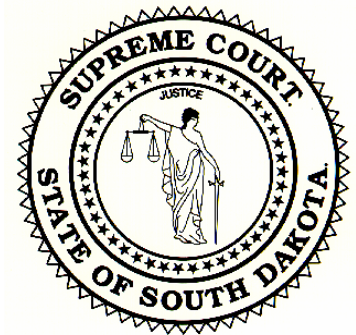


Introduction to  
**The South Dakota  
Supreme Court**



and  
**Case Summaries for  
Oral Arguments at the  
October Term of the Court  
to be held  
October 5 through October 7, 2009  
Mount Marty College  
Yankton, South Dakota**





*Supreme Court*  
STATE OF SOUTH DAKOTA

*David Gilbertson*  
CHIEF JUSTICE

October 5, 2009

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October term.

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

Sincerely yours,

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

David Gilbertson  
Chief Justice

*State Capitol Building*

*Pierre, South Dakota 57501-5070*

*(605) 773-6254*

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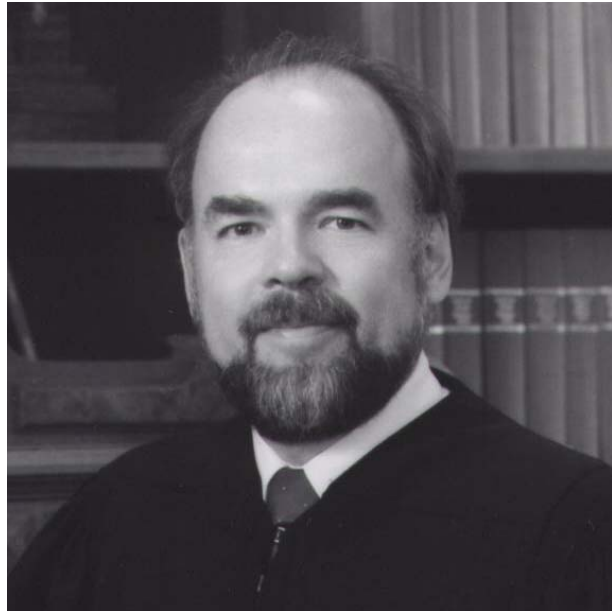
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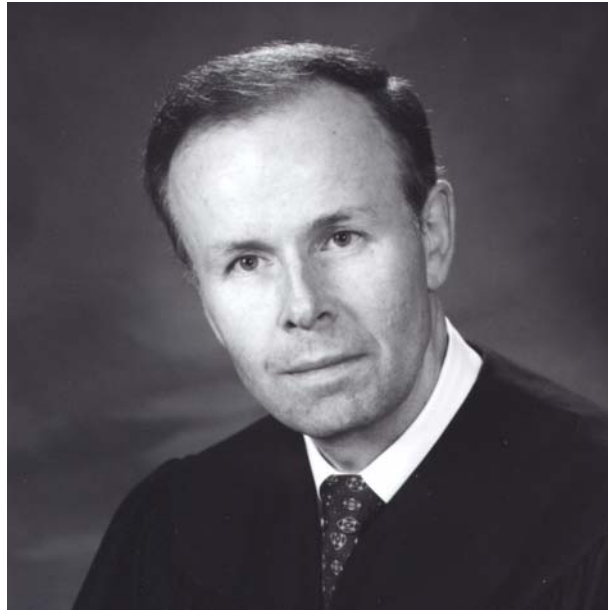
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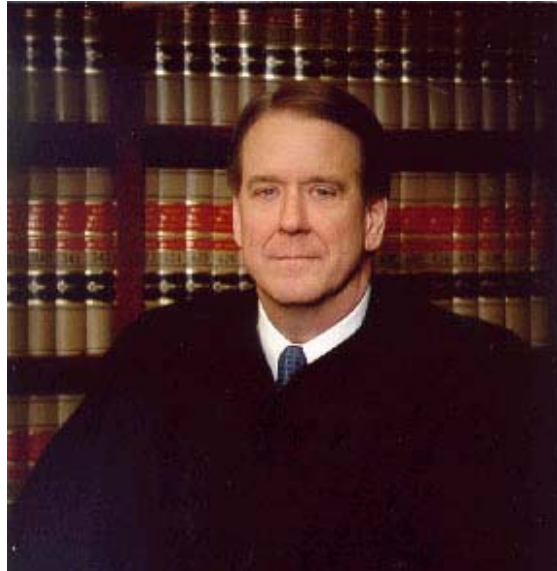
### **Chief Justice David Gilbertson**

