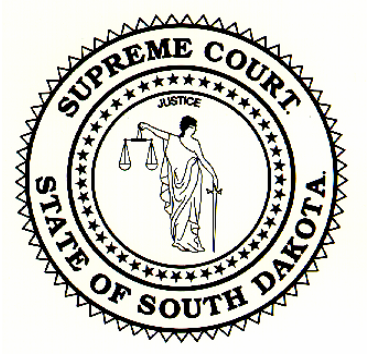
Introduction to

The South Dakota Supreme Court



and

Case Summaries for Oral Arguments at the March Term of the Court to be held March 21 through March 23, 2011

University of South Dakota Law School

Vermillion, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 21, 2011

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

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

Sincerely yours,

David Gilbertson
Chief Justice

State Capitol Building Pierre, South Dakota 57501-5070 (605) 773-6254

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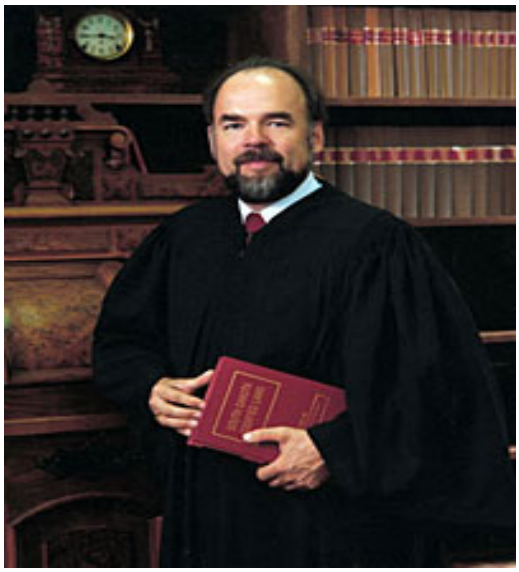
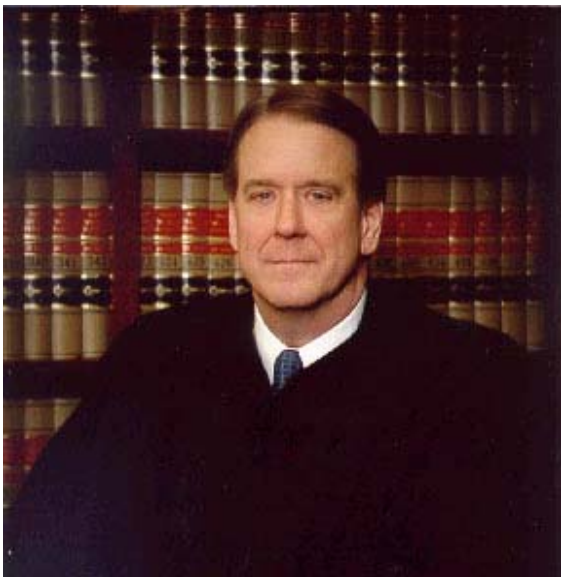


Chief Justice David Gilbertson

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

Justice John K. Konenkamp

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

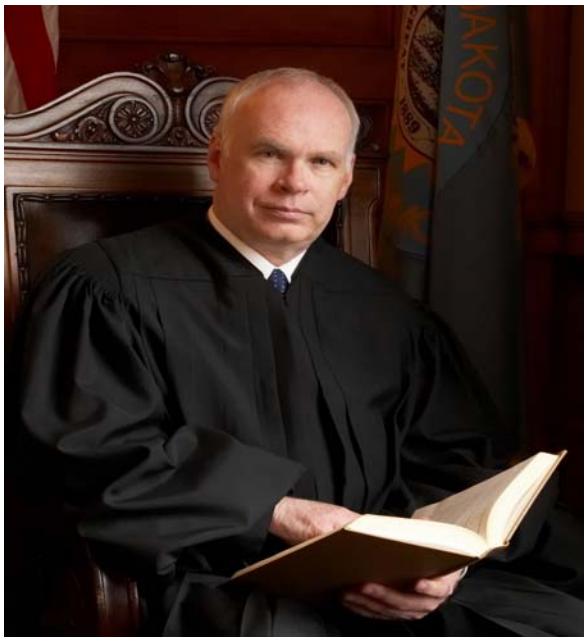


Justice Steven L. Zinter

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

Justice Judith K. Meierhenry

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



Justice Glen A. Severson

Justice Severson, born March 9, 1949, represents the Second Supreme Court District, which includes Minnehaha County and the Northwest portion of Lincoln County. He served in the South Dakota Air National Guard from 1967-1973. He attended the University of South Dakota receiving a B.S. in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1992 and a Beadle County Deputy States Attorney in 1975. He was appointed as Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court. Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He was a member South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two adult children, Thomas and Kathryn.

Clerk of the Supreme Court

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

Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Mark Joyce (Supreme Court Law Clerk), Meghann Joyce (Justice Severson), Derek Nelsen (Justice Meierhenry), Kathryn Rich (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), and Kinsley Powers (Justice Zinter).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

Five Justices appointed by the Governor from judicial appointment districts are subject to statewide electoral approval three years after appointment and every eight years thereafter. Retirement at age seventy.

