

**Introduction to**  
**The South Dakota**  
**Supreme Court**



**and**  
**Case Summaries for**  
**Oral Arguments at the**  
**October Term of the Court**  
**to be held**  
**October 3 through October 5, 2016**  
**Northern State University**  
**Aberdeen, South Dakota**



*David Gilbertson*  
CHIEF JUSTICE

*Supreme Court*  
STATE OF SOUTH DAKOTA



October 3, 2016

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 black ink that reads "David Gilbertson". The signature is fluid and cursive, with the first name "David" being the most prominent part.

David Gilbertson  
Chief Justice

*State Capitol Building*

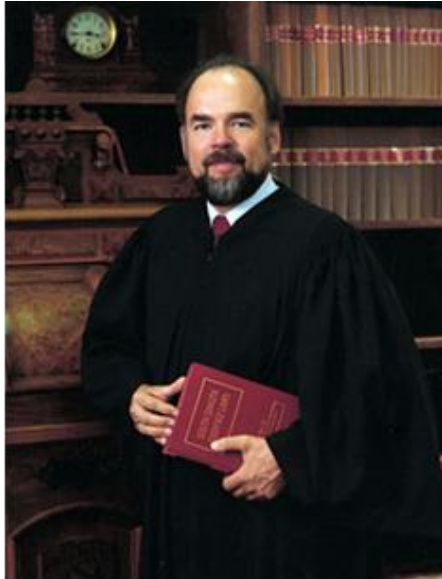
*Pierre, South Dakota 57501-5070*

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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.*

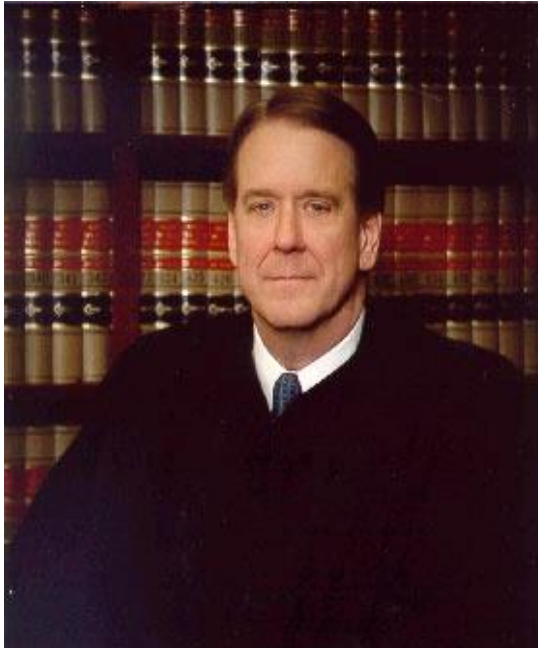


### ***Chief Justice David Gilbertson***

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, a third 4-year term in June 2009 and a fourth 4-year term in June 2013. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District, which includes Brown, Butte, Campbell, Clark, Codrington, Corson, Day, Deuel, Dewey, Edmunds, Faulk, Grant, Hamlin, Harding, Marshall, McPherson, Perkins, Potter, Roberts, Spink, Walworth and Ziebach counties, and was retained by the voters in the 1998, 2006 and 2014 general elections.

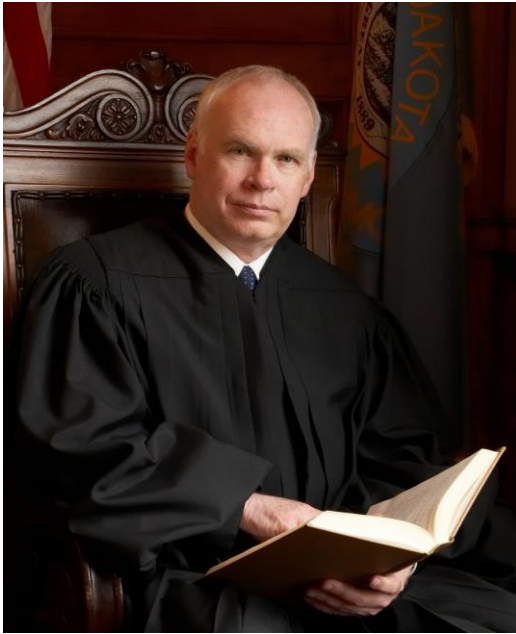
Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. He served as a Circuit Judge for the Fifth Judicial Circuit from 1986 until his appointment to the Supreme Court in 1995. He is past President of the South Dakota Judges Association and was President of the Conference of Chief Justices for the 2015-16 term. He chairs its Committees on Tribal/State Relations and the Task Force on Politics and Judicial Selection. He was a member of the Board of Directors of the Conference of Chief Justices from 2005-2007. He is the Chair-Elect of the National Center for State Courts and served as its Chair for the 2015-16 term.

