

# **STATE OF THE JUDICIARY MESSAGE**

**JANUARY 2006**

**DAVID GILBERTSON**

**CHIEF JUSTICE**

Dear Governor Rounds, members of the Legislature, Constitutional Officers, my fellow Justices, Circuit Court Judges, employees of the Unified Judicial System and all citizens of the State of South Dakota:

As I begin my second term as Chief Justice of the South Dakota Supreme Court, it is my pleasure to bring you, once again, both an oral and a written report on the state of the South Dakota Judiciary. I am pleased to report to you that the Unified Judicial System, which just completed its 30th year, is strong and working well to meet the challenges that face us.

## **THE ONGOING WORK OF OUR COURTS**

Since the creation of South Dakota as a state in 1889, our State motto has been "Under God the People Rule." We have done so under this state's constitution. Although much of the constitution remains the same as when it was originally drafted in 1889, from time-to-time the people have seen fit to change or update significant portions of it. This is not simply a dry ancient document, but rather a well-traveled map to guide us on how to organize our society and maintain it while recognizing the rights and dignity of the individual.

There are comments from time-to-time about federal court decisions interpreting the United States Constitution. In reality, the United States Constitution is a base or a beginning of individual rights. Each state is free to grant more rights or more protections to its citizens under its state constitution than are granted in the Federal Constitution. As an example, in 2005 the United States Supreme Court issued an opinion expanding the scope of eminent domain by a state to allow condemnation of private land that could ultimately wind up in the private hands of others rather than the original owner or the public. In that case, the United States Supreme Court also noted that the states were free to interpret their state constitutions in a more restrictive manner so as to offer greater rights and protections to its citizens than those afforded under the Federal Constitution. The South Dakota Supreme Court has done so repeatedly since the question of public use of private lands first came before us nearly 100 years ago. We have interpreted the South Dakota Constitution to require that no land may be taken by eminent domain unless it is for the actual use by the public. Thus, our state constitution provides more protection for private ownership of land against any threat of condemnation than does the federal constitution.

Our state constitution also serves another valuable purpose. The federal government does not define our property rights. Each state, through its legislative and constitutional process, determines the property rights of its citizens.

The South Dakota Supreme Court is called upon to interpret our State's constitution. We, as a Court, are not a continual constitutional convention in progress; we merely interpret the text that has been previously approved by this Legislature and ultimately our citizens. In the same vein, we are aware that the constitutional authority to pass legislation rests with the Legislature. The role of the Supreme Court is limited to interpreting the meaning or intent of that legislation.

This past year we marked the 30th Anniversary of the Unified Judicial System in this State. Those who are old enough to remember the previous judicial system in South Dakota are well aware of the chaotic existence of separate judicial systems that attempted to run for the most part independently of one another. It was as if each committee of this Legislature attempted to conduct its business independently and the Legislature as a body had no authority to put each committee proposal into an organized set of laws and a unified state budget.

Thirty years ago an amendment to our state constitution combined the patchwork judicial system into a single system under the direction and supervision of the South Dakota Supreme Court. While the Supreme Court is probably most well-known for its appellate opinions, it takes with equal seriousness its constitutional obligation to run the people's judicial system in the best possible manner. To borrow a phrase from President Truman, "the buck stops here." I wish to thank Justices Sabers, Konenkamp, Zinter and Meierhenry for their dedicated efforts to that end.

Since 1975 the Supreme Court has held a fall term of court outside of its courtroom in Pierre. This past year the Court held its October term of court at Northern State University in Aberdeen. Each day almost five hundred high school and college students and members of the public attended our oral arguments. Others who were not able to attend in person were able to listen to the arguments on our live Internet broadcasts. The proceedings were also widely covered by the media. We would like to thank President Schloss and the faculty and students of Northern for their gracious hospitality.

This past year we experienced a slight decline in the caseload of the Supreme Court. However, the reduction in numbers was matched by the increasingly complex issues contained within these cases. In the circuit courts the case filings remained mostly constant compared with the previous year. State-wide there were no significant trends up or down from the current caseload. However, in those counties that are experiencing a rapid increase in population, there appears to be an ever-increasing caseload in both the criminal and civil dockets. People generate litigation. More people generate more litigation.

