

# *JOURNAL OF THE SENATE*

## *NINETY-FIFTH SESSION*

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THIRD DAY

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STATE OF SOUTH DAKOTA  
Senate Chamber, Pierre  
Thursday, January 16, 2020

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

The prayer was offered by the Chaplain, Pastor Matthew Spoden, followed by the Pledge of Allegiance led by Senate page Brianna Duerre.

Roll Call: All members present except Sens. Rusch, Steinhauer, and Wismer who were excused.

### **APPROVAL OF THE JOURNAL**

MR. PRESIDENT:

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

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

And we hereby move the adoption of the report.

Which motion prevailed.

Respectfully submitted,  
Brock L Greenfield, Chair

1

**REPORTS OF STANDING COMMITTEES**

2 MR. PRESIDENT:

3 The Committee on Senate Judiciary respectfully reports that it has had under consideration  
4 **SB 25** and returns the same with the recommendation that said bill do pass.

5 Also MR. PRESIDENT:

6 The Committee on Senate Judiciary respectfully reports that it has had under consideration  
7 **SB 27** and returns the same with the recommendation that said bill be amended as follows:

8 27A

9 On page 3, line 9, of the Introduced bill, delete "who is an adult" after "person"

10 On page 3, line 10, delete "All information in the clearinghouse relating to a missing person  
11 who is a minor shall be purged when the person reaches eighteen years of age and the person's  
12 location is determined and confirmed." after "."

13 And that as so amended, said bill do pass.

14 Respectfully submitted,  
15 Lance Russell, Chair

16

**MOTIONS AND RESOLUTIONS**

17 Sen. Langer moved that when we adjourn today, we adjourn to convene at 9:00 a.m. on  
18 Friday, January 17, 2020, the 4<sup>th</sup> legislative day.

19 Which motion prevailed.

20

**CONSIDERATION OF REPORTS OF JOINT-SELECT COMMITTEES**

21 Sen. Langer moved that the report of the Joint-Select Committee relative to the arrangements  
22 for a memorial service for the Ninety-fifth Legislative Session as found on page 16 of the Senate  
23 Journal be adopted.

24 Which motion prevailed.

25

**FIRST READING OF SENATE BILLS AND JOINT RESOLUTIONS**

26 **SB 48:** FOR AN ACT ENTITLED, An Act to authorize charges for and payment of administrative  
27 services.

28 Introduced by: **Senator** Maher

29 Was read the first time and referred to the Committee on Appropriations.

1 **SB 49:** FOR AN ACT ENTITLED, An Act to add gravel to the definition of a mineral.

2 Introduced by: **Senator** Maher

3 Was read the first time and referred to the Committee on Commerce and Energy.

4 **SB 50:** FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the practice of a  
5 certified registered nurse anesthetist.

6 Introduced by: **Senator** Soholt

7 Was read the first time and referred to the Committee on Health and Human Services.

8 Sen. White moved that the Senate do now adjourn, which motion prevailed, and at 1:19 p.m.  
9 the Senate adjourned.

10 Kay Johnson, Secretary

11 **JOINT SESSION**

12 The Senate convened with the House of Representatives in the House Chamber for the purpose  
13 of receiving a message on the State of the Tribes from the Honorable Lester Thompson, Chairman  
14 of the Crow Creek Sioux Tribe. The President of the Senate, Larry Rhoden, presided.

15 The prayer was delivered by Tribal Member Gerald Zephier.

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

18 Blare; Bolin; Cammack; Castleberry; Curd; Duhamel; Ewing; Foster; Greenfield, Brock;  
19 Heinert; Jensen, Phil; Kennedy; Klumb, Kolbeck; Lake; Langer; Maher; Monroe; Nesiba;  
20 Novstrup, Al; Otten, Ernie; Partridge; Russell; Schoenbeck; Schoenfish; Smith, VJ; Soholt; Stalzer;  
21 Sutton; White; Wiik; Youngberg.

22 The Chief Clerk of the House of Representatives, Mary Lou Goehring, called the roll of the House  
23 and the following members were present:

24 Anderson; Bartels; Barthel; Beal; Bordeaux; Borglum; Brunner; Chaffee; Cwach; Dennert;  
25 Deutsch; Diedrich; Duba; Duvall; Finck; Frye-Mueller; Glanzer; Goodwin; Gosch; Greenfield, Lana;  
26 Gross; Hammock; Hansen; Healy; Howard; Hunhoff; Jensen, Kevin; Johns; Johnson, Chris;  
27 Johnson, David; Karr; Koth; Latterell; Lesmeister; Livermont; Marty; McCleerey; Mills; Milstead;  
28 Miskimins; Mulally; Olson; Otten, Herman; Overweg; Perry; Peterson, Kent; Peterson, Sue; Pischke;  
29 Post; Pourier; Qualm; Randolph; Rasmussen; Reed; Reimer; Ring; Rounds; Saba; Smith, Jamie;  
30 St. John; Steele; Sullivan; Wangsness; Weis; Wiese; Willadsen; York; Zikmund; Speaker Haugaard.

31 The Lieutenant Governor, Larry Rhoden, introduced the Honorable Lester Thompson, who  
32 delivered the State of the Tribes Address.

33 Sen. Langer moved that the Joint Session do now dissolve.

34 Which motion prevailed.

1 Pursuant to the Communication found on page 7 of the Senate Journal, the following is Chief  
2 Justice David Gilbertson's State of the Judiciary Address which was delivered at the Joint Session  
3 on January 15, 2020.