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 was the recipient of the "Grass Roots" Award by the American Bar Association in 2014 also for his defense of judicial independence. Since 2010 he has served as the state representative on the Criminal Rules Committee of the United States Courts. He also 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. Chief Justice Gilbertson and his wife Deb have four children.



### ***Justice Steven L. Zinter***

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002 by former Governor William J. Janklow. He received his Bachelor of Science degree from the University of South Dakota and his Juris Doctor from the University of South Dakota School of Law. 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. 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 to represent the Third Supreme Court District, which includes Beadle, Bennett, Brookings, Brule, Buffalo, Fall River, Haakon, Hand, Hughes, Hyde, Jackson, Jerauld, Jones, Kingsbury, Lake, Lyman, Mellette, Miner, Moody, Sanborn, Oglala Lakota, Stanley, Sully, Todd and Tripp counties. Justice Zinter was retained by the voters in 2014. 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 trustee of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife have two children and four grandchildren.



### *Justice Glen A. Severson*

Justice Severson, represents the Second Supreme Court District, which includes Minnehaha County. He attended the University of South Dakota receiving a Bachelor of Science 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 1977-1991 and a Beadle County Deputy States Attorney in 1975. He was appointed a 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 and was retained by the voters in 2012. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He served in the South Dakota Air National Guard from 1967-1973. He was a member of the 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 children, Thomas and Kathryn.



### *Justice Lori S. Wilbur*

Justice Wilbur, appointed to the Supreme Court on August 16, 2011, by Governor Dennis Daugaard, represents the Fourth Supreme Court District, which includes Aurora, Bon Homme, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, McCook, Turner, Union, and Yankton counties. Justice Wilbur was retained by the voters in 2014. 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 has two daughters and two grandchildren.





### ***Justice Janine M. Kern***

Justice Kern, who was appointed to the Supreme Court on November 25, 2014, by Governor Dennis Daugaard, represents the First Supreme Court District, which includes Custer, Lawrence, Meade and Pennington counties. She 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 1985-1996 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 in 1996 in the Seventh Judicial Circuit comprised of Custer, Fall River, Oglala Lakota and Pennington Counties and served 18 years on the trial court bench. She is a member of the American Law Institute, the National Council of Juvenile and Family Court Judges, the State Bar Association, the Pennington County Bar Association, the American Bar Association Fellows and past President of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004-2013 and on the Federal Advisory Committee on Juvenile Justice from 2004-2008 and on numerous other boards and commissions. Justice Kern and her husband Greg Biegler make their home in the beautiful Black Hills.



### *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.



### ***2016-2017 Supreme Court Law Clerks***

Law Clerks are employed by the Court to assist the Justices with research and writing of the opinion on the cases under consideration. In the photograph above from left to right, Jesse Goodwin (Supreme Court Law Clerk), Cameron Cook (Justice Kern), Jennifer Williams (Justice Wilbur), Christopher Dabney (Chief Justice Gilbertson), Michelle Oswald (Justice Severson), and Christopher Sommers (Justice Zinter).

## **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 \$12,000. 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.

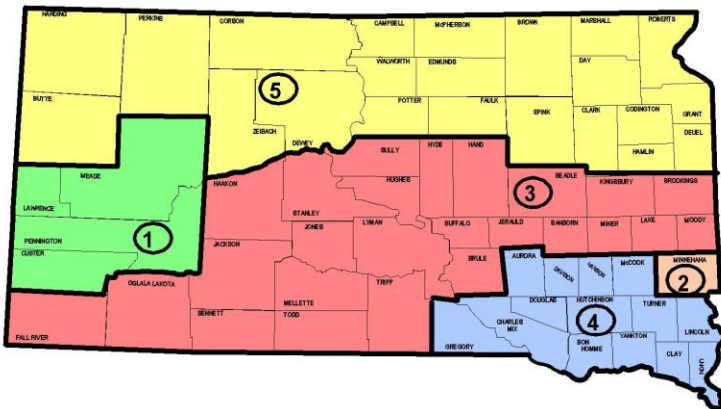
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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. Justice Janine Kern was appointed in 2014 from District One. Chief Justice Gilbertson, Justice Zinter, and Justice Wilbur were each retained in the November 2014 general election. Justice Severson was retained in the November 2012 general election.