## **FISCAL MATTERS**

For the past several years, the Unified Judicial System has responded to the increasing demands placed upon it with basically the same number of employees. We accomplished this through the dedication and hard work of 492 full-time personnel in the judicial system. We have sought additional FTEs for the UJS only when we were convinced they were essential to our mission.

The Supreme Court and the presiding circuit judges are well aware of the fiscal challenges that face our state. For the upcoming year, we will be requesting a budget increase of only 2.0% in general fund appropriations and an overall budgetary increase of 1.7%, excluding salary policy and health insurance. This budget will allow us to continue to provide the people of this state with an effective judiciary. Even with the requested increase, the UJS budget represents only a little over 1% of the state's total budget.

On the other hand, I would call to your attention the fact that the judiciary is an instrument of the state that provides revenue to various units of government. In the past fiscal year we collected \$22.3 million, as compared to our general fund budget of \$28.5 million. We returned the entire \$22.3 million with approximately \$13.1 million going to the counties and school districts, \$8.2 million to the state, and \$1.0 million to the cities.

## **THE FAMILY**

Several years ago I reported to you that when the justices and judges were polled, they unanimously answered that the disintegration of the family will have the greatest future impact on the South Dakota judiciary. If that question were again asked today, I have no doubt the answer would be the same - perhaps with more emphasis.

Our foremost concern is the status of the children in these dysfunctional family units. As the writer of the book of Proverbs observed over three thousand years ago, "train up a child in the way he or she should go, and when they are old they will not depart from it." The UJS attempts to work with wayward youth as well as their families to provide the supervision necessary to redirect their lives. There is a limit, however, to what we can do. We have individual court service or probation officers some of whom are called upon to supervise up to 150 probationers. With such large caseloads, the amount of time available to spend on each probationer is, unfortunately, not sufficient. Such an important task requires the joint efforts of the courts, schools, churches, civic organizations and concerned citizens.

Our intensive probation program, which carries a much more manageable caseload, continues to produce positive results. In many cases we are able to take successful corrective action while leaving the probationer in the home instead of the more expensive option of institutionalization or incarceration.

An experimental program is also in place that promises further positive results. In Charles Mix County we have participated in a new program called Connecting Point that serves Native American children who have been found by the court to be in need of supervision. Rather than a placement with the Department of Corrections, the juvenile clients and their

families are provided intensive community based mental health services, educational and family support. They are provided with group and individual counseling, training in life skills, a psycho-educational program, educational tutoring, job training and employment services. The good news is that as of June 30, 2005, none of the 13 clients being served by the program had committed a violation serious enough to require a placement with the DOC, and only two of the 13 had committed any type of violation at all. Avoiding placements with DOC saves the State funds and allows the juveniles to remain with their families and maintain community and cultural ties.

The opportunity to rehabilitate children in need is a task at which we simply must succeed. We all like to proudly point to individuals from our town or state that have become prominent. However, we must ask ourselves a hard question: are we raising future Presidents or future Presidential assassins?

The consequences of failure are too high. Since the dawn of civilization the vital conduit through which values and beliefs are passed from one generation to the next has been the family. Governments and empires rise and fall. Widely accepted scientific theories of the day, such as the world is flat and other ideas, are modified or debunked - yet the family endures. Although our civilization has advanced in many areas, we have developed no successful alternative to the family structure.

If the failure of the family is generated by the parents and cannot be successfully corrected, termination of parental rights is the final option. The children are often placed in foster homes during the time corrective action is attempted. Since 1997 the Unified Judicial System has had procedures in place that expedite the time involved in the termination of parental rights should it become necessary to speed up the adoption process and get abused and neglected children into quality adoptive homes.

I once heard a speaker put it in terms of the eyes of a child who just finished the first grade. For a minute think back to when you were that age. Upon release from first grade in May you did not worry about school starting in September because in your eyes as a first grader, the summer was the same as forever. If a child of that age is undergoing abuse or is stuck in limbo because of an unresponsive system, that length of time is forever in that unfortunate child's eyes. Getting these children quickly into permanent homes is imperative. Every year nationally 20,000 foster care kids "age out" of the foster care system by reaching their 18th birthday. In two years, 60% of these former foster care kids are homeless, imprisoned or dead.