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



***Justice John K. Koenkamp***

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



*Justice Steven L. Zinter*

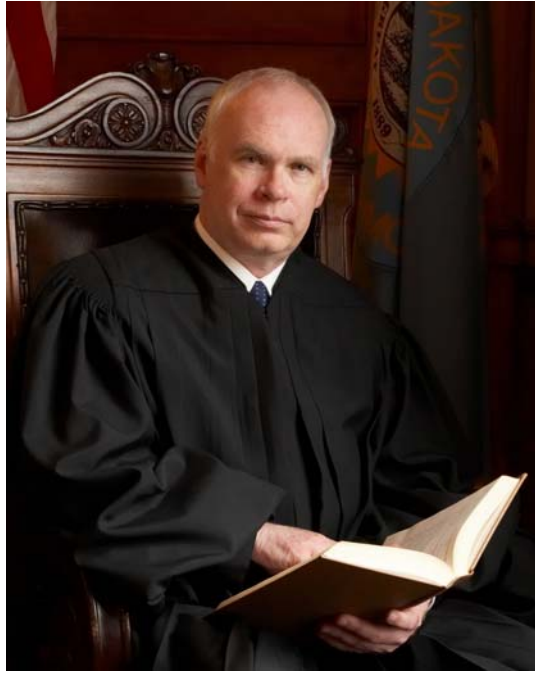
Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002. He received his B.S. degree from the University of South Dakota in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. Upon graduation from law school, Justice Zinter practiced law as an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



***Justice Judith K. Meierhenry***

Justice Meierhenry was born January 20, 1944. She received her B.S. degree in 1966, her M.A. in 1968, and her J.D. in 1977 - all from the University of South Dakota. She practiced law in Vermillion from 1977 to 1978 and was appointed by Governor Janklow in 1979 to the State Economic Opportunity Office. She was then appointed as Secretary of Labor in 1980 and Secretary of Education and Cultural Affairs in 1983. She was a Senior Manager and Assistant General Counsel for Citibank South Dakota in Sioux Falls from 1985 to 1988. In 1988 she was appointed by the late Governor George S. Mickelson as a Second Circuit Court Judge and in 1997 was named Presiding Judge of the Second Judicial Circuit. Justice Meierhenry was appointed to the Supreme Court by Governor Janklow in November 2002. She was retained by the voters in the 2006 general election. She is the first woman to be appointed to the Supreme Court in South Dakota. Justice Meierhenry is a member of the South Dakota Bar Association, the Second Circuit Bar Association, the Clay-Union Bar Association and the National Association of Women Judges. She served as President of the South Dakota Judges Association and was a member of the South Dakota Civil Pattern Jury Instruction Committee. Justice Meierhenry and her husband Mark live in Sioux Falls. They have two children and seven grandchildren.





***Justice Glen A. Severson***

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



*Clerk of the Supreme Court*

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



### ***Supreme Court Law Clerks***

Law Clerks are employed by the Court to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Kyle Wiese (Supreme Court Law Clerk), Derek Nelsen (Justice Meierhenry), Jennifer Williams (Justice Koenkamp), Marie Ruetters (Chief Justice Gilbertson), Sara Larson (Justice Zinter), and Meghann Joyce (Justice Severson).

**Summary of Jurisdictions  
for the South Dakota  
Court System**

<b>Supreme Court</b>
----------------------

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.

<b>Circuit Court</b>
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Circuit Court services available in each county seat.

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

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

### **The Supreme Court Process**

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

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

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

discusses the case and one justice is assigned to write the opinion in the case. Other justices may write concurring or dissenting opinions to accompany the majority opinion, all of which are published as formal documents by the West Publishing Company in the North Western Reporter. The Court's opinions are also available online at: [www.sdjudicial.com](http://www.sdjudicial.com).

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

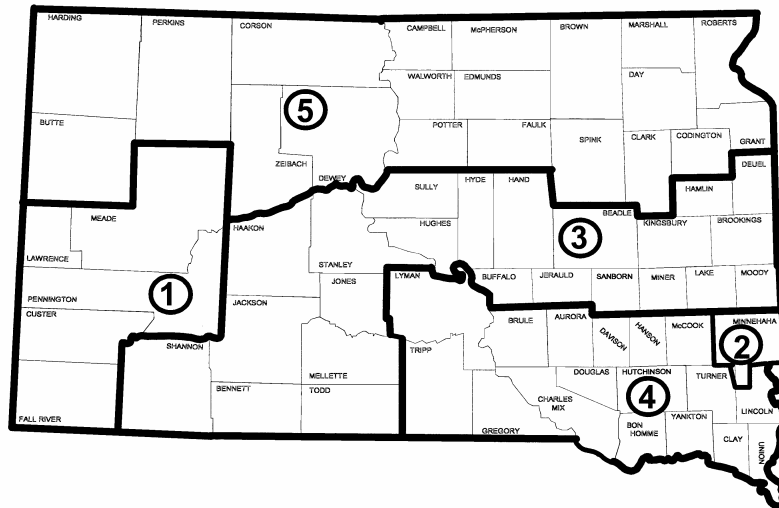
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