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

Has original jurisdiction in cases involving interests of state. Issues original and remedial writs.

Has rule-making power over lower court practice and procedure, and administrative control over the Unified Judicial System.

Renders advisory opinions to the Governor, at his request, on issues involving executive power.

Circuit Court

Circuit Court services available in each county seat.

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

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

The Supreme Court Process

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

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

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

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

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

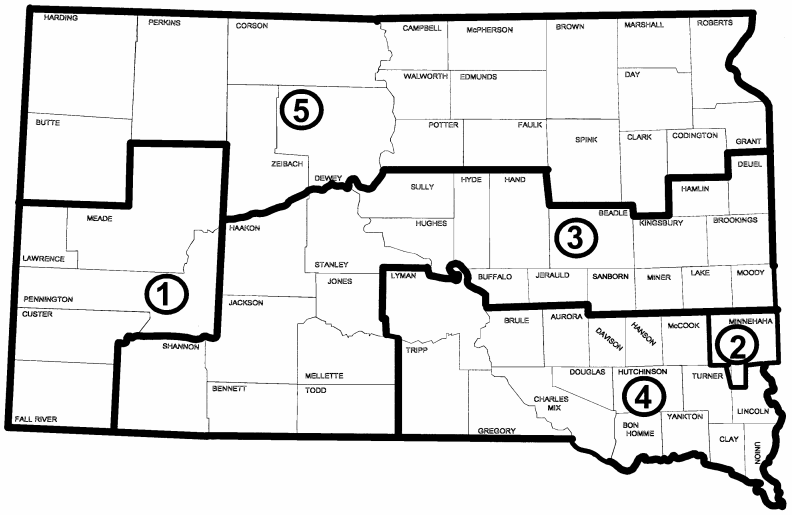
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

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

South Dakota Supreme Court Appointment Districts
Effective July 1, 2001



In the Supreme Court
of the
State of South Dakota

Courtroom Protocol

The following list of Do's and Don'ts was prepared for the benefit of anyone attending one of the Court's sessions. Your cooperation in observing proper Courtroom protocol will assure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained.

Your cooperation is appreciated.

DO

- Remove caps/hats before entering the Courtroom
- Enter the Courtroom prior to the commencement of an argument
- Stand when the Justices enter and leave the Courtroom
- Listen attentively
- Turn cell phones off before entering the Courtroom

DO NOT

- Bring food, drinks, cameras or recording equipment into the Courtroom
- Enter or leave the Courtroom during the course of an argument
- Chew gum or create any distraction
- Engage in any conversation once an argument begins

Supreme Court of South Dakota
March 2011 Term

Nine cases are scheduled for oral argument during this term. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case and respond to the Court's questions. In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar. After hearing oral arguments each day, the Court will consider several non-oral cases.

Case Summaries

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

Rapid City Journal, Associated Press, and South Dakota Newspaper Association v. Judge John J. Delaney

This is an original proceeding for a writ of mandamus brought by the Rapid City Journal, the Associated Press, and the South Dakota Newspaper Association (Media) against the Honorable John J. Delaney, Circuit Court Judge. The Media brought this mandamus action because Judge Delaney denied public access to trial proceedings in a civil action involving the shareholders of Bear Country USA, Inc. Bear Country is a family-owned South Dakota corporation.

The Bear Country litigation involved a dispute among the shareholders concerning the management and control of the business. The family-member shareholders were split into two factions. As part of the litigation, Judge Delaney was asked to determine the value of each family member's ownership interest in Bear Country. These valuations were to be used so one faction could buy out the other.

At trial, both shareholder factions submitted motions to close the courtroom whenever testimony and evidence was given on Bear Country's value. By closing the courtroom, the parties sought to protect "confidential business information." Neither side objected to the motions. Consequently, Judge Delaney entered an order that (1) closed the trial when valuation testimony and evidence was given; (2) placed all court files under seal; and, (3) prohibited the parties from discussing any proprietary or financial matters concerning Bear Country with the press or public. The Media were not notified before Judge Delaney entered this order.

After learning of this order, the Media filed a motion to intervene. The Media sought standing to challenge Judge Delaney's order on First Amendment grounds, arguing that none of the trial proceedings should be closed to the press

and public. As a result of this motion, Judge Delaney orally modified his original order and entered findings of fact and conclusions of law. The modified order sealed non-redacted trial transcripts regarding valuation, trade secrets, internal financial information, and proprietary information. This order did not address whether his original order's other restrictions were altered or abandoned.

The Media subsequently asked the South Dakota Supreme Court for permission to commence an original mandamus action to restore their presumptive First Amendment newsgathering and courtroom access rights. The Media also filed a direct appeal as an alternative action. This Court permitted the mandamus action to proceed and ordered Judge Delaney to show cause why the writ should not be made permanent and why a peremptory writ of mandamus should not be entered. The requested permanent writ would compel Judge Delaney to rescind his order preventing the press and public from attending the trial proceedings and discussing the case with the parties.