4 **2020 STATE OF THE JUDICIARY**  
5 **DAVID GILBERTSON**  
6 **CHIEF JUSTICE**

7 Governor Noem, Lieutenant Governor Rhoden, Speaker Haugaard, members of the  
8 Legislature, Constitutional Officers, my fellow Justices, Judges, Unified Judicial System (UJS)  
9 employees and all citizens of the State of South Dakota:

10 INTRODUCTION

11 This is the 19th year I have been privileged as your Chief Justice to deliver the State of the  
12 Judiciary message. There are several reasons that I do so.

13 It allows this Legislature, the bar, and the taxpaying public to know what is going on in the  
14 Unified Judicial System from the person who is ultimately responsible for its overall operation--the  
15 Chief Justice. As President Harry Truman observed, "the buck stops here."

16 This is also an opportunity for me to identify problems facing the state's legal system and  
17 propose how to address them. If you look back over the last 19 years, that is the consistent theme  
18 of my messages. They are not sugar-coated. You get the bad news along with the good news.  
19 Some are clearly not pleasant bedtime stories.

20 Many programs that have been instituted during the past two decades deal with people  
21 experiencing problems. Governor William Janklow was fond of saying that government should do  
22 for people only what they cannot do for themselves. Many of our programs focus on those groups--  
23 -victims of crime, the abused elderly and children, the mentally ill, those addicted to drugs and  
24 alcohol, and those denied reasonable access to rural legal services.

25 I have spent much time talking about UJS problem-solving courts and alternative sentencing  
26 programs--Drug Courts, DUI Courts, Veterans Treatment Courts, Mental Health Courts, and the  
27 HOPE Program. We all agree that people who commit crimes should be held accountable and the  
28 public safety protected. However, we also need to be realistic enough to deal with the underlying  
29 cause of what got them into the criminal justice system in the first place. This requires more common  
30 sense than profound knowledge. To ignore the underlying cause is simply to guarantee that those  
31 people will return again and again to the criminal justice system--a revolving door until they either  
32 die or are cured. Under these circumstances cures are not all that frequent.

33 Our alternative sentencing programs are not a "get out of jail free" card. They are not  
34 meant for people who commit violent felonies, predatory sex offenders, or those who make a  
35 conscious choice to be career criminals. We have prisons for those folks. On the day I became a  
36 judge in 1986, a wise, seasoned judge advised me that the purpose of the court system is not to fill  
37 the jails, but to keep the peace. Our evolving alternative programs are an attempt to fulfill his  
38 observation. Eleven years ago our alternative programs were non-existent. We now have 19  
39 programs that cover a significant portion of South Dakota. 516 South Dakotans have successfully  
40 graduated from these programs.

41 The condition of the judicial services offered to the citizens of South Dakota and those who  
42 use our court system is excellent. Recently a Harris poll was taken on the status of the court  
43 systems in all fifty states. Those polled actually use the courts in this state and other states. I was  
44 delighted to learn that out of the fifty states, South Dakota placed at the very top. We were number  
45 one overall. That rating was based on ten criteria. South Dakota circuit judges were rated fifth for  
46 impartiality, third for competence, and our appellate review came in second. Our juries' fairness  
47 and determination of damages came in at number one. Our overall ranking was first in the nation.  
48 However, there are storm clouds on the horizon I will address later in this message.

1 Those of you who serve or have served in the Legislature may wonder from time to time if  
2 the bills you pass and become law ultimately do any good. A major portion of my message to you  
3 today details how these laws have succeeded in improving the lives of South Dakotans.

#### 4 SENATE BILL 70

5 In the past year there has been significant public and legislative discussion about Senate  
6 Bill 70. A major portion of the discussion concerned the merits of presumptive probation as well as  
7 the fiscal impact of alternatives to it.

8 When it passed in 2013, SB 70 overhauled the state's adult criminal justice system. At that  
9 point the then-existing prison system was overloaded with non-violent offenders. The state had  
10 two options: build and staff additional women's and men's prisons, or try the route adopted by the  
11 Legislature that became Senate Bill 70.

12 The drafters of SB 70 realized that its policy changes would need to be reviewed as the  
13 times and events changed. Clearly, no one at that point could foresee the explosion of drugs,  
14 especially meth and opioids. Realizing that the law should not remain static, SB 70 provided for an  
15 Oversight Council made up of the various participants in the criminal justice system. It provided a  
16 vehicle to review a portion of, or all of, the SB 70 statutes. It also provided a vehicle to review the  
17 costs of alternatives to the present system. The Council sunsetted after five years.

18 That does not mean, however, that it is not important to continue to reexamine the policy  
19 changes SB 70 implemented and the interplay of its provisions to address public safety, produce  
20 better outcomes for those involved in the criminal justice system, and wisely spend the taxpayer  
21 dollars that support the criminal justice system. The UJS stands ready to continue this examination.

#### 22 SENATE BILL 73

23 Last year there was also significant discussion about Senate Bill 73 which overhauled the  
24 then-existing juvenile system. Under the system that existed prior to its enactment in 2015, South  
25 Dakota led all 50 states in the percentage of juveniles who were incarcerated. Obviously, that was  
26 not something to be proud of. Moreover, placements were costing the state a great amount of  
27 money and were rising.

28 As with SB 70, SB 73 provided for an Oversight Counsel. It still functions and can review a  
29 portion of, or all of, the laws on juvenile delinquency and report its findings to this Legislature. It  
30 can also provide estimates of costs for alternatives and compare them to the costs of the current  
31 system.