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

**South Dakota Supreme Court Appointment Districts  
Effective July 1, 2001**



**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 2009 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 Farm v. Gertsema**

In July 2005, Calvin and Laci Hanson (Hansons) purchased an all terrain vehicle (ATV) for their thirteen-year-old daughter, Brittany. State Farm Insurance subsequently issued the Hansons a Recreational Vehicle Insurance Policy covering the ATV. The policy insured Calvin and Laci and any other person using the ATV if the other person was using the ATV with Calvin or Laci's permission. The policy provided insurance coverage for liability and medical expenses.

In October 2005, the Hansons gave their son, Jacob, permission to drive the ATV a few miles to Eli Hickman's residence. While the ATV was parked at the Hickman residence, cousins Shane Gertsema and Jozette Gertsema used the ATV in Jacob's presence but without asking him for permission. Although Shane also did not have permission from Calvin or Laci, earlier that day, Brittany had given Shane permission. Brittany was not, however, at the Hickman residence when Shane actually used the ATV. While Shane was operating the ATV on a road outside the Hickman residence, he lost control and the ATV rolled. Jozette was seriously injured.

Following the accident, Jozette sought to recover insurance benefits under State Farm's policy, claiming that she and Shane were permissive users, and therefore, they were insured under the policy. State Farm denied coverage and filed this suit seeking a court ruling that it was not required to provide insurance benefits under its policy.

In the court proceedings in the lower court, Jozette claimed that she and Shane had express or implied permission to operate or drive the ATV from Brittany, Jacob, or their parents. State Farm moved for summary judgment, arguing that Brittany's or Jacob's permission was not

sufficient under the language of the policy requiring permission from “named insureds,” which in this case was only Brittany’s parents, Calvin and Laci. State Farm also argued that any permission Brittany or Jacob may have given was ineffective because Shane’s use violated rules that Calvin and Laci had set for other children’s use of the ATV. Jozette opposed State Farm’s motion. She argued that there were disputed facts requiring a trial to determine whether such rules existed and were enforced. Jozette also argued that Shane had express or implied permission to use the ATV because the Hansons had given Brittany authority to permit others to use the ATV. The circuit court ruled in favor of State Farm.

Jozette now appeals to this Court, arguing that there are disputed facts whether Shane and Jozette had express or implied permission to use the ATV. If there are disputed facts regarding those issues, Jozette contends that the case should be sent back to the lower court for a trial to determine whether there was express or implied permission to use the ATV.

Mr. Roy A. Wise and Mr. Zachary W. Peterson, Attorneys for  
Plaintiff and Appellee State Farm

Mr. David J. King, Attorney for Defendant and Appellant  
Gertsema

**State v. Little Brave**

This case arises out of a traffic stop on Interstate 90 near Sioux Falls. In March 2008, Trooper Koltz observed a gray Chevy Suburban with Washington State license plates cross the white fog line of the interstate. The Suburban then crossed the center line of the interstate, and then once again crossed the white fog line. At 9:44 p.m., Koltz stopped the Suburban and approached the driver, Harvey Little Brave ("Little Brave"). Koltz noted that the Suburban: (1) contained numerous duffle bags in the back, (2) appeared "lived-in," and (3) had a strong soap odor. Mary Little Brave ("Mary") sat in the passenger seat, and three small children sat in the back.

Little Brave handed Koltz his driver's license while Mary handed Koltz the Suburban's rental agreement. Koltz informed Little Brave that he was going to issue Little Brave a warning ticket for "lane driving" and asked him to have a seat in his patrol vehicle. While Koltz began to write the ticket, he initiated a conversation with Little Brave. Little Brave indicated that he was driving from Washington and going to New York to pray for a sick friend. He also indicated that he and his family were going to stay in New York until the following Wednesday and then fly back to Washington.

It was 9:50 p.m. when Koltz told Little Brave he was going to issue a warning ticket. Before completing the warning ticket, Koltz left the patrol vehicle to check the Suburban's vehicle identification number and to speak to Mary, as Mary's name was the only name on the Suburban's rental agreement. Koltz told Little Brave to stay in the patrol vehicle. After Koltz confirmed that the vehicle number matched the rental agreement, Koltz started a conversation with Mary. Because of a technical problem, the officer's microphone did not pick up their conversation.

According to Koltz, Mary confirmed that they were traveling from Washington to New York and that they were going to meet a friend. She denied, however, that anyone in New York was sick. She also indicated that they would be returning to Washington on Friday, as opposed to Wednesday.

