

JOURNAL OF THE SENATE

NINETY-EIGHTH SESSION

SECOND DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Wednesday, January 11, 2023

The Senate convened at 1:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Craig Wexler, followed by the Pledge of Allegiance led by Senate page Dustin Hermansen.

Roll Call: All members present except Sen. Tobin who was excused.

APPROVAL OF THE JOURNAL

Mr. President:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the 1st day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Lee A. Schoenbeck, Chair

Which motion prevailed.

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COMMUNICATIONS AND PETITIONS

December 2, 2022

The Honorable Larry Rhoden
President of the Senate
State Capitol
Pierre, SD 57501

RE: Appointment of Patricia A. Meyers, to the Board of Pardons and Paroles

Dear President and Members of the Senate:

Pursuant to the provisions of SDCL 24-13-1, and subject to your confirmation, the Court has appointed Patricia A. Meyers, an attorney from Rapid City, South Dakota, to the Board of Pardons and Paroles. Accordingly, the Court requests that you submit said appointment to the Senate for consent.

This appointment is effective December 19, 2022, and shall continue until March 28, 2027.

Very truly yours,
Shirley A. Jameson-Fergel

The President announced the referral of the appointment to the Committee on Judiciary.

REPORTS OF JOINT-SELECT COMMITTEES

Mr. President:

Your Joint-Select Committee appointed to make arrangements for a Memorial Service for deceased former members of the South Dakota House of Representatives and Senate respectfully reports that they recommend that the House of Representatives and Senate recess and convene in the House Chamber at 3:00 p.m. on January 19, 2023, and that a Joint Memorial Resolution be introduced in their memory by their colleagues in the House of Representatives and Senate.

A short program will follow the introduction of the Memorial Resolution. At the conclusion of the Memorial Service, the Joint Session will be dissolved.

The Memorial Resolution shall be printed in the House and Senate Journals.

Respectfully submitted,
Mike Stevens (Chair)
Jon Hansen
Lynn Schneider
Brandei Schaeffbauer
Oren Lesmeister
House Committee

Respectfully submitted,
Lee Schoenbeck (Chair)
Jim Bolin
Jean Hunhoff
Jim Stalzer
Red Dawn Foster
Senate Committee

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MESSAGES FROM THE HOUSE

2 Mr. President:

3 I have the honor to inform your honorable body that the House has appointed Reps. Stevens
4 (Chair), Hansen, Schneider, Schaeftbauer, and Lesmeister as a committee of five on the part of the
5 House to meet with a committee of five on the part of the Senate for the purpose of arranging for
6 a memorial recognition of deceased former members of the House and Senate.

7 Also, Mr. President:

8 I have the honor to inform your honorable body that the House has approved the adoption of
9 the permanent joint rules of the Ninety-seventh Legislative Session with recommended changes to
10 those joint rules for the Ninety-eighth Legislative Session as adopted in March, 2022, as the
11 temporary joint rules for the Ninety-eighth Legislative Session.

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Respectfully,
Patricia Miller, Chief Clerk

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MOTIONS AND RESOLUTIONS

15 Sen. Crabtree moved that when we adjourn today, we adjourn to convene at 1:00 p.m. on
16 Thursday, January 12th, 2023, the 3rd legislative day.

17 Which motion prevailed.

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FIRST READING OF SENATE BILLS AND JOINT RESOLUTIONS

19 **SB 53:** FOR AN ACT ENTITLED, An Act to exempt records regarding jail inmate disciplinary
20 matters from public inspection and copying.

21 Introduced by: **Senator** Duhamel

22 **SB 54:** FOR AN ACT ENTITLED, An Act to require a convicted defendant to reimburse for the
23 cost of digital forensic examination fees.

24 Introduced by: **Senator** Duhamel

25 Were read the first time and referred to the Committee on Judiciary.

26 **SB 56:** FOR AN ACT ENTITLED, An Act to revise requirements to relocate a county seat.27 Introduced by: **Senator** Maher

28 Was read the first time and referred to the Committee on Local Government.

29 **SB 55:** FOR AN ACT ENTITLED, An Act to prohibit ranked-choice voting.30 Introduced by: **Senator** Wiik

31 Was read the first time and referred to the Committee on State Affairs.

1 The following bill was read on January 10, 2023, and today the President assigned this bill to
2 committee:

3 **SB 51** was referred to the Committee on Judiciary.