32 As options are studied, one thing is clear. We cannot return to the brick and mortar  
33 institutions that the State possessed and operated in the 1950's and 1960's. They no longer exist.

34 At its core, the goal of SB 73 is to provide protection for the public and corrective action for  
35 the juvenile and his or her family. As my friend, Clarence, once said, "All kids are good kids at heart;  
36 the trick is to keep them alive."

#### 37 DRUG AND DUI COURTS

38 A few years ago, I informed you that a new wave of evil had descended upon our citizens.  
39 That evil was the increased addiction to drug usage. That evil continues to stalk our land and  
40 decimate and devour all too many of our citizens. South Dakota's Drug Courts and DUI Courts assist  
41 us in ridding our population of the curse of drug and alcohol addiction. We aggressively promote  
42 these successful alternatives to continued addiction. These programs save lives that would  
43 otherwise be lost. They also provide substantial savings to the taxpayer. A year in the penitentiary  
44 costs around \$22,000. A year in a Drug Court or DUI Court costs a fraction of that or \$8,015 per  
45 year. That cost has remained constant over the previous years. While it is a bargain, it is not free.  
46 To maintain the high-quality counseling and treatment services that are imperative to successful  
47 treatment, I am requesting an additional \$650,000. It will allow the statewide network of Drug  
48 Courts and DUI Courts to continue to work successfully because of the well-trained and dedicated  
49 people who comprise the treatment teams for each court. Sending someone with an addiction to a

1 penitentiary or jail that provides no treatment is like sending someone there with cancer and  
2 expecting them to be released cancer-free. Addiction hijacks their brain as well as their body.

3 Of particular concern to me is the literal explosion of the number of females convicted of  
4 drug offenses. When I was a circuit judge in the late 1980's, there were only 32 beds in the women's  
5 prison. It was never full. Today it has unfortunately passed the 500-bed mark.

6 Of the 557 women in the South Dakota Correctional System at the end of 2018, only 13  
7 percent of them were in prison for violent crimes. 482 women were convicted of non-violent crimes  
8 and three-fourths of them, or 352, were convicted of drug-related offenses.

9 The curse of drug addiction has negative family results. National studies show that up to  
10 80 percent of children who have a parent in prison will someday also end up in prison. The revolving  
11 prison door carries with it generational consequences.

12 Drug addicts are so concerned about feeding their addiction that they ignore the emotional  
13 and physical needs of the children in the household. Medical researchers tell us that when a child is  
14 born, a vast majority of what that child learns occurs in the first three years of life. Brain scans of  
15 children evidence the children's mental development during this time period. For children of drug  
16 addicts there is no development because they are ignored. A brain scan of a three-year-old child of  
17 drug addicted parents compares with an aged victim in the advanced stages of Alzheimer's Disease.  
18 Both scans are basically empty. For the children, this damage is irreversible and cannot be made  
19 up through medical or remedial means. They are cursed with going through life robbed of the chance  
20 of leading a normal one. They and society are the ultimate victims.

21 When the Drug Court pilot program began in the Northern Black Hills in 2008, we never  
22 dreamed that the evolution of society would present such monumental problems. The drug problem  
23 in those days was considered "manageable." Now it is everywhere, and despite our best efforts we  
24 once again are playing "catch-up." For example, the number of adults arrested for drug crimes in  
25 South Dakota climbed from 2778 in 2008, to 9080 in 2018. That is an increase of 227% in ten years.

26 In 2018, we served 594 participants in Drug Courts, DUI Courts, and Veterans Courts which  
27 was up from the 519 participants the year before. 135 participants have graduated from these  
28 programs. What is their future upon graduation? Of those who have been out of the programs for  
29 three years or more, 82 percent of graduates do not reoffend. Only 18 percent do reoffend. That is  
30 a substantially higher success rate than the 43 percent success rate for people paroled from the  
31 penitentiary.

32 Currently our programs are limited by the dosage and type of treatment services available  
33 on an outpatient basis. When inpatient treatment services are warranted, they are difficult to access  
34 for the participant due to the long waiting periods for inpatient treatment. The Drug Court has no  
35 such inpatient option. It cannot accept those unfortunate folks. Housing for drug offenders is limited  
36 or entirely unavailable.

37 This creates a situation where it is impossible for the participant to be successful while trying  
38 to balance paying rent with attending numerous hours of required treatment services. We cannot  
39 expect those with addictions to work full time and move successfully through the Drug Court  
40 program if they live under a bridge or in a cardboard box. The reality is that they go to the  
41 penitentiary or the funeral home because we cannot take them into our programs.

42 I think it is time to develop a concept that will incorporate a residential housing component  
43 into our program. It makes little sense to treat the addicted who have a home and, like the priest  
44 and Levite in the parable of the Good Samaritan, pass by on the other side of the road and ignore  
45 the person laying in the ditch. Former Chief Justice Warren Burger noted, "Concepts of justice must  
46 have hands and feet."

1

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**MENTAL HEALTH AND THE COURTS**

2 In 2017 this Legislature passed broad-based legislation to speed up and improve the  
3 treatment of criminal defendants who cannot proceed in the criminal justice system because they  
4 need to be evaluated by mental health professionals to determine if they are competent to assist  
5 their defense attorneys and enter a plea to their criminal charges. This legislation reduced the wait  
6 time for competency evaluations from the 4-6 month range to an average of just 37 days, expanded  
7 the definition of those authorized to do competency evaluations, and increased the number of  
8 available competency evaluators in South Dakota from 6 to 31. It goes a long way to ensure  
9 statewide coverage. No longer do all roads lead to Yankton and the Human Services Center located  
10 there.