Koltz testified that when he put everything together, it “seemed to make the reasonableness for this trip unreasonable,” and he testified that – at this point – he became suspicious of illegal drug activity. The articulated basis for his suspicion included: (1) the discrepancies in the Little Braves’ stories about the purpose of their trip and their return; (2) Washington State was considered a drug-source state and New York was considered a destination state; (3) those who carry drugs try to mask the odor with a soap smell, and (4) the children had been traveling for an extremely long period of time, yet Little Brave was then going to fly them back to Washington.

At 9:52 p.m., Koltz went back to the patrol car and started a conversation with Little Brave regarding Mary’s conflicting statements. At 9:56, Koltz went back to the Suburban to give Mary her identification back. Koltz then initiated another conversation with Mary. Koltz walked back to his patrol car at 9:59, and after a few further questions of Little Brave, Koltz told Little Brave one of his jobs was to look for illegal drugs. At 10:00 and again at 10:02, Little Brave denied there were any illegal drugs in his vehicle. At 10:04, Koltz told Little Brave that if he had less than two ounces of marijuana, Koltz would only write a ticket for possession of paraphernalia and let Little Brave be on his way. Little Brave’s response is inaudible on the videotape, but Koltz testified that Little Brave admitted to having a personal amount of drugs in the Suburban. At this time, Koltz had not issued Little Brave the warning ticket.

At 10:09, without Little Brave's consent, Koltz utilized his drug dog to do an exterior sniff of the Suburban. The dog alerted to the back trunk and the passenger side of the vehicle. Koltz's resulting search revealed 33.71 pounds of marijuana in the duffle bags, approximately a quarter ounce of marijuana in a console area, and two marijuana joints in the front passenger compartment.

Koltz arrested Little Brave and Mary. Koltz finished writing the warning ticket after he searched the vehicle and arrested Little Brave and Mary.

Before trial, Little Brave moved to suppress the evidence. Little Brave conceded there was reasonable suspicion justifying the initial traffic stop. However, Little Brave argued that he was unconstitutionally detained longer than was necessary to complete the initial purpose of the traffic stop – to investigate the Suburban's weaving. The circuit court found that the extended duration of the stop was constitutionally reasonable under the totality of the circumstances, including the "conflicting answers" regarding Little Brave's trip. Consequently, the circuit court denied Little Brave's motion to suppress.

Little Brave appeals, arguing that Koltz unreasonably extended the initial traffic stop in violation of the Fourth Amendment to the United States Constitution.

Mr. Marty J. Jackley, Attorney General, Mr. John M. Strohman, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Ms. Julie Hofer, Attorney for Defendant and Appellant Harvey Little Brave, Jr.

**Kreps v. Kreps**

Jason Kreps and Kelly Weis Kreps were married in January 2003. A son was born later that year. During the first two years of the marriage, the couple lived in the Des Moines, Iowa area and Jason worked while Kelly continued her medical education and was at home with their son. A year after their son was born, Kelly accepted a residency in Kirksville, Missouri, and the couple began a commuter marriage between the two cities. After four months, Kelly resigned and returned to Des Moines. Kelly was able to obtain another residency in Sioux Falls, South Dakota, and the couple made plans to move. Prior to the move scheduled for August 2005, the couple found out they were expecting twin girls in December 2005.

In the spring of 2005, a domestic incident occurred between Kelly and Jason, which resulted in charges against Jason and a restraining order. The charge was eventually reduced to disorderly conduct and a deferred sentence imposed. Kelly filed for divorce and a temporary order granted the couple joint legal custody, with Kelly having primary custody of their son. Jason was granted twice a month visitation. Kelly then moved with the couple's son to Sioux Falls to begin her residency.

In November 2005, Kelly did not inform Jason that a c-section had been scheduled, which resulted in Jason missing the birth of the party's twin daughters. Jason was able to arrive in Sioux Falls two days later, after Kelly had named the girls. Kelly would not allow Jason visitation with the twins, and Jason sought court intervention. Kelly then permitted Jason to see the twins for thirty minutes before commencement of visitation with the party's son, and thirty minutes at the end of each visitation, in a hotel lobby in Sioux Falls claiming that the breast feeding schedule would permit nothing further.

Ten months after the twins were born, the matter was transferred to Lincoln County Circuit Court, and expanded visitation was ordered. Jason filed for a change in custody and an evaluator was appointed. The evaluator's report noted it would not be an error to place the children in either parent's care. The evaluator concluded that Kelly was the primary care parent for all three children, including when the couple lived together. The evaluator recommended Kelly retain primary care.