4 Sen. Wiik moved that the Senate do now adjourn, which motion prevailed and at 1:15 p.m.
5 the Senate adjourned.

6 Kay Johnson, Secretary

7 **JOINT SESSION**

8 The Senate convened with the House of Representatives in the House Chamber for the purpose
9 of receiving a message from the Chief Justice of the Supreme Court, Steven R. Jensen. The President
10 of the Senate, Larry Rhoden, presided.

11 The opening prayer was delivered by Pastor Tom Rooney, Sioux Falls, South Dakota.

12 The Secretary of the Senate, Kay Johnson, called the roll of the Senate and the following
13 members were present:

14 Beal; Bolin; Bordeaux; Breitling; Castleberry; Crabtree; Davis; Deibert; Diedrich; Duhamel;
15 Foster; Frye-Mueller; Hoffman; Hunhoff; Johnson; Klumb; Kolbeck (Jack); Kolbeck (Steve); Larson;
16 Maher; Mehlhaff; Nesiba; Novstrup; Otten (Herman); Pischke; Reed; Rohl; Schoenbeck;
17 Schoenfish; Stalzer; Wheeler; Wiik; Wink; Zikmund.

18 The Chief Clerk of the House of Representatives, Patricia Miller, called the roll of the House and
19 the following members were present:

20 Arlint; Auch; Aylward; Bahmuller; Blare; Callies; Cammack; Chaffee; Chase; DeGroot; Derby;
21 Deutsch; Donnell; Drury; Duba; Duffy; Emery; Fitzgerald; Gross; Hansen; Healy; Heermann;
22 Jamison; Jensen (Phil); Karr; Kassin; Koth; Krohmer; Krull; Kull; Ladner; Lems; Lesmeister; Massie;
23 Mills; Moore; Mortenson; Mulder; Nelson; Odenbach; Olson; Otten (Ernie); Overweg; Perry;
24 Peterson (Drew); Peterson (Sue); Pinnow; Pourier; Randolph; Rehfeldt; Reimer; Reisch; Sauder;
25 Schaeftbauer; Schneider; Shorma; Sjaarda; Soye; St. John; Stevens; Teunissen; Tordsen;
26 Venhuizen; Wangness; Weisgram; Wittman; Speaker Bartels.

27 Sen. Crabtree moved that a committee of three on the part of the Senate and a committee of
28 five on the part of the House be appointed to escort Chief Justice Steven R. Jensen to the rostrum.

29 Which motion prevailed and the President announced as such committee Sens. Schoenbeck,
30 Crabtree, and Nesiba on the part of the Senate and Reps. Stevens, Mortenson, Rehfeldt, Lesmeister,
31 and Healy on the part of the House.

32 The Lieutenant Governor, Larry Rhoden, introduced the Honorable Steven R. Jensen, to deliver
33 the State of the Judiciary Address.

34 The Sergeant at Arms announced the arrival of Chief Justice Steven R. Jensen who was escorted
35 to the rostrum.

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2023 STATE OF THE JUDICIARY MESSAGE

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Introductory Message

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Dear Fellow Citizens of South Dakota:

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On behalf of the South Dakota Unified Judicial System, I am pleased to present the 2023 State of the Judiciary message delivered to Governor Noem and a joint session of the Legislature.

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As I begin my third year as Chief Justice of the South Dakota Supreme Court, I want to first express my appreciation to my colleagues on the Court for helping to bear the weight of the court system and for their daily encouragement, advice and assistance. I am also grateful for the judges and court staff who work tirelessly to provide justice for the many people entering our courts every day. Our employees are the court system's greatest resource.

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It is an honor and my pleasure to present this message to you.

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Steven R. Jensen

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Chief Justice

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2023 State Of The Judiciary

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Governor Noem, Lieutenant Governor Rhoden, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, Unified Judicial System (UJS) employees, and all South Dakotans: I am honored to deliver my 2023 State of the Judiciary message to you.

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It is a privilege for me to serve the court system and the citizens of South Dakota as Chief Justice. I am fortunate to work with a talented group of justices, judges and court staff in the Unified Judicial System who understand the important and unique work of the court system in providing a forum for the fair resolution of disputes of every nature that arise across this State. This work is two-fold. First, the courts provide procedural fairness so that every person has an opportunity for their disputes to be heard in an open forum by an impartial decisionmaker. Second, the courts are duty-bound to apply and uphold the rule of law in each case.

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In the United States, we understand the rule of law to mean the system of laws, consistent with the core principles of our state and federal Constitutions, designed to protect our citizens, maintain order, and restrain governmental power. The Constitution must always be the source for governing and applying the rule of law. United States Supreme Court Justice Antonin Scalia commented on the foundational role the federal Constitution has played in building, sustaining and uniting our country since its inception. He said, "Unlike any other nation in the world, we consider ourselves bound together, not by genealogy or residence but by belief in certain principles; and the most important of those principles are set forth in the Constitution of the United States."