Another area of deep concern continues to be that of domestic violence. I am still haunted by an incident of domestic violence which occurred early in my legal career. Late one Saturday night I was called to the jail by the sheriff to draft a criminal complaint for aggravated assault. When I got there the sheriff was in the process of removing scissors from the back of a man who had refused to go to the hospital. The victim looked at me and quietly said, "I hate to get her in trouble, but this is the third time."

On a national basis, if law enforcement is called in to address the situation, there is a positive effect. In such situations only one out of four perpetrators will be involved in further incidents. Further success is gained by moving these cases into the courts. However, we still have a long way to go. Nationally in such instances, if a judge issues a protection order, 60% are violated within a year. This year South Dakota saw an 8.6% increase in the issuance of domestic protection orders.

We must also stress personal accountability. Obviously, we do not have enough jails or institutions to lock up all perpetrators. Judges are called upon daily to make determinations as to who needs to be incarcerated and who can be successfully rehabilitated in non-institutional programs. As a circuit court judge, I told those I put on felony probation that they were not merely being allowed to freely walk out of the courthouse door; rather, they were being given the key to the penitentiary that they would be carrying with them at all times. It was their conduct, not someone else's decision, which would determine whether that key would be used in the future. When they left my courtroom, they knew the responsibility for whether or not that key was used rested solely with them.

Except in cases where the sentence is death or life imprisonment, the person will sooner or later be released to become part of our society. Obviously we must assist them to ensure as many as possible of those theoretical keys to the penitentiary door are never used and that as many offenders as possible are successfully rehabilitated.

A few years ago I told you that during the time I was a circuit judge nearly all felonies I encountered could be traced to alcohol abuse. The crime was either committed while the person was intoxicated or to get funds to get intoxicated. Times have changed. Although it is anecdotal, Presiding Judge Glen Severson of Sioux Falls has told me that he believes that 75% of the adult felony cases he handles can be traced to addiction to methamphetamines. These cases are not limited exclusively to drug cases. They carry over into felony assault, bad checks, burglaries, theft of autos and robberies. In visiting with veteran judges from Rapid City, they readily agree with this observation declaring methamphetamine use to be "skyrocketing."

Methamphetamine use is a particular problem in South Dakota because it can be manufactured in the state with ingredients that are all too readily available. Compared with other illegal drugs, methamphetamine is relatively inexpensive to purchase, making it more readily available to a wider range of victims.

In 1998 rural areas nationwide reported 949 meth labs. In 2003 that number increased astronomically to 9,385. This is one area where free enterprise has no place and should not be tolerated.

From 1995 to 2002 the number of South Dakotans using methamphetamines increased by over 33%. South Dakota's rate of persons using this drug was double that of Denver and Los Angeles. This State's rate of use was six times greater than the rates of Dallas, Atlanta, Detroit, Philadelphia, Baltimore and Miami.

If what brings people into the criminal system to begin with is an addiction to alcohol or drugs then those addictions must be successfully addressed or repetition of crimes is a virtual certainty. The victims and financial losses from these crimes will continue to mount. In visiting with judges and those who are experts in the area of drug abuse, it is clear that traditional forms of punishment and rehabilitation may not be effective.

The devastation of methamphetamine is not limited to its abuser. "Meth babies" are being seen with increasing regularity in our courts. Not only do we have a dysfunctional parent who probably will have his or her parental rights terminated, but the state is now faced with caring for a child who suffers the numerous ills caused by the mother's meth abuse during pregnancy. Loving foster or adoptive homes can only go so far in dealing with and overcoming the effects of this abuse on the abuser's children.

As a court system we are charged with looking out for the best interests of the children who come into our system. It is unfortunately too late for many of these meth babies after they are born. Not only do they suffer the effects of the methamphetamines from their mother, but the mother often avoids necessary pre-natal care for fear of her addiction being discovered. Keeping mothers off methamphetamines during pregnancy is imperative.