Using the factors established in the previous case *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, 591 NW2d 806, the trial court found that Kelly had attempted to manipulate visitation and the evaluation process in order to gain time as the primary care parent. It also found that she had withheld visitation and regarded the children as more hers than Jason's. The trial court awarded primary care to Jason. Kelly appeals raising the following issue:

Whether the trial court abused its discretion when it awarded primary physical custody to Jason despite the custody evaluator's recommendation to the contrary.

Mr. Ronald A. Parsons, Jr. and Mr. Leo T. Flynn, Attorneys  
for Appellant Kelly Jo Kreps

Mr. Gregory T. Brewster, Attorney for Appellee Jason Alan  
Kreps



**Wangsness v. Builder's Cashway, Inc.**

Builder's Cashway, Inc. (Builder's Cashway) is a hardware store and lumberyard in Miller, South Dakota. Builder's Cashway sells hundreds of farm and home repair products, including fencing, paint, wallpaper, shades, blinds, insulation, sheetrock, and siding.

Wangsness, Inc. is a farming and ranching operation located southwest of Miller, South Dakota, and operated by Darrell Wangsness and his brother, Mark. In 1991, Wangsness, Inc. sought to replace the sliding door on its Quonset building, which was originally built in the 1950s. Mark Wangsness selected and purchased a bi-fold door from Builder's Cashway. The door was manufactured by Schweiss Chicken Pluckers (Schweiss) and was installed by Builder's Cashway employees.

The bi-fold door purchased by Wangsness, Inc. utilized a horizontal hinge system which allowed the door to fold into two halves. When opened, the door folded outside of the building, thereby providing overhead clearance inside the building. The door was set in motion by a switch box connected by a cord to the bi-fold door's motor. A rotating shaft and cable mechanism, located on the bottom left-hand side of the door, wrenched the door upward. The door rose as the cable wrapped around a rotating shaft. The point at which the cable wrapped around the shaft was plainly visible.

On August 4, 2003, Tanner Wangsness and his grandfather, Darrell, arrived at the Quonset building shortly after lunch. The two planned to work on a vehicle in the building. Darrell first went to the nearby house to make a phone call. Meanwhile, Tanner opened the bi-fold door to the Quonset building. Shortly thereafter, Tanner appeared at

the door of the nearby house, displaying a serious injury to his hands. Tanner had set the bi-fold door in motion and an incident occurred, amputating the four fingers of his left hand. No one other than Tanner was present when the incident occurred, and Tanner maintains that he does not remember it.

Prior to the summer of 2003, Tanner was living and working on the Wangsness, Inc., farm. He spent a little more than ten hours per week working for Wangsness, Inc. He also worked on cars in and around the Quonset building. He therefore regularly observed the operation of the bi-fold door on the building, particularly in the summer. He also operated the door himself on at least two occasions prior to the incident.

Tanner initiated this lawsuit against Builder's Cashway in April 2006. He alleged that the bi-fold door was defective due to (1) the unguarded nature of the rotating shaft and cable, and (2) the lack of adequate warning as to the door's use. Builder's Cashway moved for summary judgment on the basis that Tanner failed to adduce evidence sufficient to render Builder's Cashway liable under South Dakota law. The trial court denied that motion. Tanner's strict products liability claims proceeded to trial. After hearing the evidence, the jury rendered a verdict and the trial court entered a judgment in favor of Builder's Cashway.

On appeal, Tanner Wangsness raises the following issues:

1. Whether the trial court erred by instructing the jury on the doctrine of assumption of the risk.
2. Whether the trial court erred by excluding the testimony of Dr. Joel Huber regarding Tanner's alleged memory loss.

3. Whether the trial court erred by instructing the jury that it could only consider whether the bi-fold door was defective as of the date of sale and by excluding evidence of subsequent remedial measures.
4. Whether the trial court violated the collateral source rule by allowing Builder's Cashway to examine Darrell Wangsness regarding the payment of medical bills.
5. Whether the trial court erred by granting Builder's Cashway's application for taxation of costs.

Builder's Cashway raises the following issues:

1. Whether the trial court erred by denying Builder's Cashway's motion for summary judgment.
2. Whether the trial court erred by denying Builder Cashway's motion in limine to exclude the expert testimony of Dr. Daniel Humberg and Jim Suhr.

Mr. Arlo D. Sommervold, Attorney for Plaintiff and Appellant Tanner Wangsness

Ms. Rochelle R. Cundy, Attorney for Defendant and Appellee Builder's Cashway, Inc.

**State v. Fast Horse**

On September 13, 2007, a young woman left the apartment she shared with her mother and infant daughter to attend the house party of an acquaintance. Before arriving at the party, she stopped at a liquor store to pick up beer, brandy and alcoholic energy drinks. She began drinking as soon as she arrived at the party. When the party began to come to an end, the young woman asked Vincent Fast Horse to give her a ride to her boyfriend's house. He agreed.