11 For the first time, stakeholders across the criminal justice spectrum have completed a  
12 significant amount of mental health training. Over 1000 state prison officers, 400 jail officers, 104  
13 states attorneys and deputies, 45 judges, 100 court services officers, 240 public defenders, and 129  
14 new law enforcement officers have benefited from this training. This training did not exist in South  
15 Dakota prior to the 2017 legislation.

16

**MENTAL HEALTH COURTS**

17 When I addressed you last year, the Mental Health Court in Rapid City had just become fully  
18 operational after a six-month period of selecting and training its staff. Now, with a year of operation,  
19 it is doing well. The program has grown in its first year. It now serves 13 clients. It promises to  
20 provide significant mental health services to defendants whose underlying reason for becoming  
21 enmeshed in the criminal justice system is mental illness. To treat them instead of incarcerating  
22 them for lengthy periods of time is more effective, reduces costs, and reduces the likelihood of  
23 repeat trips into the criminal justice system.

24 Last year this Legislature also funded the creation of a Mental Health Court in the Minnehaha  
25 County area. The need for this Mental Health Court was great. In just five months in 2018, 515 or  
26 13.5 percent of the prisoners screened at intake in the Minnehaha County Jail indicated they may  
27 suffer from a mental illness. When the appropriate six-month training period is completed, this  
28 Mental Health Court will follow in the footsteps of the successful Rapid City program and become  
29 operational on January 1, 2020.

30

**MENTAL TELE-HEALTH PROPOSAL**

31 The UJS is exploring the concept of incorporating mental tele-health services within the  
32 judicial system. We have discussed establishing mental tele-health services with law enforcement  
33 entities that are not large enough to have direct local access to these services.

34 When I discussed this idea with Walter Panzirer, the trustee of the Helmsley Charitable Trust,  
35 we thought it would be worthwhile to see if this concept could be expanded to provide mental tele-  
36 health services to others in the criminal justice system. Governor Noem has agreed to also  
37 participate in the study of this proposal. It could help criminal defense attorneys dealing with clients.  
38 It could assist judges in providing better judicial proceedings and sentencing. It could provide Court  
39 Services Officers with tools to better supervise and rehabilitate probationers with mental health  
40 issues. It could, in limited cases, also assist prosecutors. This is extremely important to everybody  
41 as more people are placed on probation than sent to the penitentiaries.

42

**VETERANS TREATMENT COURTS**

43 The Veterans Treatment Court concept continues to expand and grow. We now have active  
44 Veterans Treatment Courts in Minnehaha County, Pennington County, and Codington County. All  
45 programs are under the supervision of a judge who is a veteran and can relate to the problems  
46 veterans face.

47 We have been assisted by the services of the Veterans Administration. This has allowed us  
48 access to inpatient VA treatment where appropriate. The Veterans Treatment Courts stand alone  
49 among all our problem-solving court programs to offer inpatient services.

1 At the end of the horrific Civil War, President Lincoln commented, "Thank God I have lived  
2 to see this day. It seems to me that I have been dreaming a horrid dream for four years and now  
3 the nightmare is gone." We hope veterans who complete our program will be able to put their  
4 demons behind them and say the same.

#### 5 HOPE PROGRAM

6 Drugs are an increasing problem in the rural areas as well as the urban areas of this state.  
7 Unfortunately, in the rural areas, the mental health and addiction services we use in our Drug Courts  
8 and DUI Courts are not available. Instead, we have instituted the HOPE Program.

9 This is a specialized form of intensive probation. As a condition of this probation, participants  
10 follow the requirements of HOPE probation under the supervision of a specially-trained court services  
11 officer. The program focuses on drug offenders with a high risk to reoffend. Random, frequent drug  
12 testing is a key component of HOPE. There are swift, certain, and proportional sanctions with a  
13 weekend of jail for noncompliance with probation conditions, or for failing a drug test.

14 HOPE was started in 2014 and is active in 14 counties. As of July 1, 2019, 373 individuals  
15 have participated in the program. 106 people currently participate in the program. 138 people  
16 have successfully completed this program. "But for" this fine program, many of these participants  
17 would be in the penitentiary or would have reoffended resulting in a penitentiary sentence. Presiding  
18 Judge Scott Myren, the creative force behind this program, estimates 80 percent of the people who  
19 complete the HOPE program would have failed conventional probation because of continued drug  
20 use.

#### 21 24/7 PROGRAM

22 In 2007 this Legislature authorized the state-wide implementation of the 24/7 Program. As  
23 a condition of bond, those who are facing certain alcohol related traffic offenses are required to: (1)  
24 abstain from consumption of alcohol; (2) stay out of businesses that sell or serve alcohol; and (3)  
25 report to the local sheriff's office twice every day and submit to a breath test. Failing the test results  
26 in immediate incarceration for 24 hours. Failing to appear for the test results in the immediate  
27 issuance of an arrest warrant.

28 Throughout the history of the program over 35,000 South Dakotans have been tested. The  
29 failure rate is only an astonishing one percent. The other 99% are in compliance with the abstinence  
30 requirement.

