

2018

STATE OF THE JUDICIARY

MESSAGE

DAVID GILBERTSON

CHIEF JUSTICE

Governor Dugaard, Lieutenant Governor Michels, Speaker Mickelson, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, Unified Judicial System (UJS) employees, and all citizens of the State of South Dakota.

This is my 17th year as your Chief Justice. This opportunity for public service has allowed me to observe the operations of state government firsthand. The cooperation between the three branches of state government is one of the reasons state government works in South Dakota. Our

constitutional tasks are limited by the tasks assigned to the other branches and the powers reserved to the people. However, we cooperate. This is a far cry from the gridlock and verbal attacks that we see elsewhere. I hope we do not fall into the category President Harry Truman observed concerning the political environment of Washington D.C. back when he was President: “If you want a friend in this town, buy a dog.”

Public support for our three branches of government depends on public education. Sadly only 38% of Americans in 2011 could name all three branches of government. That number declined to 26% today. Thirty-one percent could not even name a single branch of government.

One frequently hears the phrase “the new normal.” This phrase does not describe the

programs and challenges undertaken by the UJS. Because events and conditions frequently change, very little remains “new” and our current situation is not “normal.” Perhaps a more fitting slogan is the Boy Scouts’ time-honored motto: “Be Prepared.”

We must not be overwhelmed by the increasing pace of change. We must always keep our eye on our constitutional tasks. As Warren Buffett noted: “Someone is sitting in the shade today because someone planted a tree a long time ago.”

THE APPELLATE PROCESS

I suspect that when people think of the South Dakota Supreme Court, they think of written appellate decisions on cases that come before us. It is perhaps helpful to describe how we undertake deciding cases.

When a case is appealed to us the circuit court proceedings are completed. We do not retry the case; we simply review the evidence and legal claims that were made in circuit court. We only answer issues that are brought to us on appeal and that were originally presented to the circuit court. We do not expand the scope of the case beyond that.

No matter how complex the issues are on appeal we are simply trying to answer two basic questions. The first is whether a mistake was made during the circuit court proceedings. If not, we affirm. If a mistake was made we decide a second question. Was that mistake so serious that it affected the fairness or the outcome of the trial? If not, we still affirm. Under our judicial system, you are entitled to a fair trial, not a perfect one.

If a case is reversed because the mistake did affect the fairness or the outcome of the trial, a general perception is that our decision makes the loser the winner and the winner the loser. In most cases where we reverse a decision, however, the case is sent back to the circuit court for retrial without the mistake. Thus, a fair trial is ultimately held.

We make decisions by majority rule. Since there are five Justices on the Supreme Court, three must agree on the resolution of a case for that to become the opinion of the Court. Should a Justice feel it necessary to not participate in an individual case, I appoint a circuit judge or a retired Justice to sit on that case. This avoids the chance for a tie and majority rule is preserved.

We are bound by the strict rules of the appellate process. The Court must follow the laws passed by

this Legislature and Congress. We do not write laws; we only interpret what they mean. We are also bound by United States Supreme Court decisions on matters of federal law and the interpretation of the United States Constitution. If there is a prior decision by the South Dakota Supreme Court on the issue before us, in most instances we follow that decision.

We do not decide cases based on our personal preferences. If we did so, we would become a Court of subjective opinions. Under our Constitution that is not acceptable. The South Dakota Supreme Court is an appellate court that decides the cases based on the facts of the case and our interpretation of the law. A critic of a United States Supreme Court decision 175 years ago noted: “Judicial tyranny is hard enough to resist under any circumstances for it

comes in the guise of impartiality and with the prestige of fairness.” We strive to avoid that. Our judicial system provides continuity and fairness in the appeal process.

DRUG AND ALCOHOL COURTS

A new wave of evil has descended upon South Dakota’s citizens. This evil is the explosion of meth and prescription drugs. The evil is compounded by the introduction of the deadly drug, fentanyl, into some existing drugs. In some areas of this state the ever increasing horrors of meth addiction are being outstripped by the increasing addiction of prescription drugs. This addiction evil continues despite the efforts by law enforcement and the court system.

The task of helping our drug and alcohol program participants succeed has become literally a

matter of life or death. For the second year in a row, we lost a program participant to a drug overdose. It is a bitter fact that while we will succeed with a good majority of our program participants, we will not succeed with all of them. In past years the consequences of the failure of a program participant were continued addiction and a trip to the penitentiary. With the introduction of these more powerful and lethal illegal drugs, the consequences are deadlier.