Fast Horse drove the young woman past her boyfriend's house and into the country, finally stopping at a dirt trail in what appeared to be a cornfield. Upon pulling over, Fast Horse attempted to kiss the young woman, who withdrew, got out of the car and ran from the vehicle. Fast Horse tripped and caught her so she could not escape. He then ordered her back into the vehicle where he raped her twice. The young woman again got out of the car and ran down the dirt road where a good samaritan picked her up and took her home.

A physician later examined the victim at a hospital and administered a rape kit. Evidence collected at this examination was preserved for subsequent testing and introduction at trial.

Fast Horse opted for a jury trial and was ultimately convicted of kidnapping, rape, and aggravated assault. The circuit court sentenced Fast Horse to sixty years in prison for kidnapping, sixty years in prison for rape, and twenty-five years in prison for aggravated assault. These sentences were to be served concurrently in the South Dakota State Penitentiary.

Fast Horse appeals the kidnapping and aggravated assault convictions and raises the following four issues:

1. Whether there was sufficient evidence to support the guilty verdict for the kidnapping charge.
2. Whether there was sufficient evidence to support the guilty verdict for the aggravated assault charge.
3. Whether the system of selecting potential jurors systematically amounted to a violation of procedural due process under the Sixth and Fourteenth Amendments to the United States Constitution, and Article VI, Section 7 of the South Dakota Constitution.
4. Whether Fast Horse was denied his right to a fair trial pursuant to Article VI, Sections 2 and 7 of the South Dakota Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution due to his inability to fully cross-examine key witnesses for the State.

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

Ms. Traci Smith, Attorney for Defendant and Appellant  
Vincent Chad Fast Horse

**Wilcox v. Vermeulen**

Shane Sheesley, Thomas Vermeulen, and Robert Beilstein died as a result of injuries sustained in an aircraft accident. The decedents' estates brought two wrongful death lawsuits against numerous defendants whose identities are not relevant in this appeal.

In deciding to sue, the Vermeulen and Sheesley estates retained common attorneys, while the Estate of Robert Beilstein hired separate counsel. One wrongful death lawsuit was initiated in state court, in Hughes County, South Dakota, and the other was initiated in federal court, in the U.S. District Court, District of South Dakota.

Wrongful death lawsuits are authorized under SDCL Ch. 21-5. This lawsuit allows a decedent's (deceased person's) estate to sue for damages when the death or injury is caused by a wrongful act, neglect, or default and the person would have been able to sue if they had not died. Damages that may be recovered include economic loss and non-economic loss. Generally, economic loss is the loss of income due to the decedent's inability to work. Non-economic losses include, but are not limited to, the loss of the decedent's companionship, advice, assistance, and protection. In order to prove these damages in both the state and federal wrongful death lawsuits, the estates jointly hired Donald Frankenfeld, a forensic economist, to testify as to the economic losses of the estates due to the deaths of Shane Sheesley, Thomas Vermeulen, and Robert Beilstein. No expert testimony was provided by any estate as to non-economic losses.

Before a jury could decide the outcome of the wrongful death lawsuits, they both settled out-of-court. The state court lawsuit settled out-of-court for \$2,500,000.00 and the federal court lawsuit settled for \$950,000.00. Both

settlements were approved by the respective courts and placed in the Sheesley, Vermeulen, Beilstein Trust (SVB Trust). A separate settlement was reached with one defendant for \$200,000.00, but this amount was not placed in the SVB Trust and was distributed evenly between the Sheesley and Vermeulen estates prior to the allocation proceeding leading to this appeal. After court costs and attorney fees were paid from the SVB Trust, the remaining corpus of the trust (\$1,625,872.00) was insufficient to make both estates whole. Further, the two large settlements in the SVB Trust failed to provide guidance on the allocation of the trust corpus among the estates.

Stacie Wilcox, f/k/a Stacie Sheesley, personal representative of the Estate of Shane Sheesley, brought this declaratory judgment action seeking to allocate the proceeds of the SVB Trust between the Sheesley and Vermeulen estates. Because all parties agreed to pay the Estate of Robert Beilstein \$134,470.50 and its attorney \$13,717.43, this appeal concerns only the remaining Sheesley and Vermeulen estates.

Dee Ann Vermeulen, as personal representative of the Estate of Vermeulen, made a motion to present additional expert testimony to facilitate allocation among the estates. In response, Stacie Wilcox, as personal representative of the Estate of Shane Sheesley, argued that both parties pursued the defendants together using one team of lawyers and one expert, Frankenfeld; that throughout the litigation, the opinion of Frankenfeld was relied upon when making trial and settlement decisions; and, that based on judicial estoppel, Vermeulen is prohibited from taking an inconsistent position by proffering a different expert. The circuit court agreed and denied the motion.

