Introduction to

The South Dakota Supreme Court

and

Case Summaries for Oral Arguments at the March Term of the Court to be held March 19 through March 21, 2012

University of South Dakota Law School

Vermillion, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 19, 2012

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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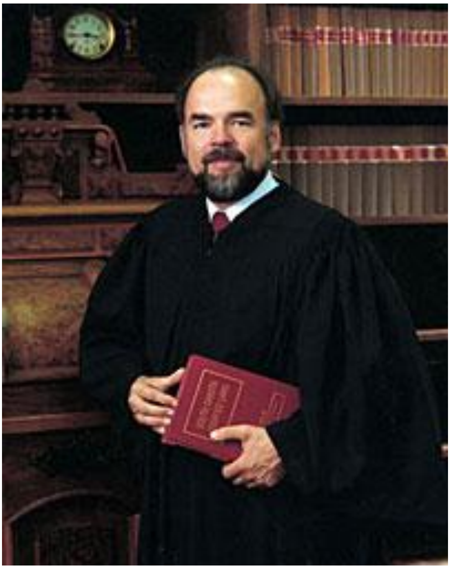
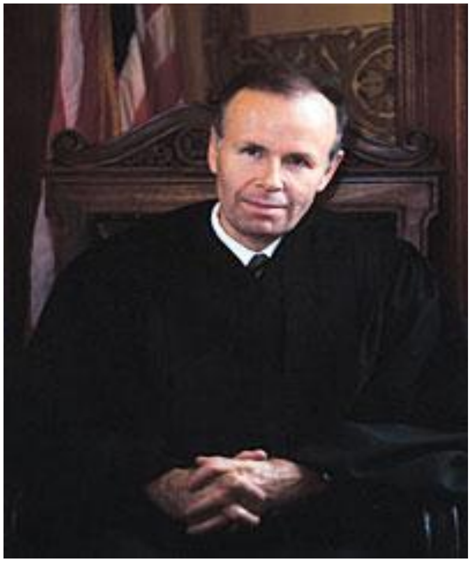


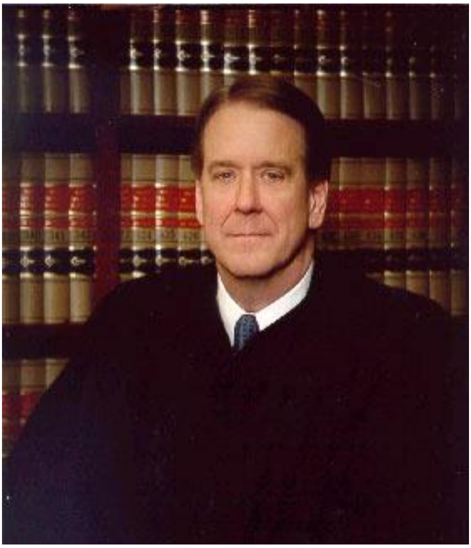
Chief Justice David Gilbertson

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.



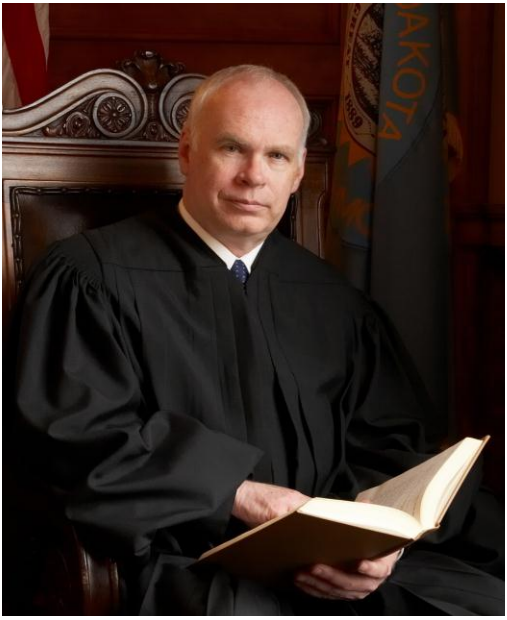
Justice John K. Konenkamp

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, 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 Glen A. Severson

Justice Severson, born March 9, 1949, represents the Second Supreme Court District, which includes Minnehaha 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.