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In discussing the rule of law, former Harvard Law Professor John MacArthur McGuire described the law as the "wise restraints that make men free." The restraints provided by the rule of law preserve our liberty when they are applied to everyone, regardless of rank or status. The importance of these restraints for our society is much like the household rules we heard as children, "Don't hit your brother," "Keep your hands to yourself," "Don't run with scissors in your hands," and "Don't cross the street without looking." As adults, we recognize that that these rules were for our safety and the common good of our household. In the same way, when the restraints of the rule of law are applied consistently and equally to all, they produce a safe, peaceful and orderly society for everyone.

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An independent judiciary is a central pillar of the rule of law. Judges are duty bound to apply the law as set forth in the Constitution, statutes, and codes enacted by our elected officials. Let me assure you judges do not sit in the back room throwing darts or flipping coins to make their decisions. Judges also do not decide cases based upon their own likes or dislikes or based upon the most popular view on social media. In fact, the correct result – the one required by the rule of law – may be unpopular. One of the reasons judges all wear the same black robe is that our individual personalities and differences should not matter when it comes to our obligation to apply the law.

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1 As I once heard a judge rightly describe, “The robe is often very heavy.” In donning the robe, a
2 judge is reminded of the duty to fulfill the oath to apply the law and administer justice to all persons
3 with impartiality.

4 Justice Scalia cautioned judges about this obligation, especially in those instances where the
5 judge might not like the result of the decision. He said, “Do not depart from the words of the law.
6 Will that produce a perfect world? Of course not... But it will produce a better world than one in
7 which judges run about enforcing their view of the natural law and of equity. The rule of law will
8 always be second best to the rule of love, but we have to leave the latter to the next world.”

9 Justice Scalia believed the “three ideal qualities for a judge” to be “adherence to the law,
10 scholarship, and an even-handed demeanor.” In South Dakota, the judiciary continually strives
11 toward all three of these. Careful selection of judges and training for judges and court staff is crucial
12 to fulfilling these qualities. The South Dakota judiciary meets biannually for training on procedural
13 and substantive law, updates on the law, considerations for sentencing criminal defendants, as well
14 as personal mental and physical wellness. Throughout the year, many other training opportunities
15 are offered to South Dakota judges. However, some of the best judicial development takes place
16 informally in South Dakota as judges talk with one another on issues and cases that come before
17 the courts. In 2023 we will continue to foster this culture of growth within the South Dakota
18 judiciary.

19 The members of the judiciary put this training and mentoring to good use as the number of
20 disputes submitted to our courts continues to climb. This past year, nearly 200,000 criminal and
21 civil cases were filed in the courts in South Dakota. Our 45 circuit court judges and 17 magistrate
22 court judges are responsible to ensure that each case is decided fairly and based upon the facts and
23 law. The judges are only able to manage this caseload because of the work of the UJS court staff
24 who docket the thousands of pleadings that are filed annually and keep these cases on track. I can
25 tell you, both from a review of many court transcripts and from experience, that our judges and
26 court staff work hard to provide a fair process. They respect the rule of law, care about the people
27 in front of them, and treat litigants and lawyers with patience, respect and dignity. We in the court
28 system are all human and can make mistakes, but we will continue to strive to be a justice system
29 worthy of our citizens’ trust.

30 In that vein, I want to speak for a few minutes today about some of our current initiatives.

31 **Barriers Group**

32 Last year, I told this body that in 2022 we would begin a project to improve and enhance our
33 efforts at rehabilitating young criminal offenders. I made the decision to move such a project
34 forward because I believe that upholding the rule of law extends beyond the courtroom. Young
35 adults between the ages of 18 and 25 comprise the majority of offenders in our system. They often
36 struggle to comply with orders of the sentencing court due to immaturity and other barriers to their
37 success, such as unmet education, housing and employment needs.

38 I have been reminded again and again this past year of the rising incidence of violent crime
39 among young offenders, especially in Sioux Falls and Rapid City. While the focus of this project is
40 on non-violent offenders, the greater success we have in rehabilitating non-violent young offenders,
41 the less likely these offenders will be to gravitate toward gangs, drug dealing, and more serious
42 criminal behavior that often accompanies these high-risk activities.