31 The 24/7 Program has produced at least two positive long-term results. Felony DUI  
32 convictions have dropped from 1348 in 2007 to 551 in 2019--a reduction of 59.1%. Alcohol related  
33 fatalities have also declined. From 2000 through 2004 an average of 83 lives were lost annually to  
34 traffic related fatalities. From 2014 through 2018 the number of deaths dropped to 51, a reduction  
35 of 38.8%. The 24/7 Program played a significant factor in the decline. The 24/7 Program has been  
36 so successful that it has been copied by other states and studied by other countries

#### 37 ELDER ABUSE

38 A few years ago, at my request, this Legislature passed a comprehensive program to protect  
39 our senior citizens from physical abuse, mental abuse, and financial abuse. These statutes are  
40 providing their intended results. Moreover, a Special Assistant Attorney General and a full-time  
41 investigator provide aggressive enforcement and protection for vulnerable seniors. Statewide  
42 enforcement under the supervision of the Attorney General provides state-wide protection. Despite  
43 the old saying that you cannot legislate morality, you can, and did, legislate protection for South  
44 Dakota's senior citizens.

#### 45 RURAL ATTORNEY PROGRAM

46 Every state in the country lacks attorneys in rural areas. The South Dakota Rural Attorney  
47 Program continues to be the gold standard for all 50 states. The Rural Attorney Program expands  
48 the ability of our rural citizens to access legal services in their home counties and towns. We  
49 currently have contracts with 25 rural counties in South Dakota to assist them in placing an attorney



1 in their county. These results are impressive considering five years ago the program did not exist.  
2 Last year the very first group of five attorneys accepted into the program successfully completed  
3 their five-year contractual commitment with the program. Four of the five have chosen to remain in  
4 their locale thus achieving long term successful results for local access to legal services in those  
5 areas.

6 Two years ago, the law expanded to benefit municipalities with a population of 3500 or less.  
7 The City of Elk Point in partnership with Union County became our first municipal contract. The City  
8 of Sisseton and Roberts County became the second partnership.

9 In 2019, this Legislature made the program permanent. Now, when an attorney completes  
10 the five-year contractual obligation, that open slot is replaced by another lawyer placed in another  
11 county or town. This ensures the program will continue to provide attorneys where needed instead  
12 of ending when it reached its 32 originally allocated slots.

13 All trends continue to be positive. Chief among them is that not one attorney who has gone  
14 into the program later left rural practice due to lack of available legal work. The need is there and  
15 the need is being met.

16 We are obtaining quality participants to go into the South Dakota Rural Attorney Program.  
17 The county, the municipality, the attorney and the public are the beneficiaries. This is taxpayer  
18 money that is well-invested. It will pay long-term benefits for the participant counties, municipalities,  
19 and the state as a whole. It helps the infrastructure of these rural counties expand and grow, rather  
20 than wither away and become uninhabited with only remnants of courthouses and what was once a  
21 thriving rural society.

## 22 DISASTER PREPARATION AND RESPONSE

23 Several years ago, when the threat of a pandemic was looming, I sought and obtained from  
24 this Legislature the legal authority to react promptly to natural or man-made disasters that interfere  
25 with the administration of South Dakota's judicial system. We came very close to invoking these  
26 provisions during the 2011 floods along the Missouri River, but in the end the courthouses that were  
27 threatened were able to remain open.

28 Unfortunately, the City of Burke was devastated by a tornado last August. It demolished  
29 portions of the school that were only two hundred feet away from the Gregory County Courthouse.  
30 The courthouse sustained damage to its windows and we were unsure when electrical power could  
31 be restored and whether our IT systems would continue to function. Faced with these uncertainties,  
32 the Supreme Court invoked its emergency judicial power at the urging of the Presiding Judge. We  
33 temporarily moved the court operations for Gregory County to Tripp County to provide continued  
34 access to the public. We were fortunate in that it turned out that the damage sustained by the  
35 Gregory County Courthouse was not as extensive as it could have been. In a matter of days I  
36 personally inspected the courthouse, conferred with the Gregory County Commission and the  
37 Presiding Judge, and obtained Supreme Court authorization to reopen court services in the Gregory  
38 County Courthouse. As for this experience, one newspaper reporter quipped, "out of a whirlwind,  
39 the Lord answered Job's plea for justice say the scriptures."

40 It was a valuable experience for the Supreme Court. We experienced how to implement  
41 emergency judicial power. Future events may present us with a more serious and long-term  
42 challenge.

## 43 JUDICIAL SELECTION AND RETENTION

44 Over the past decade there has been a steady decline in the number of applicants for vacant  
45 circuit judge positions. In a perfect world, the Governor, who fills most vacancies, would have an  
46 impressive number of highly qualified candidates to choose from. In election years, a similar group  
47 of highly qualified candidates would be available for voters to consider.

48 Why is this important? In 1993 the South Dakota Supreme Court, in *Cummings v. Mickelson*,  
49 observed, "The power which the people of this state have entrusted to a circuit court judge affects

1 the people’s lives, welfare and property to no small extent.” Circuit judges exercise this substantial  
2 power for extended periods of time--sometimes well over 25 years.

3 In recent years, judicial salaries in South Dakota have fallen significantly behind comparable  
4 income of South Dakota attorneys in private practice and have also fallen significantly behind judicial  
5 salaries in all neighboring states. Thus, it is not surprising that the number of applications filed with  
6 the Judicial Qualifications Commission for judicial vacancies has fallen substantially. Would you  
7 want you or your family’s life, property, or liberty in the hands of someone who barely made it  
8 through law school, finally passed the bar exam after failing it three times, and has not kept abreast  
9 with the many changes in the law? That sorry situation cannot be allowed to exist now, nor should  
10 it in the future. We need to retain judicial excellence that has resulted in the Harris Poll ranking  
11 South Dakota with the best state legal system in the nation.

