

South Dakota  
Unified Judicial System

# SOUTH DAKOTA SUPREME COURT

Traveling Term of Court



**OCTOBER 1-2, 2024**

Knudson School of Law  
University of South Dakota, Vermillion, S.D.



**Steven R. Jensen**  
CHIEF JUSTICE



**Supreme Court**  
STATE OF SOUTH DAKOTA

October 1, 2024

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". The signature is fluid and cursive, with the first name "Steven" and last name "Jensen" clearly visible.

Steven R. Jensen Chief Justice

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## **Tuesday, October 1, 2024**

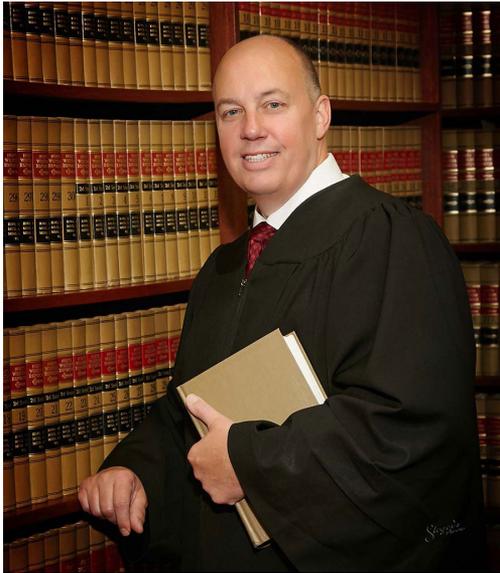
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*The Justices have extended an invitation to the public to attend any of the Court’s sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure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

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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 and became the presiding judge of the First Circuit in 2011.

Chief Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the South Dakota Judges Association, and on other boards and commissions. In 2009, he 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

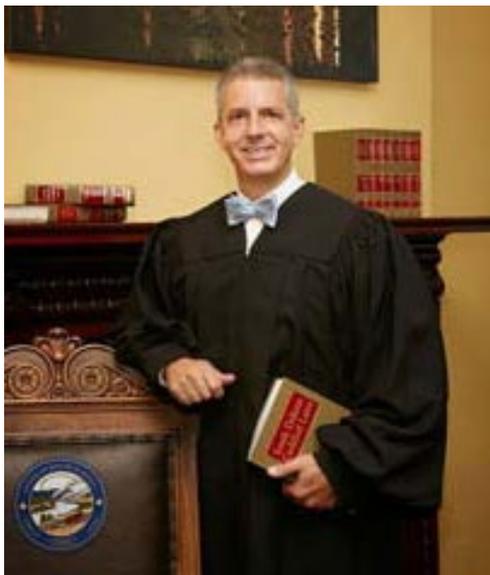
First Supreme Court District

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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, 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

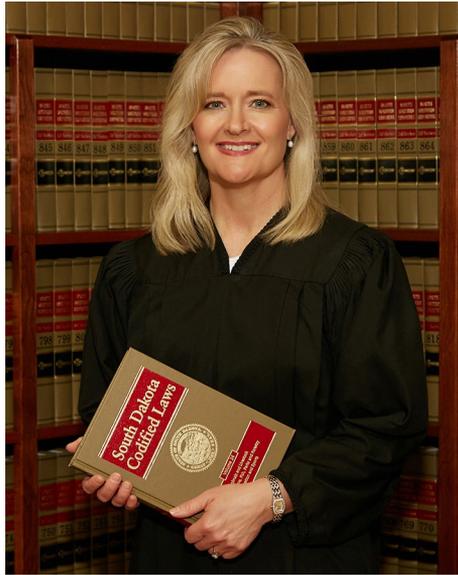
Second Supreme Court District

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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 presiding judge of Minnehaha County Veterans Treatment Court from its inception in 2016 to 2018. He is 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

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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 has served on various committees and boards, including secretary-treasurer and president of the South Dakota Judges Association. She and her husband, Fred, have three children.



## JUSTICE SCOTT P. MYREN

Fifth Supreme Court District

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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

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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

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Law clerks are employed by the Court to assist the Justices with research and writing opinions on the cases under consideration.