43 Many young adult offenders are drug involved. We are aware of the impact methamphetamine
44 has had on the crime rate in South Dakota. Both the economic and noneconomic costs of substance
45 abuse and the associated criminal activity are immense. We are also becoming more aware of the
46 dangers presented by opioid abuse, particularly abuse of synthetic opioids such as fentanyl. From
47 2015 to 2020, deaths from synthetic opioids increased nationally by tenfold. Additionally, the court
48 system must often address the mental health issues observed in offenders entering the courts.
49 While these deeper societal issues do not originate with the courts, we become uniquely positioned
50 to assist the individuals who are willing to change the direction of their lives. Our court services
51 officers and problem-solving courts, including drug courts, DUI courts, mental health courts, and
52 veterans’ courts, work hard to supervise and provide opportunities for rehabilitation for offenders.
53 However, the court system cannot go it alone in this effort.

1 The assistance of other governmental agencies, service providers, and community-based non-
2 profit and faith-based organizations has been and will continue to integral to our efforts to
3 rehabilitate offenders in the criminal justice system. Crime is a community problem and the entire
4 community must be involved in its solution. Thus, the Barriers Group was formed--to share
5 information, collaborate to find better solutions, and improve public awareness of these issues.

6 We began the Barriers project earlier this year by enlisting support from the National Center
7 for State Courts to begin interviewing and gathering data from stakeholders in the criminal justice
8 system. This past fall, we assembled a strong group of representatives from the Governor's office,
9 the Legislature, the UJS, the Department of Corrections, the Department of Social Services, the
10 Department of Education, the Department of Labor, along with community service providers, state's
11 attorneys and defense lawyers. The group's focus as it considered the data was to discuss ways to
12 improve rehabilitation, hold young offenders accountable, and maintain public safety. In terms of
13 the breadth of perspectives and experiences, this group's discussion is the first of its kind in our
14 State's history.

15 Through its collaborative work, the Barriers Group discussed several steps for improving
16 services and reducing barriers to rehabilitation for young adults. The Barriers Group is planning a
17 conference later this year to include traditional criminal justice partners such as law enforcement,
18 attorneys, and parole and probation officers. It will also include behavioral health professionals,
19 employment and housing experts, adult education services, and others to better serve young adult
20 offenders struggling with addiction, mental illness, lack of education and training, and other issues.

21 It became apparent after a few meetings that the work of the Barriers Group has just begun
22 to scratch the surface. The group primarily focused on the front end of the criminal justice system
23 this past fall, meaning those individuals who could be diverted from the criminal justice system or
24 sentenced to a suspended penitentiary sentence with probation. There is much more work to be
25 done throughout the entire system, including support for young offenders sentenced to the
26 penitentiary who are eventually released on parole and reintegrated back into our communities.

27 To that end, I am proposing a bill for the Legislature's consideration that will formalize the work
28 that the Barriers Group began this past year. The legislation is designed to bring together the three
29 branches of government, and many others across South Dakota, to continue to address
30 rehabilitation barriers. The legislation does not request additional funding at this time. Instead, it
31 is designed to bring public attention to these issues and create an established and recognized
32 process for collaboration and problem solving of these challenges within the criminal justice system.

33 **Courthouse Security**

34 A commitment to the rule of law and the expectation that people will settle their disputes
35 peacefully also means that South Dakota courthouses must be safe for everyone working and doing
36 business in them. The past two years I have discussed the need and importance of improving
37 security at courthouses across South Dakota. I am pleased to report on the progress we are making.
38 Thanks to Governor Noem and the Legislature, the UJS now has a statewide security coordinator
39 dedicated to this endeavor, as well as one-time grant dollars to make security infrastructure
40 improvements at county courthouses.

41 The UJS Security Grant Review Committee is responsible for reviewing and verifying requests
42 for grants for security infrastructure improvements. To foster active, local participation in the
43 courthouse security plans, the UJS requires a county to form and operate a local security committee
44 for grant requests that exceed \$10,000. These larger grant requests must also be supported with
45 an assessment from a trained security expert. The county is further responsible for contributing
46 25% of the cost of the security infrastructure improvement. The UJS has approved 12 requests for
47 security grants. The total dollars approved to date for these grants are just under \$560,000. With
48 additional anticipated requests on the way, the security grant requests will soon exceed \$1,000,000.
49 The approved applications have been for both large and small improvements. Some of the smaller
50 grant requests have funded items such as video cameras, ballistic shielding, and security doors.
51 Examples of larger requests include remodels to allow secured entry into the courtroom for judicial
52 staff and the creation of a security office within a courthouse.