## 12 COURT SERVICES

13 Court Services, commonly known as probation, is a form of judicial supervision for adult  
14 convicted felons who are not sentenced to penal institutions. It quietly functions in an efficient  
15 manner. There are more people on felony adult probation in South Dakota than in penitentiaries,  
16 county jails, and drug and alcohol programs combined.

17 Not everyone qualifies for probation, nor should they. Dangerous felons, career criminals,  
18 predatory sex offenders and the like, belong in a penitentiary. Those seriously addicted to drugs  
19 and alcohol who have committed crimes other than those just referenced belong in our Drug Court  
20 and DUI Court or other treatment programs.

21 In 2017, this Legislature adopted a comprehensive program to deal with the mental health  
22 of those who come into the criminal justice system. There have been many benefits. Court Services  
23 has adopted a standard intake screening to determine if symptoms of mental issues are present  
24 when a person comes into the system. Last year, 1921 probationer mental health screens were  
25 completed on people placed on probation. One quarter of those screened indicated a referral should  
26 be made for a mental health assessment. A gender breakdown shows that 23 percent of males and  
27 32 percent of females needed a referral. Mental health screens will enhance the quality of Court  
28 Services supervision, increase the likelihood of successful probation, and reduce the likelihood of  
29 repeat offenses.

30 Improvement of our Court Services program is a plus not only because of the number of  
31 people we deal with, but also the cost factor. Probation costs the taxpayer about three dollars per  
32 day. The alternatives, including incarceration, cost ten times or more than that number. A quality  
33 Court Services program benefits everyone in the long run.

34 In the face of substantial increases in the number of people placed on felony probation in  
35 recent years, the number of court services officers tasked with their supervision has remained  
36 basically stagnant. As I have told you before, the rubber band can only stretch so far before it  
37 breaks. We are at that point. Thus, I am seeking seven additional court services officers to deal  
38 with this situation--three would be stationed in the Sioux Falls area, three in the Rapid City area,  
39 and one in the Watertown area. If the funding permits, it would take 20 additional court services  
40 officers to fully address this dire shortage.

## 41 THE SOUTH DAKOTA BAR EXAMINATION

42 Traditionally the passage rate of the South Dakota Bar Exam for first-time takers who  
43 graduated from the University of South Dakota School of Law was expected to be in the 80 to 90%  
44 range. Those takers from out-of-state were also more likely to pass than not.

45 Several years ago, that passage rate radically declined for both in-state and out-of-state  
46 test takers. This decline was not unique to South Dakota. It was a nationwide problem. Much has  
47 been written about the causes of the decline and there has been more than a little finger pointing.  
48 No single cause has been identified. It was likely a combination of a number of factors.

49 The University of South Dakota School of Law made improvements in teaching and  
50 preparation for this crucial test. Members of the Bar and public also contributed significantly to fund

1 scholarships to encourage the best students to stay in South Dakota for their legal education. The  
2 Supreme Court made modest modifications in the testing procedures and scores required for  
3 passage.

4 One thing did not change. The South Dakota Board of Bar Examiners remained stable in its  
5 membership. Several board members remained from the previous “glory days” of the 90% passage  
6 rates. Through the ups and downs the South Dakota Bar Examiners continue to function as  
7 gatekeepers by recommending to the Supreme Court that only those who pass the rigorous exam,  
8 and possess good moral character, be allowed to exercise the power granted to attorneys.

9 As I told you last year, the improvement in the bar exam results for the USD School of Law  
10 graduates who were first-time test takers was nothing short of stunning. In July of 2016 that  
11 passage figure had fallen to a dismal 59% passage rate. It fell even further in July of 2017 to 52%.  
12 However, in July of 2018 it rebounded to a success rate of 82%--a 30% improvement over 2017.  
13 The July 2019 pass rate was 81% which will hopefully establish a long-term positive trend rather  
14 than a one-year aberration.

15 TESTING INDIAN LAW ON THE  
16 BAR EXAMINATION

17 Early in my tenure as Chief Justice, it became clear to me that a significant number of South  
18 Dakota attorneys were not proficient in the complex area of Indian Law that combines federal law,  
19 tribal law, and state law. Therefore in 2007, the South Dakota Supreme Court passed a rule that  
20 required testing on Indian Law as part of the South Dakota bar exam. My theory was that an  
21 attorney who learned Indian Law and passed the bar exam would retain knowledge of Indian Law  
22 when practicing law and benefit clients seeking professional legal assistance. Since its enactment,  
23 the administration of this portion of the bar exam, as well as the entire exam, has been expertly  
24 overseen by our Board of Bar Examiners.

25 Many states have opted to go to a national standardized bar exam. Were South Dakota to  
26 join this movement, we would no longer be able to include Indian Law on the bar exam. That  
27 happened in the two other states that previously tested Indian Law on their bar exam. It is the  
28 South Dakota Supreme Court’s highest priority to retain the Indian Law question, and let other  
29 states enter into standardized testing if they so choose. While South Dakota remains the lone state  
30 to test on this subject, knowledge of Indian Law is essential for lawyers who practice in South Dakota.  
31 It recognizes a significant portion of our citizens and their tribal governments. Cooperation between  
32 the tribes and the state must be more than mere words. It must also be deeds. As Benjamin Franklin  
33 observed, “Well done is better than well said.” This important program has achieved its intended  
34 results. It is an unqualified success.