L-R: Shanell Nieuwendorp, Supreme Court's law clerk; Will West, law clerk for Justice Myren; Brendan Goetzinger, law clerk for Justice Salter; Emalee Larson-Sudenga, law clerk for Chief Justice Jensen; Emily Toms, law clerk for Justice Kern; Pat Archer, law clerk for Justice DeVaney; Dana Van Beek Palmer, Supreme Court's law clerk

# SOUTH DAKOTA COURTS

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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

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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 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, 46 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.

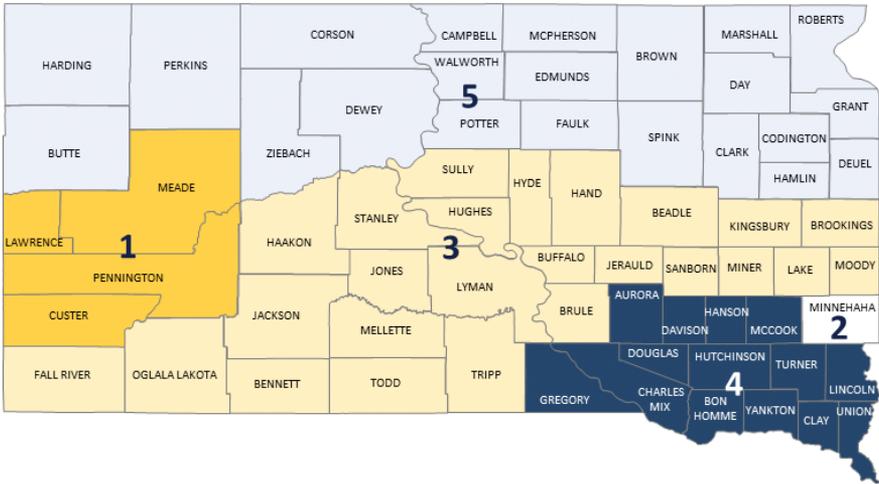
It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have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

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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

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- 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

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- 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

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Seven cases are scheduled for oral argument during the Supreme Court's October 2024 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.

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Case #30520

**Tuesday, October 1, 2024—Number 1**

## **Estate of Mack**

Phillip and Alice Mack farmed roughly 950 acres in Codington County, South Dakota. The couple had five children: Robert, Hugh, Eric, Neal, and Anita. Phillip and Alice executed similar wills. Under the terms of the couple's estate plan, after the first spouse passed away, various assets would be transferred to a trust. After the surviving spouse's passing, the assets in the trust, as well as the property belonging to the surviving spouse's estate, would be given to the five Mack children in equal shares. Phillip passed away in 2012, at which time the Phillip D. Mack Testamentary Trust came into existence. Alice and Eric were named co-trustees, but it was predominantly Alice who administered the trust for the remainder of her life. In the meantime, Robert, being the only Mack child that stayed on the family farm, continued working the farm as he had done for many years.

Alice passed away in 2018 and Hugh was appointed as co-trustee of his father's trust. Hugh and Eric were appointed as co-personal representatives of their mother's estate. After probate proceedings had begun, Robert and the co-personal representatives filed various petitions addressing a wide range of topics, causing a delay in

## CASES

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the probate process. Eventually, Robert's first attorney moved to withdraw as his attorney, which was granted by the circuit court. After Robert's next attorney began representing him, additional petitions were filed, and the probate process continued.

After more than three years, the co-personal representatives filed a petition for distribution to Robert that would satisfy his inheritance rights under his mother's will and his father's trust. Under the terms of the proposal, Hugh and Eric increased the values of various assets to account for valuation changes that might occur before the probate closed, and using those increased values, calculated what they believed was a one-fifth share. The circuit court held a hearing on the petition, and Robert's attorney appeared and made no objections to the proposed distribution. Robert was not personally present at the hearing. The circuit court then entered an order consistent with the proposed distribution.