South Dakota Supreme Court Appointment Districts  
*Effective January 23, 2012*



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

<b>Courtroom Protocol</b>
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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 2016 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.

<b>Case Summaries</b>
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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. Diaz**

On November 10, 2009, law enforcement officers and firefighters responded to a vehicle fire in a wooded area of Hanson County, South Dakota. After extinguishing the fire, they discovered a badly burned body in the vehicle's trunk, later identified as 16-year-old Jasmine Guevara. The autopsy revealed that Jasmine had been burned alive.

The investigation led law enforcement officers to Alexander Salgado and Maricela Diaz. Diaz and Salgado had arrived in Mitchell, South Dakota, in October 2009. Diaz was 15 years old, Salgado was in his twenties. Diaz had just run away from her home in Indiana with Salgado. Diaz left behind her infant daughter, fathered by Salgado when Diaz was 14 years old. Diaz is a Mexican citizen and speaks limited English. Her relationship with Salgado involved sexual and physical abuse.

Salgado's and Diaz's version of the facts leading up to and surrounding Jasmine's death differ. It is undisputed that, shortly after arriving in Mitchell, the two met Jasmine and started spending time with her. Diaz and Salgado were unemployed and spent their time looking for work or partying. Diaz was extremely jealous of Jasmine and expressed so anytime Salgado spoke to or looked at Jasmine. According to Salgado, the day before Jasmine's death, Diaz told Salgado she was going to kill Jasmine. Diaz blames Salgado and said the plan to kill Jasmine originated with him.

Salgado and Diaz do not dispute that they called Jasmine in November 2009, and asked for a ride to Walmart to purchase lighter fluid for a cookout. After purchasing the lighter fluid, the three of them drove to an area referred to as the “Haunted House” in rural Hanson County. It was at this location that Salgado and Diaz stabbed Jasmine, placed her in the trunk of her car, and started the car on fire.

During the investigation, Salgado ultimately pleaded guilty to second-degree murder pursuant to a plea agreement. He agreed to testify against Diaz. On November 12, 2009, law enforcement took Diaz to the Mitchell Police Department for questioning where she made multiple incriminating statements. After the State charged Diaz in juvenile court for the kidnapping and murder of Jasmine, she moved to suppress the statements she made to law enforcement. The juvenile court denied her motion. The State then moved to transfer the case to adult court, which motion the juvenile court granted.

The Hanson County grand jury indicted Diaz on six counts: (1) first-degree murder, (2) conspiracy to commit first-degree murder, (3) first-degree murder—felony murder (arson), (4) first-degree arson, (5) first-degree murder—felony murder (kidnapping), and (6) second-degree aggravated kidnapping. Diaz again moved to suppress the statements she made to law enforcement. The court held a hearing and suppressed Diaz’s statements after concluding that Diaz did not knowingly and intelligently waive her Miranda rights.

The State filed an intermediate appeal. This Court by a divided decision reversed the circuit court's decision suppressing Diaz's statements. *State v. Diaz (Diaz I)*, 2014 S.D. 27, 847 N.W.2d 144.

A jury trial began on December 29, 2014, and concluded on January 15, 2015. At the conclusion of the case, the jury found Diaz guilty of the murder and kidnapping of Jasmine. The circuit court sentenced Diaz to 80 years in the South Dakota State Penitentiary.

Diaz appeals, raising the following issues:

1. Whether the juvenile court abused its discretion when it transferred Diaz's case to adult court.
2. Whether the circuit court abused its discretion when it denied Diaz a new transfer hearing in light of newly discovered evidence related to the State's expert.
3. Whether this Court should reconsider its decision in *Diaz I* holding that Diaz's statements to law enforcement were admissible.
4. Whether the circuit court erred when it failed to instruct the jury with a full and correct statement of the law regarding the effects of physical and sexual abuse on a juvenile's perception of imminent fear.