35 PUBLIC ACCESS

36 Prior to September 2001, if you wanted to hear a South Dakota Supreme Court oral  
37 argument you had one option--drive to Pierre no matter what the weather and attend in person,  
38 and hope you were one of the lucky 27 people who had access to the limited public seating in the  
39 courtroom. If you wanted a copy of a Supreme Court opinion you could purchase it for a fee from  
40 a law book company and wait eight weeks for publication.

41 In September 2001, television and still cameras were allowed into the Supreme Court oral  
42 arguments for the first time since statehood. Not long after that, the Court installed Internet access  
43 to live oral arguments on the Supreme Court’s website. This was a blizzard-proof improvement. It  
44 also improved press coverage. Any member of the press can sit in his or her pressroom and listen  
45 to the arguments unfold rather than trying to convince an editor that the drive to Pierre is worth the  
46 time and expense. Moreover, all oral arguments back to 2001 are archived on the Supreme Court’s  
47 website and current oral arguments are posted within 24 hours of the argument. If you learn of a  
48 decision that interests you, you can listen to the oral argument to expand your understanding of the  
49 decision. The Court’s written opinions are also posted on the Court’s website on the day they are  
50 issued. Thus, the press and public have instant access to Supreme Court decisions.

1 At the circuit court level, limited access to trials and other proceedings is available. Both  
2 audio and video coverage are authorized when the attorneys and the judge consent. The judge, in  
3 his or her own discretion, may also allow audio coverage.

4 In 2004 the UJS established an interface television system. It allows for transmission on a  
5 two-way closed television system between every courthouse in South Dakota. It is used for bond  
6 hearings, pre-trial hearings, witness participation in trials, depositions, and meetings of UJS  
7 personnel.

8 The UJS is currently engaged in a pilot project to improve access to our court records. This  
9 is possible because we adopted an electronic documents system known as Odyssey several years  
10 ago. Beginning July 1, 2019, attorneys who are not officially involved with a case may review any  
11 case file statewide electronically. Ultimately, we hope to provide the same access to the public.  
12 However, this presents implementation problems. People's private information must be protected  
13 and redacted. For example, several decades ago, divorce filings were indexed under the Social  
14 Security number of the husband or wife. Before those files can be made open for public inspection,  
15 information such as Social Security numbers, banking accounts and tax ID numbers, must be  
16 redacted. Public access to our court records should not inadvertently assist identity theft.

17 The Supreme Court and circuit courts exist to resolve the public's legal disputes. The  
18 Supreme Court has made major strides in allowing the public to learn how courts resolve those  
19 disputes. The current system works so well that it may come as a surprise to some that it was not  
20 always that way.

#### 21 JUSTICE PATRICIA DeVANEY

22 Last April, Governor Noem appointed Circuit Judge Patricia DeVaney to fill the vacancy on  
23 the South Dakota Supreme Court caused by the unexpected death of Justice Steven Zinter. Justice  
24 DeVaney's experience and temperament render her superbly qualified to be the 52nd Justice of the  
25 Supreme Court.

26 Justice DeVaney served in the office of the South Dakota Attorney General from 1993 to  
27 2012. There she obtained broad-based experience in trial litigation and appellate work. Her work  
28 brought her into contact with major civil and criminal litigation.

29 Since 2012 she has served as a circuit judge in the Sixth Judicial Circuit handling major civil  
30 and criminal cases. This career path provides Justice DeVaney with an extensive background in all  
31 areas of the law, the courts, and appellate procedure. She is an exceptional addition to the Supreme  
32 Court.

#### 33 THE FUTURE

34 What is the future of South Dakota's judicial system? It is difficult to plan for the future if  
35 you do not learn from the past. The philosopher Santayana observed that those who ignore the  
36 lessons of history are doomed to repeat them. Looking toward the future, I agree with the classic  
37 statement that the only thing necessary for evil to triumph is for good people to do nothing.

38 Even with a thorough knowledge of the past, planning for the future is not easy. I recently  
39 reviewed my initial 2002 State of the Judiciary Message to this Legislature. I noticed that not one  
40 of the topics I talk about today was discussed in that message. It clearly was another time.

41 The youth of our state are its future. Today we see helpless children who are the victims of  
42 abuse and neglect. These numbers are sadly increasing. Likewise, all too many of our youth are  
43 being crippled by addiction to various kinds of illegal drugs. Although we are a state of many  
44 cultures, a common thread of our heritage is the long-standing recognition of caring for the needs  
45 of our children and youth. The biblical admonition that little children are to be protected rather than  
46 treated as a piece of family property to use or abuse is a hallmark of our country's Judeo-Christian  
47 heritage that arrived on our shores with the Pilgrims and continues to this day. Similar traditions  
48 of concern and care for children and our youth come from our state's Native American culture. It  
49 has received continual legal recognition from our earliest statutes and has evolved with time. While

1 we have been characterized as a “throw-away society,” it can in no way include indifference to the  
2 plight of children and youth in need.

3 The face of the South Dakota judiciary has also evolved. In my opinion the biggest change  
4 that has taken place in the state courts of South Dakota is that they have shifted their focus from  
5 being reactive institutions to becoming proactive in many respects.