Robert then learned that the attorney representing him at the distribution hearing was suspended from practice shortly after the hearing. He obtained a new attorney, and additional motions were filed. One of the motions filed was a motion for relief from the order of distribution under SDCL 15-6-60(b). Under that statute, a court may relieve a party from a judgment when it becomes apparent after a judgment has been entered that there was something wrong with the circumstances with which it was entered. Robert argued to the circuit court that his attorney did not provide him with notice of the petition for distribution, the hearing on the matter, or the eventual order of distribution. The circuit court denied Robert's motion for relief from the order of distribution. Robert appeals that denial.

Ms. Pamela R. Reiter and Mr. Ronald A. Parsons, Attorneys for Robert Mack

Mr. Lee Schoenbeck, Mr. Joe Erickson, and Mr. Vincent A Foley, Attorneys for Eric Mack and Hugh Mack

Mr. Thomas J. Linngren, Attorney for Neal Mack

# CASES

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Case #30588

**Tuesday, October 1, 2024—Number 2**

## **State v. Rogers**

Dreau Rogers called 911 at 12:48 a.m. on January 21, 2022, requesting an ambulance at his home in Spearfish. Rogers did not provide any additional information and told the dispatcher that he would explain when help arrived. When they arrived, law enforcement discovered that Destiny Rogers, Dreau's wife, had been shot in her right arm and was lying motionless on the living room floor. Officers found a spent cartridge casing from a .45 caliber weapon near Destiny's body. First responders attempted to resuscitate Destiny and ultimately transported her to the hospital, but their efforts were unsuccessful, and she died from her injury. An autopsy later revealed that the bullet traveled through Destiny's arm and into her torso, hitting her right lung, aorta, and left lung.

Rogers immediately told law enforcement that Donovan Derrek shot and killed Destiny. He reported that he and Destiny were home alone when Derrek arrived and started an argument with Rogers. As Rogers turned to walk away, he stated that he heard a noise and turned to see Destiny fall to the ground. Rogers explained that he believed that Derrek was trying to shoot him but missed. During the investigation Rogers was interviewed four times and inconsistently described where Derrek was located in the house when the shot was fired. Rogers initially placed Derrek at the door to the house, approximately 18 feet from Destiny, but later stated that Derrek was further into the house, at a location approximately 11 feet from Destiny.

Law enforcement searched Rogers' residence and in addition to the spent shell casing also discovered two firearms: a holstered .45 caliber semiautomatic handgun located under a wooden landing in Rogers's backyard and a .22 revolver, found in a dresser. Law enforcement also discovered a wooden box in Rogers's house containing a bag of .45 caliber bullets.

The Special Response Team (SRT) from Rapid City apprehended Derrek at his home on the morning of January 22, and Derrek was brought in for questioning. During the interview, Derrek alleged that

## CASES

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he had an alibi. From approximately 11:50 p.m. on January 21 until approximately 1:30 a.m. on January 22, Derrek reported that he was at Alan Reddy's house engaging in sexual relations.

Law enforcement interviewed Reddy on January 22, who confirmed that Derrek was at his house the night before. Reddy established a timeline for the evening by referencing text messages between himself and Derrek. Forensic analysis of Reddy's phone revealed that at 11:53 p.m., Derrek texted Reddy saying that he was leaving his house. Reddy stated that Derrek lived only a couple of blocks away and arrived shortly after. Reddy also showed law enforcement a photo he took of Derrek's penis at 1:23 a.m. on January 22 and stated that Derrek left shortly after. At 1:42 a.m., Derrek texted Reddy thanking him for the evening and referencing the sexual encounter.

After further investigation, law enforcement released Derrek. Rogers was later indicted on 11 counts, including alternate counts of first-degree and second-degree murder, possession of a firearm by a person with a prior felony, possession of a firearm by a person with a prior drug-related felony, and several drug-related crimes.

During the investigation, law enforcement seized multiple cell phones and digital storage devices, including Derrek's cell phone, and sent them to the Rapid City Police Department for extraction and processing. The items were sent back to the Spearfish Police Department on February 1, 2022, with an extraction report, and the lead investigator returned Derrek's phone to him on February 16. Several months later, in late June 2022, the investigator reviewed the extraction report and learned that the information on Derrek's phone had not been extracted. Law enforcement applied for a second search warrant for Derrek's phone, but Derrek had disposed of the phone at a Walmart kiosk.