5. Whether the circuit court abused its discretion when it sentenced Diaz to 80 years with no time suspended.
6. Whether the circuit court's sentence is grossly disproportionate in violation of the Eighth Amendment.
7. Whether the circuit court sentenced Diaz to an illegal sentence because 80 years is a de facto life sentence.

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

Mr. Douglas M. Dailey and Mr. Chris A. Nipe,  
Attorneys for Defendant and Appellant Maricela  
Nicolasa Diaz

#27754,  
#27775

MONDAY, OCTOBER 3, 2016 – NO. 2

**Richardson v. Richardson**

According to the facts alleged in her complaint, Sally Richardson worked as an escort and was solicited by Michael Richardson in February 2013. Sally did not perform any services for Michael at that time. In May 2013, Sally, who had stopped performing escort work, happened to meet Michael at a Walmart. Sally realized Michael was the one who had solicited her for escort services and admitted this to Michael. Despite this, the two began a relationship.

Michael encouraged Sally's escort services and became her manager. He provided Sally with a cell phone and business cards, posted her services on the Internet, drove her to appointments, and would occasionally watch and listen to her while she was with clients.

Although Sally was in love with Michael, she claimed the relationship was physically and verbally abusive. She claimed Michael threatened to kill her and himself and that he attempted to kill himself in January 2014. Nevertheless, Sally married Michael in May 2014.

After getting married, Sally wished to stop performing escort services. She claimed she begged Michael to let her stop, but he refused because of the amount of money her services generated. She also claimed he would become violent whenever she asked to stop and that she feared for her safety. Finally, Sally claimed Michael was sexually aggressive and forced Sally to perform sexual acts on him against her will.

Sally and Michael separated in September 2014. They divorced in April 2015 under a settlement agreement that left the parties free to pursue other causes of action not related to marital property. Sally subsequently sued Michael for intentional infliction of emotional distress. She claimed that Michael's forcing her to continue work as an escort was extreme and outrageous conduct causing her severe emotional distress. She also claimed that she was diagnosed with post-traumatic stress disorder due to Michael's alleged abuse.

The circuit court dismissed Sally's suit for failure to state a claim upon which relief could be granted. The court noted that Michael's conduct, if true, was severe and outrageous enough to constitute intentional infliction of emotional distress. However, the court dismissed the suit because existing South Dakota case law prohibited suits for intentional infliction of emotional distress against spouses or ex-spouses for conduct that led to a divorce.

Sally Richardson appeals the circuit court's decision, raising one issue:

Whether South Dakota law should be changed to permit suits for intentional infliction of emotional distress against spouses or former spouses for allegedly severe and outrageous conduct that causes a marriage to end in divorce.

Mr. Robert Pasqualucci, Attorney for Plaintiff and Appellant Sally Richardson

Mr. Nathaniel Nelson, Attorney for Defendant and Appellee Michael Richardson

## **Black v. Division of Criminal Investigation**

Mark Black was hired by the South Dakota Division of Criminal Investigation (DCI) in 2005. Black entered DCI as an experienced law enforcement officer, and he was eventually recognized as one of DCI's best agents. He was the first to receive the newly created Distinguished Service Award in 2009. Black's success and excellent performance evaluations, however, were accompanied by accounts of emotional instability and lapses in judgment. He received high praise on a September 7, 2006 job performance evaluation, but he was also told he needed "to continue to remind himself to maintain his composure and not allow his emotions to take over." Black's evaluations contained similar warnings for the next several years, including one report in 2008 that advised "Mark on occasion makes poor decisions with regards to his relationship with others. Mark had at times a very difficult 6 month period and became frustrated and disappointed. This became an issue when he sent a resignation email to all agents in the DCI and to the Attorney General." This email resulted in a two-day suspension, enrollment in a sixty-day work improvement plan, and counseling.