At the hearing allocating the SVB Trust, the circuit court made findings of fact based on the stipulated record from the previous state and federal cases. The stipulated record included the depositions and testimony of the two

widows and the economic expert, Frankenfeld. At this hearing, Ryan Vermeulen and his sister, Karla Vermeulen Taylor also testified to aid the circuit court in determining non-economic losses. Based on the economic losses as determined by Frankenfeld and the non-economic losses determined by the circuit court, the circuit court allocated 87% of the SVB Trust to the Wilcox/Sheesley estate and 13% to the Vermeulen estate.

Vermeulen raises five issues on appeal:

1. Whether the circuit court erred in applying judicial estoppel in denying Vermeulen's motion to offer additional expert testimony.
2. Whether the circuit court abused its discretion by adopting Shane Sheesley's potential salary as his earning capacity, while adopting Thomas Vermeulen's lowest figure from his income tax returns as his earning capacity.
3. Whether the circuit court abused its discretion by allocating the SVB Trust based largely on the economic opinion of expert Don Frankenfeld, who testified only as to economic loss and not non-economic loss.
4. Whether it was error to apply the allocation percentages to the separate \$200,000.00 distribution which was not placed in the SVB trust.
5. Whether the circuit court abused its discretion when allocating the SVB Trust proceeds as to non-economic pecuniary losses.

Mr. James W. Olson, Attorney for Plaintiff and Appellee  
Wilcox

Mr. Dennis W. Finch, Attorney for Defendant and Appellant  
Vermeulen



*In re A.L. and S.L.-Z.*

David and Joyce Zimmer are the paternal grandparents of A.L. and S.L.-Z. After their son, Scott, and his wife, Maria, denied them visitation with A.L. and S.L.-Z., the Zimmers petitioned the circuit court for grandparent visitation authorized under SDCL 25-4-52. Scott and Maria opposed the Zimmers' petition, asserting that visitation would substantially interfere with their ability to parent A.L. and S.L.-Z., and would also be against the best interests of the children.

The parties agree that their relationship is and has been strained for a number of years. According to Scott, his problems with his parents began during his adolescence. After Scott completed college, he moved to California to distance himself from his parents. While in California, he met Maria and their first son was born in 1999. Although the Zimmers visited Scott and Maria after the birth of A.L., their relationship remained strained.

Despite the tensions, in 2005, Scott and Maria decided to move from California to Vermillion, South Dakota in order to be closer to Scott's extended family. Maria wanted to move closer to Scott's family because she firmly believed that it is important for her children to have a close family relationship. After Scott and Maria moved to South Dakota, the Zimmers had regular and frequent contact with A.L. and S.L.-Z. They visited the children at least a few times a week, sometimes with A.L. spending the night at the Zimmer home.

Over the course of the next couple years no major incidents occurred between the parties, although the tension remained. In June 2007, however, Scott and Maria cut off all contact between their children and the Zimmers. According to Scott and Maria, the Zimmers repeatedly demeaned Scott

and Maria and questioned Scott's ability to parent. These actions were done in front of the children, Scott claimed. In August 2008, Scott and Maria moved back to California.

In June 2008, a hearing was held on the Zimmers' petition for visitation. The circuit court granted them limited visitation. The court found that the Zimmers have a particularly close bond with A.L., and to a lesser extent with S.L.-Z., due to his young age. The court further found that visitation would be in the best interests of A.L. and S.L.-Z., and Scott and Maria unreasonably denied the Zimmers visitation. In their appeal, Scott and Maria assert that the court violated their due process rights when it compelled them to allow visitation with the Zimmers. They also contend that visitation is not in the best interests of the children and substantially interferes with their parent-child relationship.

Mr. Thomas H. Frieberg, Attorney for Appellees David and Joyce Zimmer

Mr. Craig K. Thompson, Attorney for Appellants Scott and Maria Zimmer

**Cole v. Wellmark**

In September 2003, Della and Margie Cole contacted Della Tschetter Insurance to obtain quotes for health insurance for their family. Margie's job change required the purchase of new coverage by September 31, 2003, to avoid a lapse in coverage. Della Tschetter met with the Coles and helped them complete an application for Wellmark "Option 1" plan, which allowed Coles to select an effective date for coverage. Tschetter informed the Coles that their son's allergies would probably be considered a preexisting condition for which an exclusion would be required by Wellmark. The Coles signed the application, which stated immediately above the signature line in bold, capital letters: "coverage applied for will not be effective until Wellmark or [its underwriter] . . . have reviewed and approved this application and notified me in writing of the approval of such insurer's coverage." The application, a check for \$567 for the first month's premium, and an authorization form to deduct premiums from Coles's checking account on a monthly basis was submitted by Tschetter to Wellmark.