During a nine-day jury trial, the State presented forensic evidence connecting Rogers to the crime. Rogers had gunshot residue on his hands, his fingerprint was on the spent cartridge casing found near Destiny's body, and his DNA was on the .45 found hidden in his yard. The State argued that this was the murder weapon, although a forensic firearm examiner could not positively determine that the bullet in Destiny's body was fired from the .45 found at Rogers'

## CASES

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home. However, the doctor who performed the autopsy testified that the marks on Destiny's arm suggested that the tip of the barrel was touching Destiny's skin when it was fired, and Destiny's DNA was found on the tip of the barrel of the .45. The jury also saw text messages sent from Rogers to Destiny in October 2020 threatening to kill her and from Rogers to a third party in June 2021 asking where to purchase a gun.

The State also presented evidence establishing Derrek's alibi. The jury saw the text messages between Derrek and Reddy and heard their testimony. Derrek's DNA was not found on the .45 or any of its components. However, the evidence revealed that Derrek had gunshot residue on his hands. The State called the SRT agent that arrested Derrek, who testified that he was wearing gloves as part of his uniform and that he previously wore the gloves during firearms training. The State's theory at trial was that gunshot residue from the SRT agent's gloves transferred to Derrek's hands when he was arrested.

Rogers moved for a judgment of acquittal at the close of the State's case, asserting that the State presented insufficient evidence of Rogers' guilt and failed to disprove that Derrek was the shooter. The circuit court denied the motion. Rogers also requested a jury instruction on spoliation. Rogers argued that the State's decision to return the phone to Derrek before the data was extracted violated state law. He argued that he was entitled to an instruction informing the jury that they could presume that any evidence that would have been extracted from the phone would have been unfavorable to the State's theory of the case. The circuit court denied Rogers' motion, instead instructing the jury that they could determine whether, and to what extent, the State's mishandling of the evidence weighed on their verdict.

Rogers was convicted of second-degree murder and each of the related firearm and drug offenses. He was sentenced to life imprisonment without the possibility of parole on the murder conviction, two years in prison for each firearm-related conviction, and five years in prison for the drug offense. Each sentence was ordered to run consecutively.

# CASES

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Rogers raises the following issues on appeal:

1. Whether the circuit court erred by denying Rogers' motion for judgment of acquittal.
2. Whether the circuit court abused its discretion by denying Rogers' request for a spoliation jury instruction.
3. Whether the State violated Rogers' due process rights by returning Derrek's cell phone before it had been properly extracted.

Mr. Robert J. Rohl, Attorney for Appellant Dreau Lester Rogers

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

# CASES

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Case #30554, #30567

**Tuesday, October 1, 2024—Number 3**

## **Puffy's, LLC v. Department of Health**

In 2020, South Dakota voters approved an initiated measure creating a state medical cannabis program administered by Appellant, South Dakota Department of Health. All medical cannabis establishments, including dispensaries, must apply for and obtain a registration certificate from the Department. Municipalities and counties may enact ordinances limiting the number of medical cannabis dispensaries within their jurisdictions. In 2021, the City of Rapid City enacted an ordinance that resulted in a limit of 15 dispensaries in 2022. However, there were 47 applications for the 15 allowable state registration certificates that could be issued for medical cannabis dispensaries in Rapid City. Appellee Puffy's, LLC submitted several applications for various locations in Rapid City.

Pursuant to the Department's administrative rule (ARSD 44:90:03:16), in March 2022 the Department held a random drawing to determine which applicants would either receive registration certificates for dispensaries in Rapid City or be placed on a waiting list. Puffy's received several of the 15 certificates and was also drawn as the first alternate position on the waiting list for its location at 3308 Campbell Street in Rapid City.

The Department's rule requires applicants who receive a certificate to become operational within one year. If this does not occur, the rule states that the certificate is deemed void and must be awarded to the next applicant on the waiting list. In March 2023, one of the initial certificate holders from the Department's random drawing, Greenlight Dispensary, failed to meet the one-year operational requirement for one of its locations. After the Department denied Greenlight's request for an extension, the certificate became available for the first alternate on the waitlist, Puffy's. The Department did not, however, issue the certificate to Puffy's.