In response to the order to show cause, Judge Delaney's counsel argues that mandamus relief should not be granted because the Media had an adequate remedy at law in the form of a direct appeal. Ordinarily, a writ of mandamus is "an extraordinary remedy" that is only available "where there is not a plain, speedy, and adequate [legal] remedy." Judge Delaney's counsel argues that this adequate legal remedy was "demonstrated by [the Media's] filing of a notice of appeal in this matter." The notice of appeal was filed separately, and was independent of the application for a writ. The Media indicated that it filed a separate notice of appeal because it was unsure of the appropriate appellate procedure and wanted to ensure that all appeal requirements were met. But once this Court granted the application for a writ, the Media's notice of

appeal was dismissed. Nevertheless, Judge Delaney's counsel contends that filing the notice of appeal was sufficient evidence of a legal remedy that now bars a writ of mandamus.

Judge Delaney's counsel also argues that "the vast portion of [the Media's] claims are moot" because the total valuation of Bear Country was eventually disclosed to the public and press at one of the "open" court proceedings. Accordingly, the Media was able to obtain and publish the information it sought. As a result, Judge Delaney's counsel asserts that the current mandamus action is moot.

In response, the Media argues that a writ of mandamus should be issued to rescind Judge Delaney's order. The Media contends that the First Amendment protects the press and public's right to attend court proceedings and that right was violated by Judge Delaney's order. Further, the Media argues that its mandamus action is not moot because this issue is "capable of repetition, yet evading review." This exception to the mootness doctrine applies when cases raise issues that, because of their nature, consistently evade review. The Media asserts that this exception to the mootness doctrine has been met, and therefore, a writ of mandamus is required to prevent similar First Amendment violations in the future.

In the brief to show cause, Judge Delaney's counsel raise one issue:

> Whether the South Dakota Supreme Court should grant the Media's request for a permanent writ of mandamus.

Mr. Jon E. Arneson, Attorney for Applicants Rapid City Journal, Associated Press, and South Dakota Newspaper Association

Mr. Rodney Schlauger, Attorney for Applicant Rapid City Journal

Mr. Marty J. Jackley, Attorney General, Mr. Jeffrey P. Hallem, and Mr. Harold H. Deering, Jr., Assistant Attorneys General, Attorneys for Respondent Judge John J. Delaney

Guthmiller v. Weber

On January 16, 2002, a jury found Dale Guthmiller guilty of criminal pedophilia. Thereafter, the court found Guthmiller to be a habitual offender and sentenced him to life in prison without the possibility of parole. Guthmiller appealed, and this Court affirmed Guthmiller's conviction and sentence. *State v. Guthmiller*, 2003 S.D. 83, 667 N.W.2d 295.

On January 29, 2004, Guthmiller petitioned the circuit court for a writ of habeas corpus. He alleged, among other things, that certain statements made by the judge during voir dire and during his trial violated his constitutional right to a fair trial and prejudiced him. After an evidentiary hearing, the court issued a letter opinion finding that the judge's comments "irreparably tainted the jury." The habeas court also ruled that defense counsel's failure to object after the judge's comments deprived Guthmiller "of the fair and impartial trial to which he is entitled." However, the court denied Guthmiller's writ because Guthmiller failed to establish prejudice. After reviewing the evidence, the court held that "there is no probability that any jury, tainted or not, with or without corrective instructions, would reach a different result." The court directed the State to prepare the appropriate paperwork.

Many months passed, but the State failed to prepare any paperwork for the court. On May 29, 2009, Guthmiller moved the habeas court to reconsider its previous denial of his writ. Guthmiller now argued that he was not required to prove prejudice, because the judge's comments so affected the entire trial from beginning to end that such erroneous comments amounted to a structural error. *See Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). After a hearing, the court issued findings of fact and

conclusions of law, again holding that the judge's comments denied Guthmiller a fair trial and his right to be tried by an impartial judge. The court then agreed with Guthmiller that he need not prove prejudice, because the judge's comments amounted to a structural error. The court further found that defense counsel's failure to object was ineffective assistance of counsel, which ineffectiveness prejudiced Guthmiller. Finally, the court held that the judge's comments were not harmless error. Therefore, the court issued Guthmiller a writ of habeas corpus, ordered his conviction and sentence be vacated, and mandated a new trial.

The State appeals asserting:

1. The judge's comments did not amount to a structural error.

2. Guthmiller was not prejudiced as a result of the judge's comments.

3. Defense counsel was not ineffective for failing to object and/or move for a mistrial because of the judge's comments.

Mr. Arnold D. Laubach, Jr., Attorney for Petitioner and Appellee Dale Guthmiller

Mr. Marty J. Jackley, Attorney General, Mr. Frank Geaghan, Assistant Attorney General, Attorneys for Respondent and Appellant Douglas Weber

Rodriguez v. Miles, Donadio, and (The) Congregation of the Priests of the Sacred Heart, Inc.

Roger Rodriguez filed a lawsuit against Brother Matthew Miles, John Donadio, and (The) Congregation of the Priests of the Sacred Heart, Inc. Rodriguez's lawsuit included claims for sexual abuse and assault and battery, among others. Rodriguez's lawsuit alleged that he was sexually abused from age seven to ten by Miles and Donadio in the 1970s while he was a student at St. Joseph's Indian School in Chamberlain, South Dakota.