1 These security improvements are important, but the formation and development of local
2 security committees are really the backbone of our plan to enhance courthouse security. The local
3 committees are responsible for assessing needed security enhancements within their courthouses,
4 and to provide planning, education, and training to courthouse employees. The local committees
5 are made up of UJS and county employees, representatives from the sheriff's office, county
6 commissioners, and attorneys who regularly appear at the courthouse. It is vital that county
7 sheriffs, who are responsible for courthouse security, be involved in this process. The UJS Security
8 Coordinator provides each local committee with information, policy or technical assistance, and
9 ongoing administrative aid to keep each committee operating effectively.

10 To date, sixteen county courthouse security committees are up and running. We plan to at
11 least double the number of committees in place within the next twelve months. As we add
12 committees, we anticipate the requests for security improvements will grow along with the work in
13 managing these local committees. Presently, we do not have a need for more resources or funding.
14 However, there is still much work to be done toward our long-term goal of improving security for
15 judges, UJS staff, county employees, attorneys, litigants, jurors, and members of the public who
16 work and conduct business in county courthouses statewide.

17 In addition to these ongoing projects, the Supreme Court and UJS will be starting two new
18 projects in 2023. The first project is intended to address the provision of court-appointed attorney
19 fees in criminal, juvenile, and child abuse and neglect cases in South Dakota.

20 **Court-Appointed Attorney Fees**

21 The right to counsel for the accused is granted in the Sixth Amendment to the United States
22 Constitution and § 7 of the Bill of Rights in our State Constitution. In 1963, the United States
23 Supreme Court issued a unanimous decision in the landmark case of *Gideon v. Wainwright*
24 reaffirming what many states, including South Dakota, already recognized—that the Sixth
25 Amendment right to counsel requires states pay the cost to provide court-appointed counsel to
26 defendants who are unable to afford counsel in more serious criminal cases. As *Wainwright* aptly
27 recognized, “[L]awyers in criminal court are necessities, not luxuries.”

28 Our system of justice depends on competent counsel defending every person accused of a
29 crime. Competent counsel ensures that the other fundamental rights of the accused, such as cross-
30 examination, calling witnesses and presenting a defense, are meaningfully exercised. The right of
31 counsel is integral to the truth-finding function of our adversarial process. Without competent
32 counsel for both parties, we would not have confidence in the decisions made by judges and juries.
33 We would be left wondering whether all the facts were presented or whether the accused had an
34 opportunity to present a full defense. The beauty and brilliance of our adversarial system is
35 dependent on the availability of counsel for every defendant.

36 The right to counsel is just as important in juvenile cases and child abuse and neglect cases.
37 Court-appointed attorneys in these cases protect the rights of parents, adolescents and children
38 involved in these proceedings. Additionally, when all the parties are adequately represented in child
39 abuse and neglect cases, judges are able to make timely, well-informed interventions and issue
40 decisions that serve the best interests of children and families in crisis.

41 We are fortunate that South Dakota has recognized the importance of court-appointed counsel
42 for indigent defendants for more than 100 years. Long before the decision in *Wainwright*, state law
43 required a court to appoint counsel for an indigent defendant and the county where the charge is
44 filed to pay the cost of representation. South Dakota law guarantees indigent defense for both
45 felony and misdemeanor charges where a defendant faces the possibility of incarceration.

46 We have many excellent criminal defense attorneys in South Dakota who are experienced and
47 zealously represent and protect the rights of their clients. Attorneys in private practice who serve
48 as public defenders do so at significantly reduced hourly rates. Attorneys are also not paid an hourly
49 rate for their drive time to the courthouse or facility where a defendant may be incarcerated. In
50 some areas of the State, this is an inordinate burden on an attorney's time. Nonetheless, many
51 attorneys agree to serve as public defenders when a judge calls, recognizing the importance of their
52 public service to the justice system for those unable to afford counsel. The attorneys performing
53 this service deserve to be thanked and commended for their work.

1 While South Dakota has a great tradition of providing court-appointed counsel, we are facing
2 some challenges in our public defender system that I want to discuss today. Three counties --
3 Minnehaha, Pennington, and Lawrence Counties -- have public defender offices and full-time
4 attorneys to handle indigent defense. The other 63 counties either negotiate an annual rate contract
5 with one or more private attorneys or pay the cost of defense to private attorneys on a case-by-
6 case basis. The variety of public defender arrangements from county to county can make it difficult
7 for judges to appoint counsel and counties to manage costs. Judges, particularly in rural areas, are
8 having more and more difficulty finding counsel to represent defendants in criminal cases.