Justice Lori S. Wilbur

Justice Wilbur represents the Fourth Supreme Court District, which includes the counties of Aurora, Bon Homme, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lyman, McCook, Tripp, Turner, Union and Yankton counties. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 – 2011. Justice Wilbur, and her late husband Brent, have two adult daughters.

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 left: J. Robert Schlimgen (Justice Wilbur), Kinsley Powers (Justice Zinter), Kathryn Rich (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), Lisa Slepnikoff (Justice Severson), and Jessica J. Fjerstad (Supreme Court Law Clerk).

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.

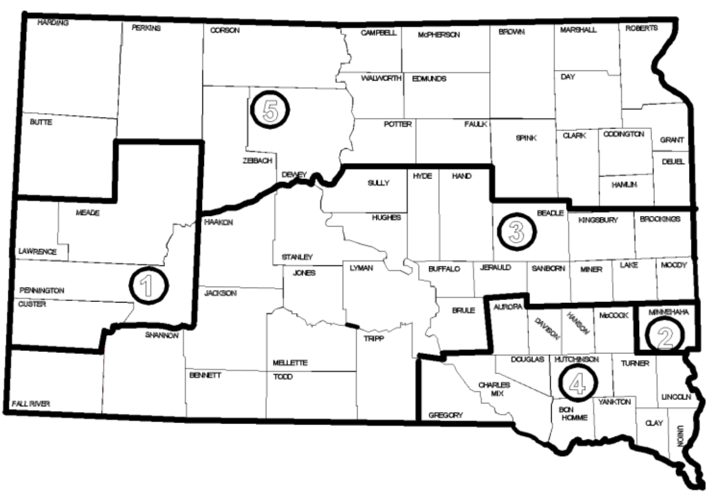
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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 Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Chief Justice Gilbertson and Justices Konenkamp and Zinter were each retained in the November 2006 general election.

South Dakota Supreme Court Appointment Districts
Effective January 23, 2012



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 2012 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.

Detmers v. Costner

In the early 1990s, Kevin Costner envisioned building a luxury resort called "The Dunbar" on property he owned near Deadwood, South Dakota. After discussions, Costner commissioned Peggy Detmers to design 17 buffalo and Lakota warrior sculptures, intending to display them at The Dunbar's entrance. Detmers and Costner orally agreed that she would be paid $250,000, and would receive royalty rights in the sculptures' reproductions that were to be marketed and sold at The Dunbar's gift shop. When The Dunbar had not been built in the late 1990s, Detmers stopped working on the sculptures.

After several months of negotiations, on May 5, 2000, Costner sent Detmers a letter to provide her additional compensation in exchange for completing the sculptures. Detmers agreed and signed the letter as requested, creating a binding contract. As part of the agreement, Costner paid Detmers an additional $60,000, clarified royalty rights on reproductions, and provided her certain rights regarding display of the sculptures. Paragraph three of the agreement, which is at issue in this case, provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

Paragraph four of the agreement provides: "We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers." Because the resort had not been built in the early 2000s and the last sculpture had been delivered, Detmers and Costner began looking for display locations as required by paragraph four. Detmers suggested locations in Hill City, while Costner considered locations near Deadwood. Ultimately, Costner realized that he could create a permanent site for the sculptures on the real property he owned and intended for The Dunbar.

On January 23 or 24, 2002, Costner called Detmers and they discussed permanently placing the sculptures at a site on Costner's property where he intended to build The Dunbar. The project became known as "Tatanka." Costner hired landscape architect Patrick Wyss to design Tatanka. Costner instructed Wyss to keep Detmers informed and involved in the design process. Detmers was influential in the sculptures' placement at Tatanka, including suggesting and implementing wood "mock-ups" to predetermine the exact location of each sculpture. Tatanka was funded solely by Costner (approximately $6 million) and is a separate legal entity from The Dunbar. In addition to the sculptures, Tatanka consists of a visitor center, gift shop, café, interactive museum, and nature walkways. Both Detmers and Costner spoke at Tatanka's grand opening in June 2003, expressing enthusiasm and pride in the attraction.