Problems also arose outside of work. Black commented on the Keloland blog about a SWAT training event. Because Black's Facebook page showed he was a DCI agent, Black's comment on the Keloland blog appeared to have been made on behalf of DCI. Black commented: "This story is an excellent example of



a waste of time by the media. This ‘mother’ would rather whine to get her face on camera than be a parent and explain to her child, it is the people that protect us practicing to keep us safe from bad guys.” DCI disciplined Black with a one-day suspension. Black also made a tape recording during an investigation which contained comments that were negative and potentially damaging to the public’s confidence in DCI. This tape recording also found its way to the Internet.

Around 2013, Black was going through a highly contentious divorce. On one occasion, Black spray painted the phrase “Patty wins” on a boat he jointly owned with his ex-wife. On February 13, 2014, Black’s ex-wife filed a petition for a protection order. Because the law prohibits a person from carrying a weapon if a protection order is issued against them Black was required to surrender his service weapon. That same day, Black’s supervisor, Brian Zeeb, placed Black on administrative leave until the protection order issue was resolved. Black’s ex-wife attached to her petition for a protection order a handwritten letter from Black. The letter contained the following passages:

As for my temper, rage, and razor tongue, I finally figured out how bad I hurt everyone around me. Especially you. I said numerous hateful things . . . .  
I know you feel like a victim . . . .  
Yes babe I know I punched walls and doors, broke dishes, pictures.  
. . . .  
I pushed and shoved you as well for that I am sorry too. A[n] honest reflection is that we both mistreated each other . . . .

Because of the appearance of domestic abuse and further examples of Black's lack of emotional control and poor judgment, Zeeb sent a letter to Black on February 21, 2014. The letter informed Black that DCI intended to terminate his employment. The petition for a protective order, however, was eventually dismissed by the court. Black cites this dismissal as evidence that the petition was untrue and as an example of his ex-wife's vindictive efforts to destroy his career.

In his letter, Zeeb cited ARSD 55:10:07:04(26) and DCI Policy 7.0101 as grounds for Black's termination for just cause. Black was given the opportunity to be heard, and he wrote a lengthy letter explaining his side of the story. Upon receipt of the letter Zeeb reconsidered his decision, reviewing numerous documents and files, but did not change his decision. Black appealed to DCI Director, Bryan Gortmaker, who also reinvestigated and reconsidered Black's termination. Gortmaker affirmed Zeeb's decision. Black then appealed to the Attorney General, who also affirmed Zeeb's decision.

Black next appealed to the Civil Service Commission (CSC) and requested a hearing. At the hearing, DCI called agents and administrators who testified about Black's long history of emotional instability and poor judgment. Black presented the testimony of four sitting Sheriffs and his DCI partner. Each of his witnesses testified about his good character, and exceptional skill as an agent. Further, Black's witnesses testified that Black's conduct did not destroy public confidence in DCI or negatively affect the moral or efficiency of the agency. CSC found that just cause existed to terminate Black's employment.

Black appealed CSC's decision to the circuit court. The circuit court affirmed CSC's decision, finding that DCI's termination of Black's employment was for just cause and held that Black was not denied due process of law. Black contends, however, that CSC's factual findings were clearly erroneous and that DCI deprived him of due process of law. Further, Black argues that DCI was required but failed to produce an independent expert witness who was qualified in the professional standards for law enforcement officers to establish the relevant standard of conduct. Black appeals the circuit court's decision, raising the following issues:

1. Whether there was good cause under the governing law, rules and regulations and the facts as presented to CSC to terminate Black's employment with DCI.
2. Whether DCI complied with governing law, rules and regulations when it terminated Black's employment.

Mr. Timothy R. Whalen, Attorney for Plaintiff and Appellant Mark Black

Mr. Robert B. Anderson, Attorney for Defendant and Appellee Division of Criminal Investigation

**State v. Pentecost**

On April 19, 2012, John Pentecost, entered the home he previously shared with his ex-wife, L.S., during their marriage. After gaining entrance he sent L.S., who was at work, a text message, informing her that he had changed the locks of the home and moved some of his property inside because he wanted “to get a piece of his life back.” L.S. called the police and reported that Pentecost had not lived in the home for more than a year. Officers arrested Pentecost in the home and discovered a shotgun and ammunition in his car. The investigation also revealed that Pentecost brought the following items with him into the residence: several bags, suitcases, clothing, four packs of zip ties, a roll of duct tape, cable wraps, a sales slip for the recent purchase of a handgun, a suicide note, and his Last Will and Testament. Pentecost was indicted for second-degree burglary, a Class 3 felony, and two alternative counts of stalking, a Class 1 misdemeanor. The State also filed a part II information alleging Pentecost had a prior conviction for stalking which if proven would increase the penalty for stalking to a Class 6 felony. Pentecost requested and received court appointed counsel to assist him.