9 This past year, I was approached by county groups about their challenges relating to indigent
10 defense in South Dakota. Some counties are struggling to afford court-appointed attorney fees and
11 lack additional funding sources. Many counties find it difficult to manage and contain these costs,
12 and some are having difficulty finding attorneys to agree to sign indigent defense contracts with the
13 county.

14 State law currently provides counties with reimbursement for a minimal portion of their indigent
15 defense costs each year. In the 1980s, the Legislature approved a fund to reimburse counties for
16 these costs. No general fund dollars are used. Instead, the funding is generated from a small
17 portion of the \$50 liquidated cost surcharge added to each criminal fine in South Dakota. This
18 surcharge is collected by the UJS and paid to the state treasurer. By statute, most of the surcharge
19 is used for the Law Enforcement Officers Training Fund. However, \$7.50 is set aside for the public
20 defender fund and another \$1.50 is placed into the abused and neglected child defense fund. During
21 the last fiscal year, South Dakota counties paid out over \$21 million dollars for indigent defense
22 costs. The reimbursement from this fund amounted to approximately 2 to 3% of the total annual
23 criminal defense costs incurred by counties.

24 Funding to shore up our public defender system is needed but isn't the only improvement that
25 can be made. Some efficiencies may be created through regionalized or statewide management of
26 indigent defense. We are one of few states that does not have any centralized system for
27 management of indigent defense cases. Many states have an independent board or other
28 governmental entity responsible for overall management of the public defender system on a
29 statewide basis to contain costs, manage caseloads, and ensure the appointment of competent
30 counsel. I am not suggesting a particular solution today for our various county-by-county approach
31 in South Dakota. We do, however, need to explore some options in order to maintain a viable public
32 defender system into the future.

33 County and attorney groups have expressed interest in working to improve our indigent defense
34 system. Support from the executive and legislative branches will be needed as the challenges are
35 bigger than the courts, counties and attorneys can address on their own. Therefore, I am presenting
36 a bill to the Legislature this session to create a study group to work on indigent defense in South
37 Dakota. The UJS is willing to staff and manage this group with the goal that we would come back
38 to the Legislature with recommendations for its consideration. I have no doubt that if we roll up our
39 sleeves we can develop a more cost-effective and efficient public defender system that will continue
40 our State's long tradition of guaranteeing the right to competent counsel in every case.

41 **Bar Admission**

42 The second new project I want to spend a few minutes discussing is the Supreme Court's
43 assembling of a study group to consider the process for admitting lawyers to the legal profession in
44 South Dakota. Last year a bill was introduced in the Legislature that would have significantly altered
45 the process for admitting new attorneys into the South Dakota Bar. It would have admitted any
46 applicant graduating from the USD Knudsen School of Law into the legal profession without a
47 separate assessment of their competence to practice law. It was concerning to the Court that the
48 bill was introduced without any notice or prior discussion with the Court, the State Bar, or the Law
49 School concerning the impact this change might have on the legal profession, or more importantly,
50 the public that the current admission process is designed to protect. I am grateful that the House
51 State Affairs Committee voted against moving the diploma privilege legislation forward. I want to
52 spend a few minutes providing some background on the current bar admission process in South
53 Dakota and the efforts of the Court to study this issue with the goal of avoiding similar proposed
54 legislation this session.

1 The current admission process includes both a character and fitness determination and a
2 competency determination before an applicant is admitted to the profession in South Dakota. The
3 Supreme Court appoints a five-member Board of Bar Examiners which is responsible for overseeing
4 both determinations. The character and fitness portion of the process involves an extensive
5 background review of each applicant, which in some instances results in further investigations,
6 interviews, or a formal hearing with the Board. The competency component of the admission
7 process is an assessment of minimum competence to practice law conducted through a written
8 examination.

9 The Supreme Court requires an applicant to obtain a passing score on the multiple-choice
10 portion of the examination, known as the Multistate Bar Examination, and a separate essay
11 examination. Both exams are prepared by the National Conference of Bar Examiners (NCBE). The
12 South Dakota essay portion of the examination also includes an Indian Law question drafted by the
13 Board of Bar Examiners. The NCBE bar exam has been administered in South Dakota for nearly
14 forty years to objectively measure minimum competence to practice law. This is the same
15 examination given in 49 out of 50 states and several US territories. The test is designed to measure
16 an applicant's understanding of the core legal principles and the ability to apply those legal principles
17 to specific factual situations. The South Dakota Supreme Court sets the minimum score necessary
18 to pass each portion of the bar exam.