Miles was a member of the religious order of Priests of the Sacred Heart assigned to work at St. Joseph's as a resident supervisor. Donadio was a resident counselor in the children's dorm after Miles was reassigned away from St. Joseph's. Both Miles and Donadio allegedly raped and sexually abused Rodriguez repeatedly. The Congregation of the Priests of the Sacred Heart, the entity that owned and operated St. Joseph's, was included as a defendant in the lawsuit under the doctrine of respondeat superior.

Before trial, the defendants filed motions for summary judgment. The defendants argued that the applicable statutes of limitations barred Rodriguez's claims. Specifically, the defendants asserted that Rodriguez failed to file his personal injury action within three years as required by SDCL 15-2-14(3); his assault or battery action within three years as required by SDCL 15-2-15(1); and, his sexual abuse action within three years from when he discovered that the abuse caused him injury as required by SDCL 26-10-25.

In response, Rodriguez argued that SDCL 26-10-25 extended the time he had to file suit for any civil action, thereby rendering SDCL 15-2-14(3) and SDCL 15-2-15(1) inapplicable. SDCL 26-10-25 provides in part:

> *Any civil action* based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or *three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act*, whichever period expires later.

Rodriguez's argument relied on this Court's decision in *One Star v. Sisters of St. Francis*, 2008 S.D. 55, ¶ 13, 752 N.W.2d 668, 675, which established that SDCL 26-10-25 is a discovery statute. This means that "discovery of the injuries alone is not sufficient to start the running of the statute. Rather, there must also be discovery of some tie linking the acts of abuse to an injury, i.e., 'that the injury or condition was caused by the act.'" *Id.*

Rodriguez maintained that genuine issues of fact existed concerning when he discovered that the sexual abuse caused his injury or condition. Rodriguez points to his psychologist's affidavit, which stated that "Rodriguez did not connect his condition with the sexual abuse until [July 2005]." Rodriguez's summons and complaint were served in June 2007. Therefore Rodriguez concluded that his lawsuit was filed within SDCL 26-10-25's three-year timeframe.

The trial court, however, rejected Rodriguez's argument. The trial court concluded that no genuine issues of material fact existed. The trial court determined that based on Rodriguez's own deposition testimony, he knew, or should have known, the effects the sexual abuse had on him "long before the filing" of his lawsuit. For this reason, the trial court granted the defendants' motions for summary judgment because the three-year statutory period to bring a claim had passed.

Rodriguez appeals, raising the following issues:

1. Whether the trial court erred in applying the statute of limitations under SDCL 26-10-25.

2. Whether the trial court erred in applying the statute of limitations under SDCL 15-2-14(3).

3. Whether the trial court erred in applying the statute of limitations under SDCL 15-2-15(1).

Mr. William G. Taylor, Mr. Justin Smith, Attorneys for Appellant Roger Rodriguez

Mr. James E. McMahon, Ms. Rochelle R. Sweetman, Attorneys for Appellee Matthew Miles

Mr. Robert B. Anderson, Attorney for Appellee John Donadio

Mr. Rick W. Orr, Mr. Timothy M. Gebhart, Mr. Steven R. Smith, Attorneys for Appellee (The) Congregation of the Priests of the Sacred Heart

State v. Goulding

Allen Kissner was fifty-six years old and wanted to die because he was in chronic, terminal pain and he was likely returning to prison. He had failed a recent attempt to end his own life. Consequently, he asked his friend, Robert Goulding, for help. The two men drove to a remote location and at Kissner's request, Goulding put a gun in Kissner's ear and pulled the trigger, causing his death.

Goulding was charged with first degree murder. At trial, Goulding claimed that he did not murder Kissner. Goulding claimed that he only assisted Kissner in committing suicide. The State argued that even if Kissner desired to die, Goulding's overt act of shooting Kissner constituted murder.

Over Goulding's objection, the circuit court gave a jury instruction that provided: "Suicide is the intentional taking of one's own life. As a matter of law, it is not suicide when another person actually performs the overt act resulting in the death of the decedent." Although this is the law in many jurisdictions, Goulding argued that South Dakota's statutes are different. Goulding contended that SDCL 22-16-2 (Corpus Delicti), SDCL 22-16-36 (Suicide), and SDCL 22-16-37 (Aiding and Abetting Suicide), when read together, contemplate that the commission of the overt act resulting in the death of the decedent may constitute aiding and abetting suicide under SDCL 22-16-37.

The jury found Goulding guilty of first degree murder. Goulding appeals raising the following issues:

1. Whether the circuit court erred in instructing the jury that as a matter of law it is not suicide when a person other than the decedent performs the overt act causing the decedent's death.

2. Whether the circuit court deprived Goulding of a fair trial, due process, and a meaningful opportunity to be heard by refusing defense instructions that supported an assisted suicide defense by defining Corpus Delicti, Suicide, and Aiding and Abetting Suicide.