6 Early on in my service as your Chief Justice I commented to you that the South Dakota  
7 judiciary should mirror the citizens it serves. At that point the South Dakota judicial system was  
8 overwhelmingly male. Only six women were on the circuit bench and none on the South Dakota  
9 Supreme Court. Today we have eighteen female circuit judges out of a total of 44 and two of the  
10 five Supreme Court Justices are female. Today appointment of women to the bench is considered  
11 part of the norm and not an exceptional event.

12 As far as the future, there is a solid distinction between gazing wistfully into a crystal ball  
13 and planning for the future. This differentiation requires no profound knowledge. Throughout my  
14 lifetime, I have tried to follow the motto of the Boy Scouts, “Be Prepared.” While planning for the  
15 future is essential, you have to maintain enough flexibility so that when the unexpected comes, and  
16 it will come, you are able to adjust to meet it and not be overwhelmed by it.

17 If you follow the quip of Benjamin Franklin that the only two things in the future that are  
18 certain are death and taxes, that does leave a lot of area for the unexpected. The best we can do  
19 is to prepare to the optimum of our abilities. In so doing we are guided by the Constitution, statutes,  
20 and the goal of maintaining a peaceful resolution of the citizens’ disputes. The people within the  
21 judicial system come and go, but the fundamental basics remain the same. We do not want to  
22 become a legal dinosaur lumbering off into oblivion.

23 COURT IS ADJOURNED

24 As I mentioned, this is my 19th State of the Judiciary Message. It is also my final message  
25 since mandatory retirement looms. As such, a few personal parting comments may be appropriate.  
26 My father was a minister and my mother was an Army combat surgical nurse during World War II.  
27 On the day I became a Supreme Court Justice in 1995 one wit observed, “The Gilbertsons will save  
28 you one way or another--whether you want it or not.”

29 During my tenure on the Supreme Court, the beard has gone from black to white and I have  
30 grown from a young man to an older, but hopefully wiser, man. During the past 34 years it has  
31 been my highest honor and privilege to serve the citizens of South Dakota as a Circuit Judge, a  
32 Supreme Court Justice, and Chief Justice. I could not have served in these positions without the  
33 constant support and love of my wife, Deborah, and my family.

34 I shall always be most grateful to Governor William Janklow. In 1986 he believed that a 35-  
35 year-old attorney from Sisseton had the potential to become a circuit judge. Ten years later he  
36 once again took a chance on me by appointing me to the South Dakota Supreme Court. It is my  
37 regret that he is not alive today so I could say “thank you” as I approach the end of my judicial  
38 career.

39 During my time on the Supreme Court, I have advocated for many new programs that have  
40 come into being within the Unified Judicial System. For the most part, these programs have  
41 succeeded with their designated goals. In some instances, it took a certain amount of time to  
42 achieve success. This success is due to the dedication of the people who worked on them. Without  
43 their impressive work ethic, these programs would have graced the scrap heap.

44 As it is, many needy South Dakotans benefit from these programs. I trust they will continue  
45 to do so well into the future. We must, however, avoid the temptation to “settle in” when we make  
46 progress. The fundamental problems they were designed to address are issues that will be with us  
47 for the foreseeable future. As times change, our response must change with them.

48 I have been privileged to work with some of the finest people I have ever met--my fellow  
49 Justices, both present and past. To a person, each brought wisdom and dedication to their position.  
50 During my 25 years on the Supreme Court I have never seen a Justice decide a case based on

1 popularity, fear, or partisan political considerations, or conform a case to some pundit's definition  
2 of a "conservative" view or a "liberal" view. They simply analyzed each case based on its facts and  
3 their understanding of the law.

4 I have also had the good fortune to work with an outstanding group of employees of the  
5 Unified Judicial System. They are the folks that make the system work successfully. The epitaph  
6 that Andrew Carnegie wrote for himself comes to mind. On his tomb it states, "Here lies a man who  
7 knew how to enlist in his service better [people] than himself."

8 I would be remiss if I did not express my gratitude for the splendid cooperation I received  
9 from Governor Janklow, Governor Rounds, Governor Daugaard, and Governor Noem. I also express  
10 to this Legislature, and all of your colleagues who came before you these past 19 years, my sincere  
11 appreciation for the consideration of my requests to improve the judicial system. Without your  
12 approval of these programs, the funding to make them work, and your support, none of this could  
13 have been accomplished. For that you should have a great sense of pride.

14 I am by nature an optimist. Were I not, I would have never run for the position of Chief  
15 Justice in the first place. During the very tense times of the JAIL for Judges campaign against the  
16 South Dakota judicial system in 2006, a JAIL leader declared me to be the "scum who rose to the  
17 top." My wife was outraged. I told her it probably was better than being known as the scum who  
18 did not rise to the top.

19 While I may have been slow to learn, hopefully I have been slower to forget. I leave knowing  
20 the South Dakota Supreme Court and the Unified Judicial System are in good hands. Some may  
21 even see this transition as an upgrade. How well I did in my capacity is not for me to say. That  
22 determination I leave to others.

23 While I am not prone to live in the past or dwell on it, I try to learn from it. I leave with  
24 satisfaction knowing that there are people alive today who would not otherwise be without our Drug,  
25 DUI, Veterans, and Mental Health courts. Our goal was to swell the employment rolls, not the  
26 cemeteries.

27 Time marches on. Borrowing a theme from St. Paul, in a secular vein, I have tried to fight  
28 the good fight, finish the race, and keep the faith. In my time, I have striven to achieve a  
29 government of the people, by the people, and for the people where "Under God the People Rule."  
30 As such, my fellow South Dakotans, this year I bid you all a fond farewell.