19 Recently, there has been some criticism of the bar examination. This criticism started when
20 bar exam pass rates began to decline during the past decade. Historically, the first-time bar exam
21 pass rates exceeded 80%, and were well above 90% after one or two retakes. Beginning in 2014,
22 however, first-time pass rates dipped significantly, both in South Dakota and nationally. There
23 were several reasons offered for the reduced pass rates, including lowered admission standards at
24 law schools due to declining enrollment, as well as changes to the bar exam itself.

25 There also has been a claim that South Dakota's method of separately grading each portion of
26 the bar examination has negatively impacted pass rates. This is simply inaccurate. The portion of
27 the exam that is most often failed in South Dakota is the MBE portion which is graded and scaled
28 by the NCBE just like every other state. The NCBE also indicates there is no correlation between
29 pass rates and combining or separately grading each portion of the bar exam. Further, in South
30 Dakota, pass rates for USD graduates taking the South Dakota bar exam for the first time have
31 exceeded the national average every year since 2018.

32 Over the past few years, the pass rates in South Dakota have returned to close to historical
33 numbers as a result of efforts by both applicants and the Law School. In July 2022, the first-time
34 pass rate for USD Law School graduates was 79%. The ultimate pass rate will be even higher as
35 those who did not initially pass re-test. Viewed over a period of two years from graduation, the
36 pass rates for 2019 and 2020 USD graduates were 94% and 87% respectively.

37 The legal profession is not unique in requiring a written competency examination. Doctors,
38 accountants and many other professionals are required to prove their preparedness, as well. This
39 is to protect the public. The requisite education for professional licensure is a significant step in the
40 process, but an assessment of the ability to practice in the profession is both expected and
41 necessary. Each current member of the Supreme Court took the NCBE bar examination. As such,
42 the members of the Court can attest to the value of studying for the bar exam following law school
43 to prepare for admission to the legal profession. The Court also understands the importance of the
44 bar exam to assess an applicant's knowledge of core legal principles and the ability to apply those
45 principles to the scenarios they will encounter in practice. Some of the criticism of the bar
46 examination is that it is too hard. Respectfully, the process to assess competence must be rigorous.
47 Lawyers occupy unique positions of trust and responsibility. Clients place their confidence in lawyers
48 to represent them in questions concerning their property, their liberty, and in the most serious
49 criminal cases, their lives.

50 As a Court, we are not unsympathetic to the individuals who have invested time and money in
51 law school but are unable to pass the bar examination. However, these sympathies cannot outweigh
52 our institutional obligation to protect the public by requiring an assessment of competence before
53 issuing a license to practice law in this State.

1 The study group appointed by the Court met for the first time in December and will continue
2 its work into 2023. The Court has tasked the study group to review the entire admission process.
3 An assessment of each applicant’s competence to practice law and the method or methods to make
4 this determination will be a central focus of the study. The group will gather data, including
5 interviews with members of the bar, recent successful and unsuccessful bar exam test-takers, and
6 others who can assist the study group in this process. They will also have an opportunity to meet
7 with representatives of the NCBE to discuss the bar exam and the current changes being made to
8 the exam. The study group will receive technical assistance in this process to ensure that it is
9 considering the best data to make informed recommendations to the Court. We have requested
10 that the study group provide a report to the Court later this fall. The Court will then make the report
11 public for comment and input before considering any recommendations for changes to the current
12 admission process.

13 In initiating this study, the Court’s overarching goal is to maintain an admission process that
14 is fair, ensures attorneys are available to meet the future needs of both rural and urban South
15 Dakotans, and protects the public. I respectfully ask the Legislature to defer to the Court’s
16 constitutional authority to consider and address any changes should be made to the bar admission
17 process.

18 **Budget**

19 The UJS has several budget priorities that we look forward to working on with the Joint
20 Appropriations Committee during this session. I want to take just a moment to highlight one
21 particular priority which is our request for an additional magistrate judge in the Second Circuit,
22 which includes Minnehaha and Lincoln Counties. Magistrate judges are limited jurisdiction judges
23 with authority to hear initial appearances on all criminal cases, criminal misdemeanor cases through
24 disposition, and civil cases up to a maximum of \$12,000. Many of the magistrate judges also served
25 as judges in our problem-solving courts.

26 The Second Circuit has had four magistrate judges for more than twenty years, while the
27 population in the Second Circuit has more than doubled. The magistrate judges in the Second
28 Circuit spend a significant amount of time in court handling initial advisement of rights, appointing
29 counsel, and setting bond in nearly all criminal cases. They also handle all the criminal misdemeanor
30 cases from start to finish, including presiding over misdemeanor jury trials. I am requesting the
31 Legislature fund this new position in this year’s budget.