3. Whether the circuit court deprived Goulding of a fair trial, due process, and a meaningful opportunity to be heard by prohibiting any reference to the Aiding and Abetting Suicide statute.

Mr. Timothy J. Rensch, Attorney for Appellant Robert Goulding

Mr. Marty J. Jackley, Attorney General, Mr. Ted L. McBride, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Raver v. SPM Thermo-Shield, Inc.

In 2007, this Court affirmed an arbitration award of $4,999,257 in favor of Plaintiff-Appellee Spiska Engineering, Inc. (Spiska). The award was based on Defendant-Appellee SPM Thermo-Shield, Inc.'s (Thermo-Shield's) wrongful termination of certain contracts between Thermo-Shield and Spiska.

Following the affirmance, discovery was conducted in an effort to enforce the judgment. Joseph Raver, Thermo-Shield's sole shareholder, president, CEO, and the Appellant in this proceeding, was deposed. Raver disclosed that he had personally sold the secret product formulae for all Thermo-Shield products, as well as the rights to manufacture and market said products, to a German corporation. There is no dispute that the product formulae, as well as all rights associated with the products, belonged to Thermo-Shield.

The circuit court appointed attorney Dennis Whetzal as Receiver for Thermo-Shield. The Receiver was given authority to identify, compile, and sell any and all assets of Thermo-Shield in an effort to satisfy Spiska's judgment. The Receiver identified a purchaser of the company's assets and moved the circuit court for approval of the sale.

The Receiver sent a copy of the Motion to Approve Sale and the Notice of Hearing to Raver by U.S. mail. The motion and notice required Raver to file objections, if he had any, to the sale of Thermo-Shield. In response, Raver filed objections claiming that the proposed sale failed to allocate any of the proceeds to satisfy a loan of $48,659.80 Raver allegedly made to Thermo-Shield. The circuit court held a hearing on the Receiver's motion. Raver appeared through counsel. Following the hearing, the court denied Raver's objections and granted the Receiver's motion to sell the company's assets.

The Receiver drafted proposed findings of fact, conclusions of law, and an order for the court's consideration. Raver objected arguing that the proposals were overbroad and improper because they included language prohibiting him from competing with Thermo-Shield. Raver contended that the proposals sought "to limit Joe Raver when he is not even a party to this lawsuit" and because "the language in the proposal amounts to a permanent covenant not to compete against Raver that spans the entire world." Raver also appeared through counsel at a hearing on this objection.

After the second hearing, the circuit court adopted findings of fact, conclusions of law, and an order approving the sale. The findings, conclusions and order also provided that "Raver may not legally use, sell, . . . or otherwise encumber any of the assets, rights or interests of SPM Thermo-Shield, Inc., including but not limited to, any and all product formula(ae) and related information[.]" The court further provided: "Nothing in this Order shall in any way prevent Mr. Raver from working in the field of ceramic coatings . . . , so long as Mr. Raver in no way makes use of the Thermo-Shield product formula, other SPM Thermo-Shield Inc. trade secrets or trade marks." The court finally ordered that: "This provision notwithstanding, Mr. Raver may not obtain an ownership interest in, or serve in a management capacity with any company that manufactures ceramic coatings or paint products which in any way competes with SPM Thermo-Shield, Inc. or any successor to its assets."

Raver raises two issues in this appeal:

1. Whether the circuit court had personal jurisdiction to grant injunctive relief affirmatively prohibiting him from competing with Thermo-Shield.

2. Whether the circuit court's injunction is unreasonable and an unlawful restraint of trade in violation of SDCL 53-9-8.

Mr. Brad J. Lee, Attorney for Appellant Joseph Raver

Mr. Michael C. Loos, Attorney for Plaintiff-Appellee Spiska Engineering, Inc.

Mr. Dennis C. Whetzal, Receiver for Defendant-Appellee SPM Thermo-Shield, Inc.

State v. Jones

In October 2008, E.B. and her friend Abby celebrated Abby's 21st birthday in Sioux City, Iowa. E.B., who was 23 years old at the time, began drinking around 8:45 p.m. E.B. drank approximately eight to ten beers and at least three shots of whiskey at the bar. Around 1:00 a.m., the girls met Abby's boyfriend, Chance, and his friend, Christopher Jones, at another bar. E.B. had not previously met Jones. The group continued to drink before going to Chance's house. Once they arrived at Chance's, E.B. had another five to six beers. E.B. decided to go to sleep on the couch around 3:30 a.m. At trial, Jones testified that he and E.B. had consensual sexual intercourse. E.B. however, testified that Jones raped her twice during the night. E.B. went to the hospital the next day and reported the rape. An exam of E.B. and her clothes revealed Jones' sperm. Officers arrested Jones and he was subsequently charged with E.B.'s rape.

When settling jury instructions at trial, Jones requested an instruction that provided:

> Consent is not a defense to the crime of rape in the third degree where the victim is incapable of giving consent because of intoxication *and the Defendant knew that person was incapable of giving consent because of intoxication.* In determining whether the victim was incapable of giving consent because of intoxication you must consider all the circumstances in determining whether the victim's intoxication rendered her unable to exercise reasonable judgment in the process of forming mental or intellectual decisions and of discerning or comparing all the circumstances present at the time. It is not enough that the victim is intoxicated to some degree, or that intoxication

> reduces the victim's sexual inhibitions, in order to establish that the level of the victim's intoxication deprives the victim of the legal capacity to consent to the sexual act.