In 2008, Detmers and Detmers Studios, Inc. brought suit against Costner and The Dunbar, Inc., seeking a declaratory judgment that she did not agree to the placement of the sculptures as required by paragraph three of their May 2000 contract. For relief, Detmers sought an order requiring Costner to sell the sculptures with the proceeds dispersed consistent with paragraph three. Detmers claimed that because The Dunbar was not built within ten years *and* the sculptures were not "agreeably displayed elsewhere," she was entitled to 50% of the proceeds from the sale of the sculptures, which would be specific performance.

Before trial, Costner made a motion to use parol evidence. Detmers objected, requesting summary judgment that the May 2000 contract was not ambiguous and parol evidence was therefore inadmissible. The circuit court concluded that the May 2000 contract was not ambiguous. The court denied Costner's motion to admit parol evidence. The sole issue at the bench trial was whether the sculptures were "agreeably displayed elsewhere." Costner, Detmers, and Wyss testified at trial.

After post-trial briefing, the court granted judgment in favor of Costner. The court maintained its earlier conclusion that the May 2000 contract was unambiguous. The court concluded that "'[e]lsewhere,' as used in the contract, clearly means at a site other than The Dunbar." Additionally, "[b]ecause The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere." The court also concluded: "Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location. Detmers was notified of the plan to place the sculptures at Tatanka in January 2002 . . . ."

On appeal, the issues presented are:

1. Whether the circuit court erred in determining that the sculptures were agreeably displayed "elsewhere" as required under the contract.

2. Whether Detmers agreed to the display of the sculptures at Tatanka in the absence of a promise or guarantee from Costner that The Dunbar would be built by 2010.

3. Whether the circuit court erred in concluding that construing the contract literally would lead to an absurd result.

Mr. A. Russell Janklow and Mr. Andrew R. Damgaard, Attorneys for Plaintiffs and Appellants Peggy A. Detmers and Detmers Studios, Inc.

Mr. James S. Nelson and Mr. Kyle Wiese, Attorneys for Defendants and Appellees Kevin Costner and The Dunbar, Inc.

State v. Graham

In February 1976, Anna Mae Aquash's body was found in the Badlands near Highway 73 between Kadoka and Wanblee. An autopsy indicated that she died from a single bullet wound to the head.

In 2003, John Graham, a Canadian citizen, was charged in federal court with the premeditated murder of Aquash. Graham was extradited to the United States from Canada in 2007 on the federal charge. After the federal charge was dismissed, Graham was indicted in state court on the charge of felony murder. The underlying felony was the alleged kidnapping of Aquash.

In the 1970s, Aquash had been actively involved in the American Indian Movement (AIM). In 1975, Aquash was arrested with several AIM leaders on federal charges involving the possession of explosives on the Rosebud Indian Reservation and state charges involving an exchange of gunfire with the Oregon Highway Patrol. Aquash was released on bond on the federal charges in South Dakota, and she fled to Denver around November 25, 1975.

At trial, the State's theory was that Aquash was murdered because members of AIM believed she was a government informant. The State presented evidence that a few days after Aquash arrived in Denver, AIM leaders ordered Aquash to be taken to Rapid City to face the informant allegation. Witnesses testified that Aquash's hands were tied and she was taken to Rapid City by AIM members Graham, Arlo Looking Cloud, and Theda Clarke. The State alleged that this group eventually obtained a gun, took Aquash to the Badlands, and killed her.