32 **Judicial Elections and Transitions**

33 Finally, I want to comment on judicial elections for circuit judges which are currently required
34 every eight years by Article V, § 7 of the South Dakota Constitution. A resolution was introduced a
35 few days ago in the Senate to change the process for selecting and retaining circuit judges through
36 an amendment on the statewide ballot. Therefore, I believe it is important for me to briefly describe
37 the current process for selecting circuit judges and how this amendment would alter it.

38 In 2022, the eight-year terms for all 45 circuit judges were up for re-election as required by
39 the State Constitution. Every judge seeking re-election was required to file a petition for candidacy
40 with the Secretary of State. A circuit judge can be challenged in a non-partisan election by a South
41 Dakota-licensed attorney who files a petition of candidacy. Historically, however, very few sitting
42 judges are challenged, and most are re-elected without a contested election.

43 Most circuit judges are initially appointed to the circuit bench through the merit selection
44 process, rather than by election. The process of merit selection requires the submission of an
45 application for an open circuit judge position, an extensive background investigation, and an
46 interview with the Judicial Qualifications Commission. The JQC is a constitutionally-created board
47 made up of judges, lawyers, and lay persons appointed by the South Dakota Judges Association,
48 the President of the State Bar, and the Governor. The Board is also responsible for investigating
49 complaints of ethical violations by a judge. As part of the merit selection process, the Board must
50 nominate and send the names of at least two applicants the Board determines to be qualified to the
51 Governor. The Governor will then make the appointment from the list of qualified applicants
52 received from the Board. The appointee fills the remaining eight-year term of the open position.

1 The proposed amendment would modify the Constitution to require every circuit judge to be
2 initially appointed through the merit selection process I have outlined. There would be no longer
3 be contested judicial elections. Instead, circuit judges would stand for retention by the voters in
4 their circuit at the general election 3 years after their appointment. Every eight years thereafter
5 the judge would again stand for retention by the voters. A retention election places the judge's
6 name on the ballot and asks the voters to indicate "yes" or "no" on retention of the judge. A majority
7 of voters must vote to retain the judge. This is the current process in the Constitution for selecting
8 and retaining South Dakota Supreme Court Justices. The proposed amendment would provide for
9 a parallel system to select circuit judges. The Court will be discussing this Resolution within the UJS
10 and amongst the circuit judges and we will be communicating further with the Legislature on the
11 Resolution as the session moves ahead.

12 In 2022 there were three contested elections; only one of those involved a sitting circuit judge.
13 The other two contested elections involved attorneys running for the position of a resigning or
14 retiring circuit judge. The incumbent judge was re-elected. The court system also had a fourth
15 position open for election to fill the spot previously held by Judge Jon Flemmer in Sisseton. Sadly,
16 Judge Flemmer passed away unexpectedly this past August. I want to take a moment to honor
17 Judge Flemmer's memory and service to the court system. Judge Flemmer was humble, possessed
18 a great judicial demeanor, and faithfully served the citizens of South Dakota for more than 30 years.
19 He was a true public servant. Marshall Lovrien was elected to replace Judge Flemmer. I want to
20 congratulate Marshall Lovrien, as well as Doug Barnett from Sioux Falls and John Fitzgerald from
21 Deadwood, who won their elections to replace judges who were resigning or retired. All three judges
22 took their oath of office and began their duties last week. I express a warm welcome to these three
23 new circuit judges.

24 **Conclusion**

25 I am grateful to have had the opportunity to speak today about the critical work performed
26 daily by judges and court staff in South Dakota. None of us in the court system take the resources
27 we have been provided or trust of our citizens lightly. As such, we will continue our work in the
28 court system and will remain accountable to the other two branches of government, and most
29 importantly, the citizens of South Dakota.

30 The prophet Amos declared more than two millennia ago in Amos 5:24—"Let justice roll on like
31 a river, righteousness like a never-failing stream." This was Dr. Martin Luther King, Jr.'s most-
32 quoted Bible verse as he spoke about justice. The clarion call of this verse is no less clear today
33 than it was in the days of Amos or Dr. Martin Luther King, Jr. May the lives and livelihoods of our
34 people be protected and strengthened by the work of our justice system today and throughout this
35 next year, so help us God.

36 Thank you.

37
38
39

Respectfully Submitted,
Steven R. Jensen
Chief Justice

40 Sen. Crabtree moved that the Joint Session do now dissolve.

41 Which motion prevailed.