At the time of the incident Pentecost maintained a residence in Rapid City but was staying in Florida with relatives. Although Pentecost and L.S. divorced more than a year earlier, he continued to send her hundreds of text messages and hours of voicemail, hoping to win back her affections. The former marital residence had not yet been sold, but the State argued

Pentecost's ownership interest in it had been severed during the divorce case in 2011. Pentecost, on the other hand, argued that he was still a joint owner of the home and had a legal right to be present.

On November 5, 2012, Pentecost pleaded guilty to second-degree burglary. The circuit court found that Pentecost's guilty plea was knowing and voluntary and that there was a sufficient factual basis for his plea. On December 3, 2012, the circuit court sentenced Pentecost to six years in prison.

Pentecost's attorney filed a notice of appeal which was dismissed by the South Dakota Supreme Court as untimely. Pentecost then filed a petition seeking a writ of habeas corpus. The presiding judge ordered the circuit court judge assigned to the case to resententence Pentecost. On July 30, 2014, the day before his resentencing hearing, Pentecost filed a motion to set aside his judgment of conviction and to allow withdrawal of his plea. The circuit court held a resentencing proceeding on July 31, 2014, and denied Pentecost's motion. The court resentenced Pentecost to the same sentence it had imposed in 2012. Pentecost appealed his conviction to the South Dakota Supreme Court, raising several issues regarding his plea. The Court held it could not reach the merits of the case and remanded it to the circuit court to set forth the grounds for the resentencing hearing. Upon remand, the circuit court issued findings of fact and conclusions of law and required Pentecost to serve out the original sentence. Pentecost now appeals that judgment and raises the following issues on appeal:

1. Whether it is a legal impossibility for a homeowner to burglarize his own house.
2. Whether the circuit court abused its discretion in denying Pentecost's motion to set aside the judgment of conviction and allow withdrawal of his guilty plea.
3. Whether the circuit court accepted Pentecost's guilty plea without establishing a factual basis for the offense of second-degree burglary.

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

Ms. Jamy Patterson, Attorney for Defendant and Appellant John Pentecost

**State v. Jones**

On January 23, 2015, Detective Rogers from the Brookings Police Department received information from a law enforcement officer that an individual has been traveling from Huron, South Dakota in his red GMC pickup to Joseph Jones's home in Brookings to pick up large quantities of marijuana to sell. Jones lives in a trailer in the Lamplighter Village Trailer Park. In response to this tip, Detective Rogers arranged for a City employee to install a pole camera on a public street light across from Jones's trailer. The employee installed the pole camera inside a pole camera box approximately two to four feet from the top of the light. The box, but not the camera, was visible to the public. The camera sent a live feed to a server located in Pierre, South Dakota, and to a telephone accessible by Detective Rogers. The camera captured activity at the entrance and exit to Lamplighter Village Trailer Park, Jones's trailer and front yard, and a portion of Third Avenue South.

The camera recorded individuals coming and going from Jones's trailer, including the individual driving the red GMC pickup. On March 6 and 11, 2015, Detective Rogers's review of the camera footage revealed that Jones put trash bags into his vehicle, drove a short distance, and returned. Detective Rogers searched the community dumpster and found information identifying Jones and evidence of drug use. Detective Rogers used this information to obtain a search warrant for Jones's trailer. Detective Rogers and others executed the search warrant on March 19,

2015, and subsequently arrested Jones. The State charged Jones with multiple drug-related offenses.

Jones moved to suppress the evidence obtained as a result of the execution of the search warrant. He argued that the State’s use of the pole camera violated his Fourth Amendment Right to be free from unreasonable searches and seizures. The circuit court held a hearing and denied Jones’s motion. It concluded that “[t]here was no physical invasion of [Jones’s] residence or privacy, and the use of physical observation in this case, via a pole camera, was conducted on public property, and without trespassing onto [Jones’s] property, and thus, no Fourth Amendment violation has occurred.” The court further concluded that, even if the pole camera violated the Fourth Amendment, the good-faith exception to the exclusionary rules applied.