Over defense objections, the State introduced a number of out-of-court statements, including the following: (1) Troy Lynn Yellow Wood testified Aquash told Yellow Wood that in June 1975, AIM member Leonard Peltier accused Aquash of being an informant while pointing a gun at her head; (2) Darlene "Kamook" Ecoffey testified that Peltier, while in the presence of Kamook and Aquash, confessed to murdering an FBI agent on a South Dakota Indian Reservation; (3) Looking Cloud testified that in 2002, he told Denise Maloney (Aquash's daughter) that he was sorry but Graham shot Aquash while Clarke and Looking Cloud were present; and (4) Maloney confirmed that in 2002, Looking Cloud told Maloney that Graham, Clarke, and Aquash went over a hill, Looking Cloud heard a gunshot, and Graham and Clarke returned without Aquash.

The jury found Graham guilty of felony murder. He was sentenced to life in prison without parole. Graham now appeals to this Court, raising six issues:

1. Whether under a United States treaty with Canada and the doctrine of specialty, Graham could be extradited and tried in state court on the state charge alleging felony murder when he was originally extradited to the United States on the federal charge alleging premeditated murder.

2. Whether Looking Cloud's and Maloney's testimony about Looking Cloud's 2002 out-of-court statements to Maloney were inadmissible hearsay.

3. Whether Yellow Wood's testimony that Aquash stated that Peltier accused Aquash of being an informant while pointing a gun at her head was inadmissible hearsay.

4. Whether Kamook's testimony that Peltier confessed to murdering an FBI agent was inadmissible hearsay.

5. Whether the evidence was sufficient to find Graham guilty of felony murder.

6. Whether Graham's sentence of life without parole was authorized by statute, and whether the sentence was cruel and unusual punishment under the Eighth Amendment.

Mr. Marty J. Jackley, Attorney General and Mr. Max A. Gors, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. John R. Murphy, Attorney for Defendant and Appellant John Graham

Manuel v. Toner Plus, Inc. and the South Dakota Department of Labor, Unemployment Insurance Division

Toner Plus, Inc. was primarily in the business of selling toner cartridges for printers to local businesses. Manuel was the president and sole stockholder of Toner Plus. He was also an employee of the company. Toner Plus made payments to the South Dakota unemployment compensation fund based on Manuel's status as a covered employee.

Manuel decided to close Toner Plus in May 2009. He then filed a claim for unemployment compensation benefits. After the Department denied his claim, Manuel appealed the decision to the Secretary of Labor. The Secretary of Labor adopted the administrative law judge's order of dismissal.

Manual appealed the Secretary of Labor's decision to the circuit court. The circuit court remanded the case back to the Department for a hearing on the merits. In accordance with the circuit court's order, a hearing was held before an administrative law judge on May 29, 2010. During this hearing, Manuel testified that he decided to close his business because sales for ink cartridges had declined over the years due to technological advances. Manuel testified that these technological advances made it difficult for Toner Plus to compete with national suppliers.

In its findings of fact, the administrative law judge acknowledged that Manuel decided to close Toner Plus because of "industry trends." Nonetheless, the administrative law judge held that Manuel was ineligible to receive unemployment insurance benefits. It noted that unemployed individuals who are otherwise eligible for unemployment benefits may be disqualified from receiving benefits under SDCL 61-6-13, which provides in part,

> [a]n unemployed individual who, voluntarily without good cause, left the most recent employment of an employer or employing unit, after employment lasting at least thirty calendar days is denied benefits until the individual has been reemployed at least six calendar weeks in insured employment during the individual's current benefit year and has earned wages of not less than the individual's weekly benefit amount in each of those six weeks.

The administrative law judge determined that Manuel "voluntarily" closed Toner Plus and that his reasons for doing so did not constitute "good cause" under South Dakota's unemployment compensation statutes. The circuit court affirmed the ruling of the administrative law judge. Manuel appeals, raising the following issue:

> Whether the administrative law judge erred in finding that Manuel was not entitled to relieve unemployment insurance benefits.