Nationally, the drug epidemic is at a crisis level. Opioid addiction is overwhelming the public health, child welfare, and justice systems of many states. For example Montgomery County, Ohio which includes the city of Dayton experienced 371 deaths in 2016 due to opioid abuse. This year, Montgomery County is on target to exceed 800

deaths. Nationwide, 175 Americans die each day from this curse.

While South Dakota's fatalities are much lower in number, they still more than doubled between 2007 to 2015. The statistics for opioid abuse are somewhat surprising to me. This is not exclusively a youthful addiction. The South Dakota Department of Health reports that a majority of people addicted to opioids are between 40 and 64 years old. The second highest bracket of addiction is the 25-39 age group. Eighty percent of the cases involve Caucasians and 57% are women.

When we started the drug court pilot program in 2008 we never dreamed that the evolution of society would present us with such monumental problems. We certainly had a drug problem in those days, but we considered it "manageable." Now it is

everywhere and despite our best efforts we once again are playing “catch-up.” As President Franklin D. Roosevelt observed: “There are many ways of going forward, but only one way of standing still.”

We have a statewide network of drug courts and alcohol courts. Wanting something to work and having it actually work are separate concepts. Our programs are actually working because of the dedicated people who make up the treatment teams for each court. The programs actually work because of the training and dedication that each team member is willing to undertake.

In FY 2015 we served 314 participants. In two years that number significantly increased. In FY 2017 we served 462 participants. Ninety-six participants have graduated from our programs. What is their future upon graduation?

Eighty-two percent of the graduates do not reoffend. That is higher than the national average of 75%. It is substantially higher than the rate for people paroled from the penitentiary. That is around 40%.

I never tire of attending drug and alcohol court graduations. The compelling life story each graduate has is an example of what can ultimately go right in this society. One graduate said, “I have a completely different work ethic. I show up on time and make sure the job task is done right. I don’t just hurry through it to get it done.” In these programs we stress and require employment, but this statement by a graduate summarizes what it means. In South Dakota our unemployment rate is low enough that most participants can get a job. To keep

a job and recognize the importance of a work ethic -- that is change.

This work ethic is directly tied to earning capacity. Between January 1, 2017 and June 30, 2017, the 462 participants earned \$1,537,405 in wages. That calculates to an annual figure of \$3,074,810 to support them and their families. That is a far cry from spending in the neighborhood of \$25,000 per year of taxpayers' dollars to house each of these 462 participants in the penitentiary.

The cost savings do not end there. Our drug and alcohol court participants are parents of 1219 children, who, if their parents were in the penitentiary instead of our programs, would be the wards of Department of Social Services at \$10,000 per-year, per-child. That number is up from 707

children last year. Thus, this past year, we saved taxpayers \$12,190,000 in child support costs alone.

Another cost saving from these diversion programs is in health care. The Avera Health System estimates that South Dakota hospitals annually treat 3980 people in emergency rooms due to drug overdoses and their complications. Since virtually none of these people have insurance or the ability to pay for the emergency medical services, it annually costs County Poor Relief, Medicaid, and the Department of Corrections about \$2,790,000. An additional \$3,580,000 is never paid by or on behalf of the drug-addicted patient so the cost is ultimately passed back to the other paying customers. In a perfect world, the hospitals would rather focus on other necessary medical needs of patients. Other worthwhile uses for this \$6,370,000 abound.

A circuit judge who has been active in these programs since the beginning defined the difference between drug addicts and alcoholics. Although alcoholics are addicted to alcohol, they generally maintain a home and some form of employment. Drug addicts are “couch potatoes.” They generally have no job, no home, and nothing more than the clothes on their backs. This is a crucial point in the ability of the UJS to deal with drug addicts in the drug court program. Currently our program is only out-patient. To get into the drug court program a drug addict must have a home and a job. Sadly, the worst of the worst have neither. We cannot expect those with these addictions to work full time and move successfully through the drug court program if they are living under a bridge or in a cardboard box. The reality is that they go to the penitentiary

because we cannot take them into our programs. I think it is time to develop a concept that will incorporate an in-patient component into our program. It makes little sense to treat the addicted who have a home and, like the priest and the Levite in the parable of the Good Samaritan, pass by on the other side of the road and ignore the person laying in the ditch. As former Chief Justice Warren Burger noted, “concepts of justice must have hands and feet.”

