was relevant to his defense of consent. However, the circuit court ruled that, unless the topic of the sex toys was first introduced by the State, Van Der Weide could not offer evidence or testimony on these matters at trial. This ruling involved the interpretation of SDCL 19-19-412, a rape-shield statute which provides that "evidence offered to prove that a victim engaged in other sexual behavior" is not admissible unless "offered by the defendant to prove consent or if offered by the prosecutor." The statute also permits the admission of evidence "whose exclusion would violate the defendant's constitutional rights."

Van Der Weide cross-examined several witnesses at trial and attempted to impeach S.O. regarding her previous statements to police that she had thrown a sex toy at Van Der Weide during their encounter. In a side-bar discussion, the court explained that, even if the thrown sex toy was relevant for impeachment, "the jury does not need to view or learn about what sex objects may or not have been used as the State's not offering those objects as part of the crime that they need to prove." Van Der Weide elected to testify at trial and was asked if S.O. had told him to get an "undisclosed object" from the bedroom, but the State's objection was sustained.

Van Der Weide introduced text messages between himself and S.O. regarding their ongoing custody dispute, which he presented as a possible motive for the false allegation. The court allowed the State to cross-examine Van Der Weide on other select text exchanges between himself and S.O. However, according to Van Der Weide, the "snippets of conversation" were never put into context for the jury since the full text message exchange was not admitted or entered into the record.

Van Der Weide raises the following issues on appeal:

1. Whether the circuit court improperly excluded evidence of the sex toys and the couple's sexual history.

CASES

2. Whether the circuit court erred in permitting the State to cross-examine Van Der Weide with select unadmitted text exchanges.

Ms. Kristi Jones, Attorney for Appellant Keaton Van Der Weide

Mr. Marty J. Jackley, Attorney General, and Ms. Chelsea Wenzel,
Assistant Attorney General, Attorneys for Appellee State of South
Dakota

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.

GLOSSARY OF TERMS

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.

South Dakota Supreme Court Justices

L-R: Justice Patricia J. DeVaney, Pierre, Third District;
Justice Janine M. Kern, Rapid City, First District;
Chief Justice Steven R. Jensen, Dakota Dunes, Fourth District;
Justice Mark E. Salter, Sioux Falls, Second District;
and Justice Scott P. Myren, Aberdeen, Fifth District



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