Mr. Jonathan K. Van Patten and Mr. Derek A. Nelsen, Attorneys for the Claimant and Appellant Michael Manuel

Mr. Robert B. Anderson and Mr. Aaron N. Arnold, Attorneys for Appellee the South Dakota Department of Labor, Unemployment Insurance Division

Walter v. Fuks

On May 19, 2009, John Walter and Dale Morck rode their motorcycles to various bars as part of a Poker Run. Stopping at five bars over the course of two hours, they consumed between four and six beers. After leaving the last bar, Walter and Morck drove west on a paved county road. On that same road was John Fuks, also heading west. Fuks was driving his tractor to a field to help a friend pick rocks. Walter and Morck slowed as they approached Fuks's tractor. Fuks later testified that he intended to make a left-hand turn into a field approach, and just before doing that drove his tractor across the center line partially into the eastbound lane. He testified that he looked behind him for traffic, and seeing none veered right. When Fuks veered right, the bucket on the front of his tractor struck Walter's motorcycle, sending Walter into the ditch and seriously injuring him.

Walter brought suit against Fuks. Fuks admitted he was negligent, but asserted that Walter was barred from recovering because Walter was contributorily negligent, more than slight as compared to Fuks. Fuks argued that Walter operated his motorcycle while legally intoxicated at the time of the accident. As support, Fuks offered expert testimony that Walter's blood alcohol content (BAC) at the time of the accident was .087%. Walter, however, asserted that he was not intoxicated and that his BAC was less than .08%. Over Fuks's objection, the court instructed the jury that a person is presumed to not be under the influence of alcohol if his BAC is .05% or less, and that no presumption of alcohol influence exists if his BAC was more than .05% but less than .08%. This instruction came from a statute related to criminal prosecutions. After a three-day trial, a jury found Walter contributorily negligent, but not more than slight as compared to the negligence of Fuks. It awarded Walter $520,754.00. Fuks moved for a new trial and/or judgment as a matter of law. A hearing was held, after which the court denied Fuks's motions.

Fuks appeals asserting:

1. The court abused its discretion when it denied his motion for a mistrial and new trial because of Walter's interjections of improper issues into the jury trial.

2. The court abused its discretion when it allowed Walter to ask two witnesses, not legal experts, about the criminal laws related to drinking and driving, and to ask one witness questions beyond the scope of the prior examination.

3. The court erred when it gave the jury an instruction on the criminal presumptions related to BAC.

4. The court erred when it denied Fuks's motion for a judgment as a matter of law that Walter was legally intoxicated, and therefore, contributorily negligent more than slight.

Mr. Gary D. Jensen and Ms. Jessica L. Larson, Attorneys for Plaintiff and Appellant John Christian Walter

Mr. Bram Weidenaar and Mr. Scott G. Hoy, Attorneys for Defendant and Appellant John Edward Fuks (Special Administrator Pollard has been substituted for Appellant Fuks, because Mr. Fuks died during the pendency of this appeal).

State v. Jucht

Summer Neuman and her two daughters lived in a house in Bridgewater, South Dakota. Neuman's friend, Carrie Lape, and her daughter also lived in the house. Neuman frequently had guests reside in the house with her.

Robert Lee Anderson owned an office building across the street from Neuman's house. Anderson was a member of the Bridgewater City Council. Several city residents complained to Anderson about men who were "marauding" around the town. Anderson believed these men were residing in Neuman's house. Anderson also suspected that these men had stolen tires from him and committed other thefts in town.

On the night of September 21, 2010, Anderson went to a local bar in Bridgewater. After Anderson arrived at the bar at approximately 8:30 or 9:00 p.m., he began drinking extensively. Kevin Jucht, an area farmer, entered the bar at approximately 12:00 a.m. Jucht eventually sat down next to Anderson and the two men discussed the complaints Anderson had received from city residents. Anderson soon invited Jucht over to his office building.

After the men arrived at the office building, Anderson, who was extremely intoxicated, decided to go over to Neuman's house and confront the individuals who were residing in the house. Because Anderson heard these individuals possessed firearms, Anderson retrieved a nine-millimeter pistol from his gun cabinet and gave it to Jucht to hold for "protection."

Anderson and Jucht went across the street to Neuman's house. Anderson knocked on the screen door, pulled it open, and banged on the inside door. After the inside door opened, Anderson walked about four feet into the house. Jucht stepped one foot into the house briefly and then stepped back outside the doorway.