Jones appeals, arguing that the circuit court erred when it denied his motion to suppress.

Mr. Marty J. Jackley, Attorney General, and Ms. Caroline Srstka, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. D. Sonny Walter, Attorney for Defendant and Appellant Joseph A. Jones



**Novotny, et al. v. Sossan, et al.**

This case is an intermediate appeal regarding discovery issues. Plaintiffs in this case were treated by Dr. Sossan at medical facilities in South Dakota. Plaintiffs experienced problems after treatment and sued various health organizations along with Dr. Sossan, collectively referred to as Defendants. They alleged that Defendants committed negligence, negligent credentialing, fraud, deceit, bad faith peer review, unjust enrichment, racketeering, and conspiracy.

Plaintiffs sought discovery of documents from Defendants, including those documents held by medical peer review committees. Defendants asserted that the documents are protected by statute SDCL 36-4-26.1. The circuit court held a hearing on the discovery dispute. It determined that some peer review documents are not subject to discovery but that the statute protecting the documents is only constitutional if a crime-fraud exception applies. The circuit court determined that the exception is necessary to protect Plaintiffs' constitutional rights. It found that Plaintiffs had demonstrated a prima facie case of crime or fraud. Therefore, it ordered Defendants to produce certain documents for in camera review by the court. It also determined that objective facts within a peer review committee's possession are discoverable by Plaintiffs and ordered Defendants to produce those documents for Plaintiffs, without in camera review.

We granted Defendants' request for intermediate appeal. They raise the following issues:

1. Whether the circuit court erred by compelling production of independent-source items held by a peer review committee.
2. Whether the circuit court erred by creating a crime-fraud exception to SDCL 36-4-26.1.

Mr. Roger A. Sudbeck and Mr. Matthew D. Murphy,  
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Services and Avera Health

Mr. Edwin E. Evans and Mr. Mark Haigh, Attorneys for  
Appellants Curtis Adams, David Barnes, Mary  
Milroy, Robert Neumayr, Michael Pietila, and  
David Withrow

Mr. John Gray and Mr. Jeff Wright, Attorneys for  
Appellant Lewis & Clark Specialty Hospital

Mr. Gregory J. Bernard, Attorney for Appellant Kynan  
Trail

Mr. Timothy L. James, Attorney for Appellees

Mr. Michael D. Bornitz, Mr. Robert D. Trzynka, and  
Mr. Brendan F. Pons, Attorneys for Appellees

**State v. Krause**

Twin brothers Brian and Ryan Krause were employed in information-technology positions by Valley Queen Cheese and Big Stone Therapies, respectively. These businesses are located in Milbank, South Dakota.

In early 2014, it was discovered that the brothers had been stealing office equipment and supplies from their employers and selling the items on the internet. The items stolen included toner, toner cartridges, computers, computer monitors, printers, phones, and other electronic equipment and miscellanea. An internal investigation conducted by Valley Queen Cheese revealed that approximately \$180,000 in equipment had been stolen by the Krauses.

In addition to stealing company property, the Krauses also accessed sensitive and private information. They accessed Valley Queen Cheese's payroll information, which included the ID numbers, salary, benefits, leave, bonus payments, mailing addresses, and bank account numbers of the company's employees. They accessed the personal financial statements of the company's chief financial officer (CFO) and chief executive officer. The Krauses also accessed the email accounts of the CFO and Valley Queen Cheese's information-technology administrator. Using those email accounts, the Krauses accessed the CFO's and administrator's bank accounts online.

The brothers entered into identical plea agreements, pleading guilty to one count each of grand theft and four counts each of unlawfully using a computer system. Focusing on punishment and deterrence, the circuit court sentenced each of the Krauses to four years imprisonment for grand theft. The court also sentenced the Krauses to two years imprisonment for each count of unlawfully using a computer system. Additionally, the court ordered all sentences run consecutively.

The Krauses appeal the sentences imposed for the eight counts of unlawfully using a computer system. They raise three issues:

1. Whether their sentences constitute cruel and unusual punishment.
2. Whether the circuit court was required to impose sentences of probation instead of imprisonment.
3. Whether the circuit court was required to state aggravating factors justifying a sentence other than probation.