The trial court refused the italicized portion of Jones' proposed instruction, determining that it was an incorrect statement of the law. The jury found Jones guilty of two counts of rape in the third degree, in violation of SDCL 22-22-1(4), which provides: "Rape is an act of sexual penetration accomplished with any person . . . [i]f the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis[.]"

On appeal, Jones argues that the trial court erred in concluding that his proposed instruction was an incorrect statement of the law. Jones asserts that when the statutory history and similar statutes of other states are considered, his proposed instruction was an accurate statement of the law. Specifically, Jones contends that SDCL 22-22-1(4) mandates knowledge by a defendant that a victim is intoxicated. According to Jones' reading of the statutory history, the "knowledge" element carries over from a previous version of the statute, which provided:

> Rape is an act of sexual penetration accomplished with any person other than the actor's spouse . . . [w]here the victim is incapable of giving consent because of any intoxicating, narcotic or anesthetic agent, or because of hypnosis, *administered by or with the privity of the accused*[.]

SDCL 22-22-1(3) (1984) (amended in 1985). In 1985, the Legislature amended former SDCL 22-22-1(3) by deleting the phrase "administered by or with the privity of the accused." 1985 S.D. Sess. Laws 359, ch. 179. Jones contends that "[n]othing in the amended statute supports the notion that

'knowledge' was intended to be removed. The unintended effect of removing said language was that knowledge of the defendant, which was presumed with the prior statutory language, was now no longer considered in the plain, unambiguous language of the statute."

Jones also argues that the "rape by intoxication statute is intended to protect those who become so intoxicated they can no longer function in any appreciable manner," and that such a low functioning should "be obvious to the accused." Consequently, Jones contends that "intoxicated persons are not, and should not be, afforded the same protections [as minors and mentally handicapped]."

Jones appeals, raising the following issues:

1. Whether the trial court erred in refusing Jones' proposed jury instruction that a defendant must know a victim is incapable of consenting to intercourse because of intoxication.

2. Whether the trial court erred in refusing to grant Jones' motion for judgment of acquittal.

Mr. Marty J. Jackley, Attorney General, Ms. Ann C. Meyer, Assistant Attorney General for Appellee State of South Dakota

Mr. Anselem Jason Rumpca, Attorney for Appellant Christopher Jones

Lindskov v. Lindskov

Automotive Company, Inc. is an authorized dealer of New Holland agricultural equipment with dealerships in Isabel and Mobridge, South Dakota. Automotive Company was incorporated in December 1982 and was owned and operated by cousins, Dennis and Les Lindskov, until 2006. Dennis and Les were equal shareholders with each owning approximately 2,500 shares of common stock. Les served as the company's president, and Dennis served as its secretary-treasurer. Both served on the company's board of directors.

By spring 2005, the cousins' relationship had deteriorated. Dennis and Les therefore discussed the possibility of dividing the company by franchise. They wrote to New Holland to inquire whether one party could operate the Isabel dealership while the other operated the Mobridge dealership. In March 2005, New Holland declined the cousins' request, stating that it would "not approve any separation of the existing locations." New Holland also declined to establish a new dealership for either Dennis or Les. The cousins' relationship became further strained in the coming months.

In October 2005, Les initiated an action seeking the dissolution of Automotive Company. Now represented by counsel, the cousins negotiated and each extended offers to buy the other's interest in the company. On April 14, 2006, Dennis agreed to purchase Les's 2,500 shares in the company for $1,190,000, as well as the real property associated with the business for $210,000. The cousins executed a dissolution agreement that day. Section 4.1 of the agreement was entitled "Confidentiality and Non-disparagement":

> In addition, Seller and Buyer agree that they shall not hereinafter engage in any form of conduct, or make any statements or representations, that will disparage or otherwise harm the reputation, goodwill, or commercial interests of the other party.

The cousins closed on their agreement on April 25, 2006. Les remained on the company's board of directors and continued to serve as its president until the closing.

Les subsequently elected to enter business with his four sons. On May 12, 2006, the South Dakota Secretary of State issued a Certificate of Organization to Les's new venture, Premier Equipment, L.L.C. Les and his sons opened a farm implement dealership in Mobridge in late 2006. And in October 2006, they acquired K&A Implement, a New Holland dealership in Eureka, South Dakota. Finally, Premier Equipment opened a branch location in Isabel in spring 2007. Through Premier Equipment, Les now sells farm implement equipment in Isabel and Mobridge in immediate competition with Automotive Company.

In September 2008, Dennis initiated this breach of contract and fraud and deceit action against Les. He argued that Les breached the non-disparagement provision of the dissolution agreement by opening a competing business within months of the sale of his interest in the company. Dennis also argued that Les engaged in fraud and deceit by not disclosing his intent to open a competing business after his departure.