In administering drug and alcohol courts, the Unified Judicial System has followed national standards and learned from other states’ programs. However, when dealing with uncontrolled addictions and unanticipated situations, there is a bit of the philosophy of boxing champion, Mike Tyson:

“Everybody has a plan until they get punched in the mouth.”

FEMALE JUSTICES AND THE COURT

South Dakota’s population is both male and female and so is the composition of the South Dakota Supreme Court. In the late 1970’s, Circuit Judge Mildred Ramynke of Peever was the first woman to sit on a Supreme Court case by designation. In 2002, Justice Judith Meierhenry was the first woman appointed to be a permanent Justice of the Court.

At least half of the population of South Dakota is female. On April 25, 2017, for the first time, three of the five designated Justices on an individual case were female. Justice Lori Wilbur, Justice Janine Kern, and Retired Justice Judith Meierhenry sat on a case that was orally argued before the court. This was a historic day for the Court.

HOPE PROGRAM EXPANSION

We continue to expand our HOPE program.

HOPE is a form of intensive probation. It works well in our more rural counties that do not have ready access to treatment services required for a successful drug court or alcohol court.

Under the leadership of Presiding Judge Scott Myren we are expanding into additional counties. This is important. I have yet to talk to a rural sheriff who is not facing an increasing amount of drug traffic in his or her county.

Addiction is an evil that plays no favorites. It is an equal opportunity disease that affects persons of all ages, sexes, and races. Several of our HOPE programs are in counties that border reservations.

They have achieved impressive results with both Native American and non-Native American clients in Charles Mix, Walworth, and Tripp counties.

VETERANS COURTS

Veterans Courts continue to be successful in Codington County and Minnehaha County. The Minnehaha County program is under the direction of Judge Mark Salter, himself a veteran. Currently the program only takes veterans who face felony charges. However, serious consideration is being given to increasing the scope of the program to include those charged with high grade misdemeanors. If undertaken, this could double the size of the program. Further consideration is also being given to taking veterans from other counties in the general vicinity of Minnehaha County.

Part of the program's success is due to the active participation from the Veterans Administration in Sioux Falls. A VA employee sits on the team that oversees the program.

There is a great need for a Veterans Court in the Rapid City area. We currently have 98 veterans on felony probation there. To see if a Veterans Court would work in that area we started a diversion program called a Veterans Protocol that can supervise eight veterans under a specially trained court services officer. It works well. If funding were available we could rapidly expand the Veterans Protocol into a Veterans Court serving a significant number of those 98 veterans. President Abraham Lincoln commented: "You cannot escape the responsibility of tomorrow by evading it today."

MENTAL ILLNESS AND THE COURTS

Last year this Legislature considered the Mental Health Task Force's report and passed a comprehensive bill to deal with mental health issues and the courts. The law went into effect July 1, 2017. It will significantly improve how our criminal judicial system treats those who come into the system with an underlying issue of mental illness. By broadening the definition of those mental health professionals who can do competency evaluations, the logjam of people sitting in jail waiting for an evaluation before entering a plea will be significantly lessened or hopefully go away completely. It also will reduce costs of incarceration to taxpayers who ultimately pay for the county jails and their staffing. Speeding up the system of justice benefits all involved. Since South Dakota ranks

second from the bottom in the nation in the mental health professional provider to population ratio, we have to maximize the wise use of what resources we have.

The proposed pilot project for a mental health court in Pennington County did not pass last year. While it was not viewed as unnecessary or ill-advised, the dollars were simply not there to fund it. Hopefully funding will be available in the near future to undertake this project. In other states, these types of programs have proved highly successful and save significant taxpayer dollars. It has certain common elements with our drug court and alcohol court programs. All three seek to deal with the root problem that got the individual into the criminal justice system in the first place. We

**need to ask, “What happened to you?” and not
“What’s wrong with you?”**

COURTHOUSE SECURITY

The 2017 Legislature authorized a one-time appropriation to address courthouse security needs throughout the state. Counties were eligible for up to a 50% match for projects to help provide enhancements to safety and security in courthouses across the state. I am pleased to report that 26 counties were awarded these grants totaling approximately \$295,000. Examples of projects that were funded through these dollars included metal detectors, bullet resistant benches, locking systems, security doors, video surveillance systems, panic alarms, and bullet resistant glass. Improving courthouse security not only benefits those who

work in such facilities but also the many members of the public who transact business in them.