The negative effects of a drug addicted parent continue after the child's birth. Nationally, approximately 10% of all children live with at least one parent who abuses alcohol or other drugs. Also nationally, between one-third and two-thirds of child maltreatment cases involve substance abuse. In 2005 there were 110 children in foster care in South Dakota due to parental involvement with meth. In cases before the South Dakota Supreme Court concerning the termination of parental rights, I believe that drug and alcohol abuse is at the core of over 90% of these cases.

One of the ways the UJS is addressing the meth problem in South Dakota is by implementing a pilot drug court program in the near future in the Northern Black Hills of the Fourth Judicial Circuit. We are hopeful that by focusing additional resources and attention to this area, we can assist our citizens in decreasing meth use and its devastating effects on our State. This is the first attempt by the UJS at dealing directly with the meth problem within the judicial system. Only time will tell if it will be successful. However the greatest folly would be to simply do nothing as the problem continues to expand.

## **PERSONNEL CHANGES**

Jack Ellenbecker, our Director of Budget and Finance, retired after 33 years of service to the UJS. I know many of you worked with Jack on financial matters. He provided necessary budgetary guidance and planning to ensure the UJS operated consistently in a proper fiscal manner.

This year two of our veteran circuit judges, Judge Boyd McMurchie and Judge Tim Johns, retired. Both had 30 years of judicial service to the people of South Dakota. They

were with the UJS in its infancy and have been major contributing factors to its success. I thank them for their many years of service and wish them well in their future plans.

Continuity is important. A key factor in judicial decision making is the experience judges acquire on the bench over their years of service. Difficult legal questions arise that may call for painstaking hours of legal research in the law books. However an even more difficult issue is the same one that faced King Solomon in determining who should get custody of a child. In such an instance a judge does not get the luxury of simply going to a law book or check list for an easy or automatic answer. The judge is all too often presented with the difficult decision of deciding custody between two parents, either both saints or both sinners. The exception is the easy call where there is one saint and one sinner. In a close case concerning the issue of custody, the best interests of the child may often times be guided by the years of judicial experience a judge has gained on the bench.

The same rationale applies to an appropriate criminal sentence. Think back to your youth. Who among us who violated a rule of our household, while obviously not thrilled with our short-term prospects, would have wanted our parents to consult a "punishment table" to determine our fate? There would be no chance to plead our case or to bring up hopefully mitigating circumstances. If we are to sentence by a sentencing table rather than judicial experience, the sentence is by definition either too hard or too soft. The punishment does not fit the crime or the criminal.

## **EQUAL JUSTICE UNDER LAW**

In each of your counties you have a building that is named or called a "courthouse." In a way the name is a misnomer. It is not owned by the court - it is owned by the people who direct through their constitution that the court system use it to resolve their disputes in an orderly and timely manner. Many of our courthouses have inscriptions in stone and murals depicting the concept of equal justice under law. The challenge is to take these stone inscriptions and murals and breathe life into them so that they become reality.

Since 2001 the Unified Judicial System has provided data and other assistance to a research project conducted by the Political Science Department of the University of South Dakota. The study was an effort to determine whether there were disparities in sentencing and incarceration of Native Americans in this State, and if so, the reason for them. Based upon a review of actual court files, the study concluded that any disparities are based upon poverty and socio-economic factors, not racism. While this offers comfort in that we, as a judicial system, are putting forth a good faith effort at judicial equality, there clearly is a cause for concern that socio-economic factors determine to some degree the likelihood a person will be incarcerated and how much time will be served. Although admittedly anecdotal, it is my personal experience that poverty, alcohol abuse and drug addiction are the three main culprits in our ever-increasing penitentiary population. To put it another way, sober people with good jobs and a supportive family commit few serious crimes.