Les filed motions for summary judgment on both causes of action. After hearings on the motions, the trial court granted summary judgment in Les's favor. As to the breach of contract claim, the trial court construed the non-disparagement clause to prohibit only disparagement and not the establishment of a competing business. And as to the

fraud and deceit claim, the trial court concluded that Les did not owe Dennis a duty to disclose his intent to open a competing business. The trial court thus entered a judgment dismissing Dennis's complaint.

Dennis now appeals, raising the following issues:

1. Whether Les breached the non-disparagement clause of the dissolution agreement by opening a competing business.

2. Whether Les engaged in fraud and deceit by not disclosing his intent to open a competing business.

Mr. Ronald A. Parsons, Jr., Mr. Steven M. Johnson, Mr. Shannon R. Falon and Ms. Pamela R. Bollweg, Attorneys for Plaintiffs and Appellants Dennis Lindskov and Automotive Company, Inc.

Mr. John W. Burke, Attorney for Defendants and Appellees Les Lindskov and Premier Equipment, L.L.C.

State v. Zahn

Elmer and Ranee Zahn lived in Gettysburg, South Dakota. In June 2008, Ranee passed away while visiting her daughter, Katie Circle Eagle, in Aberdeen, South Dakota. Because Ranee was not in the care of a physician when she died, police were called to Circle Eagle's residence to investigate the death. Elmer, Ranee's husband, was present when the officers arrived but left before the officers interviewed him.

As part of the death investigation, the officers searched the bedroom where Ranee died. In the bedroom closet, the officers found a large, brown suitcase. The suitcase contained a digital scale and approximately 120 quart-sized plastic containers. A strong odor of raw marijuana emanated from several of the containers. The officers also found $8,890 cash in a nylon shoulder bag in one corner of the bedroom. A drug dog later alerted to the cash as having an odor of marijuana or some other narcotic. Their suspicions aroused, the officers attempted to contact Elmer, but their efforts were unsuccessful.

In November 2008, Elmer was arrested for driving while intoxicated. The arresting officers searched his vehicle. They found a black duffel bag in the backseat that contained an unmarked pill bottle filled with a green leafy substance. Tests later confirmed that the substance was marijuana. The officers also recovered a large amount of cash from the duffel bag, from a purse in the cargo area of the vehicle, and from Elmer's person. In total, the officers discovered nearly $10,000 cash. A drug dog later alerted to the cash as having an odor of marijuana or some other narcotic. Elmer was charged with and pleaded guilty to driving under the influence, possession of two ounces or less of marijuana, and possession of drug paraphernalia.

On March 3, 2009, Tanner Jondahl, a detective with the Aberdeen Police Department, affixed a GPS tracking device to Elmer's vehicle while it was parked in the parking lot of an apartment complex. The tracking device continuously transmitted the geographic location of Elmer's vehicle, allowing officers to pinpoint his location within five feet. A computer at the Brown County Sheriff's Office recorded Elmer's movements.

By use of the tracking device, Detective Jondahl observed Elmer's activities throughout March 2009. He observed that Elmer visited a storage unit at Plaza Rental five times and a storage unit at Stor-It four times. His visits to the storage units generally lasted only a few minutes. Detective Jondahl later confirmed that a Plaza Rental storage unit was rented to Ranee and that a Stor-It storage unit was rented to Alan Zahn, Elmer's brother. Based on his training and experience, Detective Jondahl believed that Elmer kept controlled substances in the storage units and was involved in drug distribution.

On March 29, 2009, Elmer traveled to Gettysburg, South Dakota. Because Elmer was out on bond at the time, he was not permitted to leave Brown County. Elmer was arrested for the bond violation when he returned to Aberdeen, and a search of his person revealed approximately $2,000 cash. A drug dog alerted to the cash as having an odor of marijuana or some other narcotic.

Later that day, Detective Jondahl submitted an affidavit in support of a search warrant for the Plaza Rental storage unit, the Stor-It storage unit, and Elmer's person. A judge signed the search warrant, and Detective Jondahl, along with several other officers, executed the warrant. During the search of the Stor-It storage unit, a drug dog alerted to a freezer, which was hidden from view by a wall of empty cardboard boxes. In the freezer, the officers discovered two jars filled with nearly one ounce of a finely ground substance, which possessed a strong odor of raw

marijuana. A large suitcase in the freezer contained five four-ounce plastic bags of a green, leafy substance. Tests later confirmed that the substance in both the jars and the plastic bags was marijuana. The freezer contained several other items, including a glass pipe, three empty plastic bags, and several unused plastic containers. No evidence was recovered from the Plaza Rental storage unit, and a urine sample taken from Elmer that day tested negative for marijuana ingestion.

In April 2009, a Brown County grand jury indicted Elmer on one count of possession with the intent to distribute one pound or more of marijuana and one count of possession of one to ten pounds of marijuana. Additionally, Elmer was charged with possession of drug paraphernalia. Elmer filed a motion to suppress evidence discovered during the execution of the search warrant. The trial court denied the motion after a hearing on the matter. The case proceeded to a court trial in February 2010, and Elmer was convicted of all charges.