RURAL ATTORNEY PROGRAM

The Rural Attorney Program continues to grow and expand. We now have contracts signed with 20 counties. We hope to expand that number in the future. The attorneys we have placed are enjoying the rural counties they now live in and serve.

Each year I host a one-day seminar for all the program participants. In visiting with them it appears they are satisfied with their decision to locate to a rural setting.

Last year this Legislature expanded this program by authorizing the placement of attorneys in smaller municipalities. Municipalities with a population under 3500 are eligible to participate.

This expansion went into effect July 1, 2017 and we are in the process of informing municipalities of the opportunities and benefits of the Rural Attorney Program.

PROBATION SERVICES

Probation is a form of judicial supervision for adult convicted felons and for juveniles. It quietly functions in an efficient manner. There are more people on felony adult probation in South Dakota than in penitentiaries, the county jails, and the drug and alcohol programs combined.

While penitentiary, county jail, and other alternative sentencing programs' populations have substantially risen, the increase in the number of people on felony probation is measured in the 1000s:

| <u>FISCAL YEAR</u> <u>ENDING</u> | <u>CASES OF</u> <u>ADULT FELONY</u> <u>PROBATIONERS</u> |
|-------------------------------------|---|
| FY 2011 | 5130 |
| FY 2012 | 5149 |
| FY 2013 | 5892 |
| FY 2014 | 6893 |
| FY 2015 | 8006 |
| FY 2016 | 8634 |
| FY 2017 | 9078 |

It is fair to ask what happens to these probationers.

Last year 84% remained in the program and 1862

people were successfully discharged. Of equal

importance is the performance of these probationers

once they are discharged. In FY 2017, 83% did not

reoffend in the three-year period following their

discharge. Thus, the system does not see them again.

As with every state program, cost is a significant

consideration. If the 9078 cases committed by felons

in FY 2017 were placed in the penitentiary or

alternative sentencing programs those institutions

and programs would be overwhelmed. The state

could not afford the increased cost. Yet, if those 9078 cases committed by felons continue on probation, they are supervised for a cost of \$3 per-day, per-probationer. This is a taxpayer's bargain.

Not everyone qualifies for probation nor should they. Dangerous felons, career criminals, sex offenders and the like belong in a penitentiary. Those seriously addicted to drugs or alcohol belong in our drug and alcohol courts and other treatment programs.

THE SOUTH DAKOTA BAR EXAM

Recently there has been significant public discussion about the passage rates of the South Dakota bar exam. When the passage rate was 80 to 90% virtually no one noticed except the law school graduates who sat for the exam. Nationally the passage rate has significantly declined and South

Dakota is no exception. Both the passage rates for the graduates of the University of South Dakota School of Law and law school graduates from out-of-state are down significantly. Although there has been a lot written on the issue and more than a little finger pointing, no single cause for the decline has been isolated. It is likely a combination of a number of factors.

I do not have a single magic solution. The Supreme Court is willing to review the situation with other key players in the process such as the law school, the law school faculty, the State Bar, and the law students. Our ultimate goal is to provide a quality lawyer who can practice law either in South Dakota or elsewhere and provide professional legal services to his or her clients.

The South Dakota Board of Bar Examiners has remained stable in its membership. Several board members remain from the “glory days” of the 90% passage rates. Their approach to grading the bar exam has not changed. All of our neighboring states have also experienced a drop in passage rates. To me, that shows the South Dakota Bar Examiners are continuing to function as gatekeepers, allowing only those who pass the rigorous exam to exercise the power granted to attorneys. Were South Dakota to remain in the highest category of passage when all the neighboring states experienced a significant decline in passing rates, it would likely signal that the bar exam in this state was not fulfilling its intended function – the protection of the public by only allowing those who are academically fit and possess good moral character to assist the public as

attorneys. The Supreme Court ultimately oversees the process and is pleased with the Board's work.

THE UNIVERSITY OF SOUTH DAKOTA

SCHOOL OF LAW

South Dakota has always had only one law school that is located on the campus of the University of South Dakota at Vermillion. The Executive Director of the State Bar estimates that the University of South Dakota School of Law has produced over 90% of South Dakota's attorneys and judges.