Puffy's filed an application for a writ of mandamus in circuit court. It asked the court to compel the Department to issue a medical cannabis establishment certificate for its dispensary at the Campbell Street location. Thereafter, the Department sent a letter to Puffy's

## CASES

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stating that Puffy’s “may proceed with the application process” for the certificate that had recently become available.

The circuit court issued an alternative writ of mandamus directing the Department to either issue the certificate to Puffy’s within 30 days or show cause before the court as to why it had not done so. The Department then filed a motion to dismiss or, in the alternative, a motion to quash the circuit court’s alternative writ. It based its motion on several grounds, including a claim that the court lacked jurisdiction to enter the writ because Puffy’s had failed to exhaust administrative remedies. The Department also asserted the matter was moot given its letter acknowledging Puffy’s right to proceed with the application process for the available certificate. Puffy’s responded, alleging that ARSD 44:90:03:16 required the Department to issue the certificate to Puffy’s as the first alternate on the waiting list, without requiring anything further on the part of Puffy’s. Puffy’s also challenged whether the Department had the authority to create and implement ARSD 44:90:03:16, or whether the rule was invalid. After a motion hearing where the court heard arguments of counsel, the circuit court denied the Department’s motion to dismiss and held in favor of Puffy’s. The court entered a peremptory writ of mandamus ordering the Department to issue the registration certificate to Puffy’s for its Campbell Street location.

The Department raises the following issues on appeal:

1. Whether the circuit court erred in not granting the Department’s motion to dismiss.
2. Whether the circuit court should have allowed an opportunity for an evidentiary hearing prior to ruling on the merits of whether the peremptory writ is warranted.

Puffy’s filed a Notice of Review, raising the following issue on appeal:

1. Whether ARSD 44:90:03:16 is unconstitutional and exceeds the statutory authority granted to the Department.

Mr. Marty J. Jackley, Attorney General, and Ms. Tamara Lee and Mr. Howard Pallotta, Special Assistant Attorneys General for Appellant South Dakota Department of Health

Mr. Ryan D. Cwach, Attorney for Appellee Puffy’s, LLC

# CASES

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Case #30443

**Tuesday, October 1, 2024—Number 4**

## **State v. Bordeaux**

Jeanette Jumping Eagle died from a single gunshot wound to her forehead in the early morning hours of January 1, 2020. She had spent New Year's Eve with her boyfriend, Dion Bordeaux, his brother Giovanni, and some of her family members in a room she rented at the Microtel hotel in Rapid City. She and Bordeaux were not getting along and were arguing that evening. This made Giovanni uncomfortable, and after everyone else had left, he called some coworkers to come pick him up at the hotel. While he was in the bathroom, he heard a loud bang and when he opened the door to the room, he smelled gun powder and saw his brother “freaking out.” When Giovanni asked him what happened, Bordeaux kept repeating, “I don’t know.” Giovanni caught a glimpse of Jeanette on the couch, bleeding from her head, but his view was obstructed by Bordeaux, who had walked up to where she was sitting. According to Giovanni, they were both panicking, and after Bordeaux washed his hands in the bathroom, they left the room and began running away from the hotel while Bordeaux was repeatedly stating, “I’m sorry.”

After the two split up, Bordeaux called 911 and reported that his girlfriend had shot herself. When law enforcement responded to the hotel, they found Jeannette, deceased, on the couch, with a handgun on her lap underneath her right hand. Jeanette’s cell phone cord, which was still attached to her phone, was wrapped around one of her right fingers. They photographed and processed the scene, collecting the handgun and other evidence, including swabs of blood stains found on the walls, the bathroom floor, and sink. When the handgun was removed from Jeanette’s lap, its safety was on, and the officers observed what was later determined to be transfer blood stains on the gun and Jeanette’s hand.

Meanwhile, other officers located Bordeaux and asked him what happened. He stated that he and Jeanette had been fighting and he broke up with her. After telling her he was leaving, he said he heard a loud noise and thought she had shot at him, so he and his brother ran from the hotel. He explained that after realizing she was not chasing them, he decided to call the police.