Elmer now appeals, raising the following issues:

1. Whether Elmer's Fourth Amendment rights were violated when police affixed a GPS tracking device to his vehicle.

2. Whether the facts contained in Detective Jondahl's affidavit were sufficient to establish probable cause to issue the search warrant.

3. Whether the search warrant authorized police to search the locked freezer in the Stor-It storage unit.

4. Whether there was sufficient evidence to convict Elmer of possession of marijuana with the intent to distribute one pound or more of marijuana.

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

Mr. Thomas M. Tobin, Attorney for Defendant and Appellant Elmer Zahn

Demaray v. De Smet Farm Mutual Insurance Company

On July 16, 2007, The Alvine Family Limited Partnership brought suit against Floyd Demaray and James Hagemann for negligence, res ispa loquitur, nuisance, and trespass. Alvine alleged that Hagemann's cattle operation, which is on land leased by Demaray, intermittently and repeatedly discharged animal waste pollutants into lakes and streams on Alvine's property. Alvine sought to enjoin Hagemann from discharging further pollutants from his cattle operation, an order for Demaray and Hagemann to clean the water, and compensatory and punitive damages.

After receiving notice of the suit, Demaray and Hagemann notified De Smet Farm Mutual Insurance Company, their insurer through which they owned separate, but identical, insurance policies. De Smet, however, refused to defend Demaray or Hagemann in the suit against Alvine. It claimed it owed no duty under the contract based on certain exclusionary language for "the discharge, dispersal, release, or the escape of pollutant into or upon land, water or air[.]" Demaray and Hagemann sought counsel to defend the Alvine suit, and on March 5, 2009, a jury returned a verdict in favor of Hagemann and Demaray. Alvine appealed to this Court, which affirmed. *Alvine Limited Family Partnership v. Hagemann*, 2010 S.D. 28, 780 N.W.2d 507.

On March 31, 2010, Demaray and Hagemann brought suit against De Smet, alleging De Smet breached its duty to defend them in the Alvine lawsuit. They sought indemnification for all costs and fees incurred as a result. The parties submitted fact stipulations and moved for summary judgment. Demaray and Hagemann alleged that a special endorsement in the policy provided them coverage. The special endorsement covers "bodily injury or property damage arising out of the sudden and accidental discharge, dispersal, release or escape into or upon land . . . of

pollutants used in or intended for use in normal and usual farming activities[.]" Relying on this same language, De Smet argued that the alleged pollution was not from a "sudden or accidental" discharge. Rather, Alvine's complaint asserted that it was intermittent and repeated. The circuit court, however, concluded that Alvine's complaint contained a claim that, if proven true, would have fallen within the endorsement's coverage. Therefore, the court granted Demaray and Hagemann's motion for summary judgment, ruling that De Smet had a duty to provide a defense to its insureds, Demaray and Hagemann.

De Smet appeals asserting that the allegations in the Alvine complaint do not give rise to a duty to defend Demaray and Hagemann under the relevant insurance policy.

Mr. Mark V. Meierhenry and Mr. William Blewett, Attorneys for Appellees Floyd Demaray and James Hagemann

Mr. Larry M. Von Wald, Attorney for Defendant and Appellant De Smet Farm Mutual Insurance Company

Glossary of Terms

Affirm - When the Supreme Court "affirms" a circuit court's action, it declares that the judgment, decree or order must stand as decided by the circuit court.

Appeal - The Supreme Court's review of a circuit court's decision in a lawsuit. The Supreme Court does not consider new evidence or listen to witnesses. Rather, it reviews the record of a case and applies the proper law to determine if the circuit court's decision is correct.

Appellant - The person who takes an appeal from the circuit court to the Supreme Court. (In other words, the person who does not agree with the result reached in circuit court.)

Appellee - The person in a case against whom an appeal is taken; that is, the person who does not want the circuit court's decision reversed. Sometimes also called the "respondent."

Brief - A document written by a person's attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which his legal position is based. The brief tells the Supreme Court the facts of the case, the questions of law involved, the law the attorney believes should be applied by the Court and the result the attorney believes the Court should reach.

Defendant - The person sued by the plaintiff or prosecuted by the state in the circuit court.

Oral Argument - An opportunity for the attorneys to make an oral presentation to the Supreme Court when the appeal is considered. Oral arguments also give the Court an opportunity to ask the attorneys questions about the issues raised in their briefs.

Plaintiff - The person who brings a lawsuit in the circuit court.

Record - All the papers filed in a circuit court case including any transcripts. This includes the original complaint, motions, court orders and affidavits and exhibits in the case.

Remand - The Supreme Court "remands" an appealed case back to the circuit court for some further action. For example, the Supreme Court might remand a case to the circuit court and require that court to hear additional evidence and make further factual findings that are important in deciding the case.

Reverse - When the Supreme Court "reverses" a circuit court decision, it finds that a legal error was made and requires that the decision be changed.

Transcript - A document that contains a verbatim account of all that was said in a circuit court case by the parties, the attorneys, the circuit judge, and any witnesses. The transcript is prepared by the court reporter and it is reviewed by the Supreme Court as part of the appeal process.