Soon after, Wellmark attempted to contact the Coles to advise them that two exclusions would be required on their policy, and requesting their signatures on the exclusions before the policy would issue. When Wellmark did not receive the signed exclusions, it sent a letter dated October 24, 2003, advising them their application had been rejected. The Coles claimed they never received the letters. On November 4, 2003, Wellmark issued a refund check to the Coles for the \$567 premium payment. The Coles claimed that they did not receive the refund check. The Coles also claim they never received an approval letter, insurance cards, or any notice that they were not insured. Premiums for November and December were also not deducted from their checking account.

On November 9, 2003, Coles's daughter was injured playing sports. On December 2, 2003, medical care was sought. It was then that Margie contacted Tschetter to inquire about the insurance policy. After being informed that the policy was never issued due to the Coles's failure to sign and return the exclusions, a suit was filed against Wellmark and Tschetter for breach of contract, negligent misrepresentation, estoppel, reformation, waiver, and breach of fiduciary duty. Wellmark and Tschetter's respective motions for summary judgment were granted and the case was dismissed after the trial court determined that no duty of care existed on the part of Wellmark or Tschetter toward Coles. The Coles appeal raising the following issue:

Whether Tschetter or Wellmark had a duty to the Coles during the health insurance application process.

Mr. N. Dean Nasser, Jr., Attorney for Plaintiffs and Appellants Coles

Ms. Kristine L. Kreiter-O'Connell and Mr. Justin G. Smith, Attorneys for Defendant and Appellee Wellmark

Mr. Thomas M. Frankman, Attorney for Defendant and Appellee Della Tschetter Insurance

**Estate of Duval**

Paul Duval died on June 24, 2008, as a result of a rock climbing accident in Custer County, South Dakota. From 1994 until his death, Duval had lived with Karen Hargrave. Duval and Hargrave were never formally married, but did hold themselves out to friends and family as a married couple. Beginning in 1996-97, Duval and Hargrave began spending summers at their cabin in Custer, SD, and winters at their home in Nuevo Leon, Mexico. Mexico had a law that permitted couples to become married without a formal ceremony if they were united for more than five years and met certain requirements outlined by statute.

While in Mexico for the winter of 2005, Duval was assaulted and left with life-threatening injuries. Hargrave cared for Duval throughout his long recovery and was listed as his wife at the hospital in Mexico and was the primary caretaker for Duval while he was a patient at the Mayo Clinic in Rochester, Minnesota. After completing treatment at the Mayo Clinic, Duval and Hargrave moved to Broken Arrow, Oklahoma. While there, Duval and Hargrave purchased personal property together and established banking accounts in both of their names. In the summer of 2008, Duval returned to South Dakota where he filed an income tax return listing Hargrave as his wife. Duval had also applied for VA health benefits and listed Hargrave as his beneficiary and gave her a general power of attorney. He died shortly thereafter, a result of a rock climbing accident.

A lawsuit was filed by Hargrave in the circuit court in Custer County, SD, petitioning for a formal probate of Duval's estate and seeking an order for determination of heirs and appointment of herself as the personal representative of the estate of Duval. Duval's two adult daughters, Nathalie Duval-Couetil and Orielle Duval-Georgiades, filed an objection to this petition. A trial was

held on the matter and the circuit court granted Hargrave's petition.

The circuit court determined that Hargrave was married to Duval and stated that South Dakota recognizes the validity of a marriage that is entered into in another jurisdiction. The circuit court concluded that Duval and Hargrave met the requirements for a common-law marriage in both Mexico and Oklahoma. Having concluded that a marriage existed, the circuit court permitted Hargrave to be treated as an heir for inheritance purposes as she was Duval's surviving spouse. Duval's daughters contend that the union arising under Mexican and Oklahoman law should not be recognized in South Dakota and that Hargrave was not entitled to inherit Duval's assets after his death.

Duval's daughters raise the following issues:

1. Did the trial court err when it held that Decedent Paul A. Duval and Petitioner Karen Hargrave, while they were domiciled in South Dakota, had entered into a common-law marriage when they traveled to other jurisdictions that recognize common-law marriage.
2. Did the trial court err when it held that it would recognize Duval and Hargrave as husband and wife on the basis of the relationship the parties had under the law of Mexico.
3. Did the trial court err when it held that Hargrave had met her burden of establishing the elements of a common-law marriage under the law of Oklahoma.

Mr. Gerald M. Baldwin, Attorney for Appellants Nathalie  
Duval-Couetil and Orielle Duval-Georgiades

Mr. Patrick M. Ginsbach, Attorney for Appellee Karen  
Hargrave

## 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.

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## NOTES

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