## CASES

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A forensic pathologist performed an autopsy the next day and concluded, from the stippling on Jeanette's skin, that the gun was not in contact with her forehead when it was fired; rather, it was fired from a short distance away. He also described the wound pathway which shows the bullet traveled in a straight downward path, without any angular deviation.

While the investigation was ongoing, law enforcement spoke to Bordeaux a second time, and during this interview, Bordeaux provided a different account of what happened. He explained that as he was knocking on the bathroom door to ask Giovanni if he could get a ride with him and his coworkers, he heard Jeanette say something like, "Fuck you then, I will just die." He stated he then heard a gunshot and went over to her and cradled her head in his hands. He explained that he was concerned about drugs being in the hotel room and didn't know what to do, so after washing his hands, he and his brother took off running.

A grand jury later indicted Bordeaux on one count of first-degree murder. Prior to trial, the State filed a notice of its intent to offer evidence of other acts, one of which involved an argument between Bordeaux and one of his cousins in September 2019 after they had been drinking at his cousin's home. The cousin's girlfriend, who was sleeping in a bedroom, heard them arguing and when she came out, she witnessed Bordeaux stabbing her boyfriend, who was eventually able to subdue Bordeaux. She then convinced Bordeaux to let go of the knife, after which he apologized and assisted in getting her boyfriend to the hospital. Bordeaux was later charged and pled guilty to aggravated assault as a result of this incident. The State contended this evidence was similar to Bordeaux's actions on the night of Jeannette's shooting and therefore admissible to show intent and a common scheme or plan in which Bordeaux, after drinking, suddenly and violently attacks a victim with a deadly weapon, then apologizes and engages in a cover-up. Bordeaux objected to the admission of this evidence, arguing that it was not sufficiently similar to warrant its admission. After a hearing, the circuit court entered an order allowing the evidence to be presented to the jury at trial.

The jury found Bordeaux guilty of first-degree murder and he was sentenced to life imprisonment without parole in the state

## CASES

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penitentiary. Bordeaux appeals, contending the circuit court abused its discretion when admitting this other act evidence. He claims this Court has precluded this type of character or propensity evidence in other cases. He further contends he was severely prejudiced by its admission. The State claims the other act evidence was properly admitted, but alternatively argues that even if the court abused its discretion in admitting the evidence, a reversal is not warranted given the overall strength of the forensic and other incriminating evidence presented to the jury.

Mr. Kyle Beauchamp, Attorney for Appellant Dion Bordeaux

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

# CASES

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Case #30732

Wednesday, October 2, 2024—Number 1

## Earll v. Farmers Mutual

On December 22, 2022, Rebecca A. Earll was killed in a motor vehicle collision when William Pigg ran a stop sign while traveling at a speed of 97 miles per hour and crashed into Rebecca's Subaru Forester. Rebecca was not at fault for the accident. The collision and the resulting death of Rebecca were proximately caused by the negligence of Pigg, who had a motor vehicle insurance policy with liability limits of \$25,000. Rebecca had a motor vehicle insurance policy with Farmers Mutual Insurance Company of Nebraska (Farmers Mutual) covering the Subaru Forester that provided for underinsured motorist (UIM) coverage of \$100,000.

Rebecca's parents, David H. Earll and Marcia R. Earll (Earlls), individually and on behalf of Rebecca's Estate were paid the \$25,000 policy limits from Pigg's policy. The Earlls also recovered \$75,000 in UIM benefits from Farmers Mutual on the Subaru Forester policy (\$100,000 less the \$25,000 recovered from Pigg). The Earlls sought additional UIM benefits in the amount of \$250,000 from a separate motor vehicle policy purchased by the Earlls from Farmers Mutual, providing coverage for two other vehicles owned by the Earlls. The policy named the Earlls and family members with whom they lived as insureds. At the time of the accident, Rebecca lived with her parents, and it is undisputed that she qualifies as an insured under the Earlls' Farmers Mutual policy. However, Farmers Mutual denied UIM coverage to the Earlls based on an "owned but not insured" exclusion in the policy because Rebecca was occupying her Subaru Forester at the time of the collision, a vehicle not listed in the declarations of her parents' policy. The owned but not insured exclusion at issue provides as follows:

### EXCLUSIONS FOR UNDERINSURED MOTOR VEHICLE COVERAGE

There is no coverage for: . . .