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

Mr. Chad C. Nelson, Attorney for Petitioners and Appellants Brian M. Krause and Ryan A. Krause

**State v. Stanage**

Shortly before 2 a.m. on October 26, 2014, in Brookings, South Dakota, Steven Stanage ordered food at a Hardee’s drive-up window. Adam Hill, an employee working at the window, noticed Stanage’s eyes were bloodshot and his speech slurred. Stanage also had some difficulty grasping the beverage he had ordered.

Hill reported his observations to James Debough, his shift supervisor. Debough, in turn, notified the police that a potentially drunk driver was parked at the window and gave the license-plate number to the dispatcher. The Hardee’s employees delayed Stanage’s order to stall his departure.

The dispatcher contacted Brooking’s County Sheriff’s Deputy Jeremy Kriese, who was only one block from the Hardee’s. The dispatcher relayed the information provided by Debough but did not inform Deputy Kriese of the informant’s identity. At Deputy Kriese’s request, Hardee’s “released” Stanage. After Stanage exited the Hardee’s, Deputy Kriese initiated a traffic stop. Deputy Kriese did not independently observe any suspicious behavior—the stop was predicated entirely on the information provided by the dispatcher.

Deputy Kriese approached the vehicle and observed an overwhelming odor of alcohol emanating from it. Deputy Kriese administered field sobriety tests and based on the results, arrested Stanage for driving under the influence. Stanage submitted to a blood draw. A blood analysis reported a BAC of 0.204% at approximately 2:28 a.m.

Stanage was charged with driving under the influence (first offense). He moved to suppress all evidence resulting from the stop or the blood test. The court denied his motion and convicted him of driving while under the influence.

Stanage raises one issue on appeal: Whether Deputy Kriese had the reasonable suspicion required to justify the traffic stop.

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

Mr. Don McCarty and Mr. Benjamin Kleinjan,  
Attorneys for Petitioner and Appellant Steven A. Stanage

**State v. Kihega**

On January 19, 2015, between 8:30 and 9pm, two men entered Casino Korner carrying weapons and yelling at everyone inside to get down. They discharged their weapons multiple times into the ceiling. One of the men demanded money from the counter clerk, who handed over \$4,600. The two escaped through the back door, and a third man drove them away. Eventually, law enforcement arrested Roger Kihega, and he was charged with robbery and possession of a firearm by a convicted felon. Law enforcement also arrested Michael Washington and Gregory Two Hearts in connection with the robbery.

Washington testified against Kihega at trial. Washington provided details of the crime and of his and Kihega's escape with Two Hearts. Washington testified that he entered Casino Korner with Kihega that night and Two Hearts drove them after the robbery. However, a friend of Kihega's testified that Kihega was at home in Cokato, Minnesota, at 4:45pm the day of the robbery. Because Kihega and Washington had concealed their faces during the robbery, no one present that night, other than Washington, could positively identify Kihega. A detective that investigated the crime also testified at trial and provided details of what his investigation revealed. The court allowed in as evidence audio tapes of telephonic conversations that Kihega had with his wife while he was in jail.

At the conclusion of the presentation of evidence at the trial, Kihega moved for a judgment of acquittal, noting that a defendant cannot be convicted solely on the testimony of an accomplice and claiming that the State had not introduced sufficient corroborating evidence to support a conviction. The circuit court denied the motion and submitted the case to the jury.

The jury found Roger Kihega guilty of first-degree robbery and possession of a firearm by a convicted felon. For the robbery conviction, he was sentenced to fifty years in the penitentiary with twelve years suspended. He was also sentenced to five years in the penitentiary for possession of a firearm by a convicted felon.

Kihega appeals his conviction, raising the following issues:

1. Whether the circuit court erred by denying his motion for judgment of acquittal.
2. Whether the circuit court abused its discretion by allowing certain testimony and audio conversations into evidence.
3. Whether the circuit court violated his right to confront witnesses.
4. Whether the cumulative effect of errors by the circuit court deprived his right to a fair trial.
5. Whether his sentence constitutes cruel and unusual punishment.



Mr. Marty J. Jackley, Attorney General, and Ms. Ann  
C. Meyer, Assistant Attorney General, Attorneys  
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Mr. Thomas J. Cogley, Attorney for Defendant and  
Appellant Roger Kihega

## 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.