At the time Anderson and Jucht entered her home, Neuman was putting together a puzzle with one of her daughters in a room upstairs. Lape was sleeping in the bedroom on the main floor. An acquaintance of Neuman's, who she knew only by the name "Dre," was sleeping on the couch.

After Neuman heard a loud pounding on the front door of her house, she ran downstairs. Anderson then began yelling at Neuman. Neuman went to get Lape from the bedroom. Neuman and Lape argued with Anderson and told the men to leave. Anderson yelled obscenities at the women and told them he was going to make sure they were removed from the town. Anderson then pointed to Dre, who was sitting on the couch. Using a racially derogatory term, Anderson told Dre to leave. While Anderson was arguing with Neuman and Lape, he broke the glass out of the screen door.

Neuman's brother and his friend then pulled up to the house in a white van. When they arrived, Jucht walked into the middle of the street. From the street, Jucht fired three shots in rapid succession. Testimony at trial was inconsistent as to whether Jucht fired the shots into the air or whether he was aiming at the white van.

The State charged Jucht with (1) malicious intimidation or harassment; (2) first-degree burglary; (3) intentional damage to property; (4) disorderly conduct; and, (5) commission of a felony while armed with a firearm. Jucht pleaded not guilty to each of the charges.

The State made a motion in limine to preclude Jucht from eliciting testimony that Anderson suspected the men residing in Neuman's house had stolen tires from him and committed other thefts. The trial court granted the motion, finding that the evidence was irrelevant.

At the close of the evidence, Jucht moved for judgment of acquittal on all counts, which the trial court denied. The jury acquitted Jucht on Count (3), intentional damage to property, but convicted him of all the remaining charges. Jucht appeals, raising the following issues:

1. Whether the trial court erred in denying Jucht's motion for judgment of acquittal.

   (a) Whether there was sufficient evidence to support Jucht's conviction for malicious intimidation or harassment.

   (b) Whether there was sufficient evidence to support Jucht's conviction for first-degree burglary.

   (c) Whether there was sufficient evidence to support Jucht's conviction for commission of a felony while armed with a firearm.

2. Whether the trial court abused its discretion in excluding evidence of Anderson's suspicion that the men staying in Neuman's home had stolen tires from him and committed other thefts.

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

Mr. Ronald A. Parsons, Jr. and Mr. Douglas M. Dailey, Attorneys for Defendant and Appellant Kevin Roger Jucht

DT-Trak v. Prue

DT-Trak Consulting, Inc. (DT-Trak) is a South Dakota Corporation that offers services to medical providers using electronic medical records. Most of DT-Trak's clients are Indian Health Services facilities and providers. Dan Prue became a 51% owner of DT-Trak in 2003, in addition to serving as President and Chief Executive Officer. His primary responsibility was developing and maintaining relationships with clients.

Kathy Price and Tara Hochhalter worked for DT-Trak. Hochhalter worked there from 2005 to March 2007. Price started with DT-Trak's Miller office in August 2002, but began working out of her Huron home in November 2006. Both women worked on DT-Trak's account with Maniilaq Health Center in Alaska, a key account for the company.

In 2007, Prue was removed from daily operations of DT-Trak due to personality and other conflicts. Prue entered into a Stock Purchase Agreement ("Agreement") with DT-Trak, terminating his relationship with the company. The Agreement provided for DT-Trak's purchase of Prue's interest for $310,000 plus annual performance payments totaling $500,000 beginning in January 2009 to January 2012. The Agreement also contained provisions limiting competition, solicitation, and disclosure. Specifically, Prue agreed that for three years he would not (1) compete with DT-Trak; (2) directly or indirectly solicit or attempt to induce current and certain former employees of DT-Trak to leave the company; (3) solicit or induce any current or prospective DT-Trak customers to cease doing business with DT-Trak; or (4) knowingly attempt to interfere with any business relationship between DT-Trak and any third party. If Prue violated any of these provisions, DT-Trak was entitled to cease making any further annual payments and to receive a full refund of the funds it had already paid to Prue. The Agreement also contained an arbitration provision.