2. **bodily injury** to any **insured** while **occupying**, or through being struck by, a motor vehicle or trailer of any type owned by **you, your spouse**, or a **relative** if it is not insured for this coverage under this policy.

## CASES

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Following the denial, the Earlls, both individually and as co-personal representatives of Rebecca’s estate, filed an action for declaratory judgment seeking UIM benefits arising from the accident under their Farmers Mutual policy. The Earlls argued the “owned but not insured” exclusion violated South Dakota public policy and was not enforceable to deny the UIM claim. Farmers Mutual responded that the exclusion was consistent with public policy and a valid limitation on underinsured coverage under *De Smet Insurance Company of South Dakota v. Pourier*, 2011 S.D. 47, ¶ 12, 802 N.W.2d 447, 451–52. The parties agreed to a stipulation of the undisputed facts and filed competing motions for summary judgment. After a hearing on the motions, the circuit court granted summary judgment in favor of Farmers Mutual, denying the Earlls’ motion.

The Earlls appeal the circuit court’s ruling requesting this Court overrule its decision in *Pourier*, or alternatively distinguish the circumstances of the case. The Earlls raise two issues:

1. Whether the circuit court erred in holding that the “owned but not insured” exclusion does not violate South Dakota public policy when it found that the exclusion was a valid limitation on underinsured coverage under the language of SDCL 58-11-9.5.
2. Whether the circuit court erred in holding that the Farmers Mutual policy did not provide UIM coverage for uncompensated damages resulting from the collision that killed Rebecca Earll.

Mr. Scott A. Abdallah and Mr. Ronald A. Parsons, Jr., Attorneys for Appellants David H. Earll and Marcia R. Earll, individually and as co-personal representatives of the Estate of Rebecca A. Earll

Mr. Justin T. Clarke, Attorneys for Appellee Farmers Mutual Insurance Company of Nebraska

# CASES

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Case #30569

**Wednesday, October 2, 2024—Number 2**

## **State v. Turner**

In July 2022, a group of people gathered outside a liquor store in Sioux Falls. While the group conversed, a vehicle approached. One member asked who was driving the vehicle. James Driver answered that it was somebody who lived in the area. Gunfire erupted from the vehicle, and one person was hit in the leg. As people emerged from their cover, the vehicle returned and opened fire again. The vehicle sped off after the second round of shooting.

A 911 caller described the vehicle as a gold SUV and gave the license plate information. Law enforcement arrived at the scene and began investigating. An officer gathered spent shell casings he found in the street. While this was going on, another officer saw a vehicle that matched the description provided during the 911 call. After the vehicle stopped at a gas station, the officer pulled up behind the vehicle and initiated a stop. The only person in the vehicle at the time of the stop was Lydelle Turner. A search of the vehicle and Turner's person revealed live ammunition and spent shell casings. Law enforcement at the scene of the shooting brought Driver to where Turner was stopped. Driver initially was uncertain Turner was the shooter. After looking at him longer, Driver said he believed Turner was the shooter. Turner was arrested and charged with the shooting.

Law enforcement gathered additional evidence during their investigation, including security camera footage from the area of the shooting and Turner's home. Additionally, traffic camera video from the area showed that minutes before the shooting, Turner was driving alone in his car toward the scene. Law enforcement took a photograph of a scene from the video but did not save the video.

The spent shell casings were tested, which revealed that the same gun fired the spent casings found at the shooting scene and those found in Turner's car. A report detailing this forensic analysis was prepared but was not disclosed to the defense until a few days before the trial.

# CASES

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Before trial, Turner moved to suppress Driver’s identification of Turner and requested dismissal of all charges because the State had failed to disclose the ballistics report in a timely fashion. Turner also asked the court to preclude the State from introducing the photograph of the traffic camera video. The circuit court denied each request. During the trial, the circuit court also denied Turner’s request for three specific jury instructions and his motion for judgment of acquittal. On appeal, Turner challenges the circuit court’s rulings on each of those requests.