The University of South Dakota established a committee under the chair of House Speaker Mark Mickelson to study the future of the law school. Monumental changes in legal education have taken place not only in South Dakota, but around the nation. Rows of leather bound law books that were

the bread and butter of a legal education and a lawyer's practice are now antiques. Most legal research is now done on-line, on a computer.

I think it is clear that the citizens of South Dakota want and need an in-state law school. Where it should be located and how it should function are important questions for study and discussion.

Ultimately the majority of the committee voted to recommend that the law school remain in Vermillion, create a physical presence and program in Sioux Falls, and increase revenue for student scholarships and the law school.

Several individuals have asked me if the location of the law school will affect the success of the Rural Attorney Program. I have been involved with every rural attorney placement and have spoken to most of those who participate in the

program. In my opinion the Rural Attorney Program will not be negatively or positively affected by the location of the law school.

SUPREME COURT

LAW LIBRARY RESTORATION

Last year I was pleased to report to you that the restoration of the Supreme Court Law Library was well underway. Substantial progress has been made during the past 12 months and it is nearing completion. I have yet to escort a person into this set of rooms that is not struck by the beauty of the restoration and the original beauty of the facility. These are the last public rooms in the Capitol to be restored and it was certainly well worth waiting for. I invite you to see the project for yourself. You will be duly impressed. While it is, in large respect, a return to the 1911 decor, it still is a modern fully-

functioning law library with the latest computer technology for legal research.

JUSTICE LORI WILBUR

This past June, Justice Lori Wilbur retired. She left the bench with an impressive record. She is the only person I know who held every judicial position in South Dakota from Supreme Court law clerk, to part-time Magistrate Judge, to full-time Magistrate Judge, to Circuit Judge, to Presiding Circuit Judge, to Justice of the Supreme Court. She did them all with grace and expertise.

She provided major contributions to this Court's case law by the opinions she authored and participated in deciding. Many were complex.

Justice Wilbur was a driving force in the growth and expansion of drug courts and alcohol courts. She started the first alcohol court in South Dakota.

When I told her that the UJS had no money to fund it, she simply smiled and went out and found her own funding. That program continues to thrive today. She also made personal visits to every drug and alcohol court in South Dakota. If a program was having a few bumps in the road getting going or was experiencing difficulties, she was always willing to involve herself to improve the situation.

Justice Wilbur left the UJS a better place than she found it.

JUSTICE STEVEN JENSEN

In September 2017 Governor Daugaard appointed Presiding Judge Steven Jensen to fill the vacancy on the Supreme Court created when Justice Wilbur retired. Justice Jensen had been a circuit judge in the First Judicial Circuit since 2003. He became the presiding judge for that circuit in 2011.

Besides his normal judicial and administrative duties, he implemented drug and alcohol courts in his circuit and contributed to juvenile justice reform and UJS technological advances.

His tenure on the bench has earned him respect on a statewide basis. The importance of his selection is underscored by the fact that since we became a state in 1889, only 50 people have served as Justices on the South Dakota Supreme Court.

JUDICIAL TURNOVER

We did not just welcome a new Justice to the UJS this past year. We experienced a tsunami of judicial retirements. In one year, 6 of our 43 circuit judges retired from that position. The governor has named replacements or is in the process of doing so. We also had 4 of our 15 magistrate judges retire. They have been replaced.

We were able to accommodate the departures through the use of retired judges who agreed to come back as “temp help” where needed. Sitting judges juggled schedules and some of the retiring judges agreed to stay and finish their cases after their official retirement date. Thus, we did not experience a backlog of cases.

In the UJS, judicial turnover is to be expected. That is how the current Justices and judges got their judicial positions. We hate to lose the years of judicial experience, but we also welcome new blood.

CONCLUSION

Near the end of the titanic Civil War, President Abraham Lincoln pondered if he controlled events as President of the United States or events controlled him. Every person who has served in public office

has faced that question. However, he also mused that you cannot escape the responsibility of tomorrow by evading it today. I believe our actions as public servants are not currently controlled by events and we are able to move forward to address the public issues that need to be addressed. That is an on-going process.

Those of us in the UJS seek to improve the justice system and the services it delivers to the public. As far as the judicial function in South Dakota, today's message should be evidence that impartiality does not equate with indifference. There is nothing new with this concept. Over three thousand years ago the Prophet Isaiah declared, "Maintain justice, and do what is right."