As a consequence of our concern that all people be treated equally in our criminal justice system, the Supreme Court created an Equal Justice Commission. The Equal Justice Commission held hearings at various locations throughout South Dakota, including seven Indian Reservations and several cities to listen to the various concerns of those who had grievances or complaints about their treatment in the system. It also visited the penitentiaries and obtained input from a number of inmates. It received numerous letters and written testimonials from South Dakota citizens dealing with the subject of fair treatment for minorities. It also heard from South Dakota Attorney General Larry Long and Secretary of Public Safety Tom Dravland. A representative of the Board of Pardons and Paroles also provided information to the Commission. All told, the Commission heard from hundreds of South Dakota citizens.

The Commission was composed of judges, lawyers and lay persons, all with varying backgrounds, cultural heritages, and walks of life. I would like to thank those dedicated individuals who served on this Commission and rendered such an outstanding report.

The Commission made recommendations to the Court as to how the Unified Judicial System can provide the utmost fairness to all people throughout the entire judicial process. That report has now been filed with the Court and we are studying it with the goal of implementing its recommendations. The report gives us some reasons to work for improvement, but it also encourages us that, by and large, justice in South Dakota is fair and evenhanded.

## **PREPAREDNESS**

The courtrooms of this state dot the landscape from border-to-border. Disruptions in the past that have either befallen a specific locale, such as a tornado, or if state-wide, such as the recent Thanksgiving weekend blizzard of 2005, have been temporary. In either event, although somewhat disruptive, the UJS was up and running again within a reasonably short period of time.

This year, however, we were presented with the possibility that the forces of nature, or man, would release damage so horrific that the legal system would be unable to operate for an extended period of time. One need only look at the devastating effects Hurricane Katrina had upon the legal system of Louisiana to realize this type of risk, while probably not great, is nevertheless a risk that could render our legal system inoperable for a significant period of time. Louisiana's legal system is basically being forced to start over. Obviously we are not the potential victim of a hurricane, but that should not allow us to become complacent to forces that could potentially overwhelm us.

We wish those states who have sustained significant damage to their legal systems all the best in restoring them so that they might once again function to serve the public.

## **PERSONAL PRIVILEGE**

Before I conclude I would like to take a moment of personal privilege to mention two matters, one humorous and one serious. I realize that my annual address to this Legislature is a public event that will be covered by the press. During last year's State of the Judiciary address, I was photographed flanked by Governor Rounds and Lt. Governor Daugaard. In the photo, the eagle's wings on the mural behind me appeared to be attached to my shoulders. This prompted one South Dakota citizen to send the photograph to Jay Leno of the Tonight Show. Leno showed the photograph on national television and quipped that the photo should have been lined up differently or in the alternative, "this judge can fly." Let me assure you I am well aware that I am not Superman and I cannot fly. Numerous others would willingly attest to both. I have also been repeatedly reminded that my robe and wings were the wrong color to claim I am an angel.

On a more serious note, a few months later, I faced a diagnosis of prostate cancer. The surgery was successful and I am now cancer free. I would like to thank my wife, Deborah, and family, my colleagues on the Court, staff, members of the Executive and Legislative branches of government, as well as the citizens of South Dakota for their kind support, prayers and assistance during my diagnosis, treatment and recovery. I would also urge all men of this state who are over 40 to have the PSA blood test that led to the discovery of my cancer. This simple quick test can save your life.

## CONCLUSION

A government in which we each have a stake and that values the rights of all equally is internally secure. We currently face threats from a group of self-appointed terrorists who have sworn to destroy us and our way of life. One of our public officials addressed the ultimate result of this type of challenge:

At what point shall we expect the approach of danger? By what means shall we fortify against it? Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow? Never. All the armies of Europe, Asia and Africa combined, with all the treasure of the earth . . . could not by force take a drink from [our rivers] or [set foot on our hills] . . . If destruction be our lot, we must ourselves be its author and finisher. As a nation of free [people] we must live through all time, or die by suicide.

That was not a present-day leader attempting to assess our current situation, but rather Abraham Lincoln speaking in the early 1860s. If we continue to adhere to our constitutional principles, including equal justice under the law, we cannot be overcome.

The UJS has done its best during the past 30 years to provide the citizens of this State with a judiciary that is timely and responsive at carrying out its constitutional and statutory tasks. Hopefully we can say, "the best is yet to come."

Respectfully submitted

David Gilbertson  
Chief Justice