Ms. Josey M. Blare and Ms. Mindy R. Werder, Attorneys for Lydelle Turner

Mr. Marty J. Jackley, Attorney General, and Mr. Jacob R. Dempsey, Assistant Attorney General, Attorneys for the State of South Dakota

# CASES

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Case #30664

**Wednesday, October 2, 2024—Number 3**

## **Anderson Industries, LLC v. Thermal Intelligence, Inc.**

Thermal Intelligence, Inc. (TI), is a Canadian corporation that specializes in selling industrial heaters. In 2018, TI sought a new supplier for its heater inventory and negotiated with Anderson Industries, LLC (Anderson), to custom manufacture 30 model V1.0 industrial heaters. Anderson completed the order, and TI paid for the heaters which were then sold to an affiliated company.

TI and Anderson discussed the potential for future, improved heater models along with the idea of continuing their business relationship into the future. The parties also discussed the possibility that TI could, at some point, acquire the intellectual property rights to Anderson's manufacturing technology.

As part of completing the original V1.0 order for 30 heaters, Anderson had purchased components and parts to build 60 heaters. This left Anderson with sufficient material to manufacture an additional 30 heaters. Anderson proposed to incorporate design modifications to the V1.0 and build 30 new V1.5 models which it would offer for sale to TI.

Anderson's proposal came amid other ongoing negotiations about future heater models and the sale of its intellectual property rights to TI. As to the former topic, Anderson stated that it would consider building other heater models only after it had sold the 30 V1.5 models. The subject of this appeal concerns whether TI and Anderson reached an agreement for the sale of the V1.5 heaters.

Anderson points to a series of July 19, 2019, emails which it asserts establish that TI agreed to purchase the 30 V1.5 heaters for \$69,500 each. The parties also agreed to a conditional term, in Anderson's view, that allowed TI to recover \$5,000 credit against the purchase price of the intellectual property rights if the parties were ultimately able to reach an agreement in that regard.

## CASES

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TI asserts initially that it did not agree to purchase the 30 V1.5 heaters. Instead, TI argues that the July 19 emails were only a portion of a larger scope of negotiations which did not come to fruition. Alternatively, TI contends that, in the event an enforceable contract exists, its obligation to perform by paying the purchase price should be excused because of quality issues associated with the heaters and what it alleges was a lack of support to address the performance issues from Anderson.

Concerning this latter claim, Anderson notes that TI never returned any of the heaters as unsuitable or nonconforming goods. Citing provisions of South Dakota statutory law which incorporate the Uniform Commercial Code, Anderson argues that TI may not now seek to avoid contract liability by claiming the heaters were defective.

Litigation between the two parties began when Anderson sued TI seeking the balance of the purchase price for the 30 V1.5 heaters, plus statutory interests. TI denied any liability and asserted affirmative defense that included its claim that no enforceable contract existed along with claims that Anderson failed to manufacture heaters that conformed to TI's custom specifications, failed to "provide warranty and service work as promised[,]" and repudiated the contract by closing an Anderson facility in North Dakota and terminating key employees.

Both parties moved for summary judgment. The circuit court granted Anderson's motion for summary judgment after determining that there were no disputed issues of material fact as to the agreement for TI to purchase the 30 V1.5 heaters. After subtracting the money TI had already paid for the heaters and applying the statutory rate of prejudgment interest, the circuit court entered a judgment for Anderson in the amount of \$1,309,847.67.

From this final judgment, TI has appealed.

Ms. Tatum O'Brien, Attorney for Appellant Thermal Intelligence, LLC

Mr. Jonathan A. Heber and Ms. Nichole J. Mohning, Attorneys for Appellee Anderson Industries, LLC

# GLOSSARY OF TERMS

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## **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 party who takes an appeal from the circuit court to the Supreme Court. (In other words, the party who does not agree with the result reached in circuit court.)

## **Appellee**

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

## **Brief**

A document written by a party’s attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which their 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 party sued by the plaintiff or prosecuted by the state in the circuit court.

# GLOSSARY OF TERMS

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## **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 party 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, Justice Janine M. Kern, Chief Justice Steven R. Jensen, Justice Mark E. Salter, and Justice Scott P. Myren



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## **SOUTH DAKOTA SUPREME COURT**

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