Price resigned from DT-Trak in June 2007. Before leaving, she copied multiple files from her work computer and from the DT-Trak server related to the Maniilaq account. The information was confidential and property of DT-Trak. Soon after, Prue exchanged emails with Price, in which Prue asked Price for a favor and indicated they should only have phone contact. Hochhalter left DT-Trak in March 2007. Before leaving, Price and Hochhalter signed non-compete and non-disclosure agreements with DT-Trak, but the restrictions ended in or around November 2008.

In 2009, Price and Hochhalter formed P&H Med Services, which competes with DT-Trak. P&H entered into a contract with Maniilaq in March 2009, even though Maniilaq was still DT-Trak's client. Maniilaq terminated its contract with DT-Trak in June 2009. That same month, DT-Trak sued Price, Hochhalter, P&H,

and other former employees under a variety of theories, including breach of non-compete agreements and misappropriation of trade secrets and confidential information. Although DT-Trak believed Prue was involved in Price and Hochhalter's enterprise and would have named him as a co-defendant, his Agreement contained an arbitration provision.

Through discovery in the suit against P&H, DT-Trak learned Prue had frequent contact with Price and Hochhalter after they had left DT-Trak. Many of the calls addressed Maniilaq, the formation of P&H, and the importance of keeping their business relationship quiet. As a result of this discovery, DT-Trak withheld Prue's January 2010 payment, asserting that he had violated the Agreement by assisting Price and Hochhalter.

Prue initiated an arbitration proceeding. He sought his 2010 payment, plus damages for breach of the covenant of good faith and fair dealing, prejudgment interest, lost investment income, and procedural safeguards for future payments. DT-Trak counterclaimed that under the Agreement, it was entitled to withhold the payment because of Prue's actions.

The arbitration provision of the Agreement required arbitration by a three-person panel of licensed attorneys with commercial law experience. No arbitrator could be related to or have represented either party at any time. Each party was entitled to choose their own arbitrator and the two arbitrators would then select a third arbitrator. Written notice of each party's selected arbitrator was required. Also per the Agreement, the panel was required to enter findings of fact and conclusions of law. Prue selected Robert Hayes. DT-Trak selected Don Peterson from Morgan & Theeler, LLP. Hayes and Peterson chose Jon Sogn as the third arbitrator.

After arbitration had commenced and the hearing was scheduled, Peterson informed DT-Trak's attorneys that he had previously had contact with a person listed as a witness. Peterson withdrew as an arbitrator, but indicated Jack Theeler, also from his firm, could serve because the conflict was personal, not legal. The nature of the conflict was confirmed by Sogn. DT-Trak agreed to allow Theeler to replace Peterson.

The arbitration panel issued findings of fact and conclusions of law after a two-day hearing. The arbitration panel held that DT-Trak failed to prove that Prue violated the non-compete provisions. Prue was awarded payments under the Agreement. After the hearing, DT-Trak's attorneys noticed in phone records that Price had placed a call to Morgan & Theeler the day she was served with DT-Trak's complaint in the state court litigation. DT-Trak served discovery on Price in that litigation asking her to identify and describe the conversations she had with the Morgan & Theeler firm. Price asserted attorney-client privilege.

DT-Trak filed a motion to vacate the arbitration award with the circuit court. DT-Trak claimed that an arbitrator (Theeler) was evidently partial and that the arbitration panel exceeded its authority by failing to submit true findings of fact on key facts in dispute. In response to this motion, Prue's attorney contacted Price's attorney. Price provided a supplemental discovery response, indicating that Price spoke with Tim Bottum of Morgan & Theeler when she called about possible representation. They spoke briefly and Price ultimately hired a different firm to represent her. No file was opened at Morgan & Theeler. The circuit court denied DT-Trak's motion to vacate the arbitration award.

On appeal, the issues presented are:

1. Whether a choice-of-law provision in a contract preempts the Federal Arbitration Act.

2. Whether the circuit court erred in determining there was not evident partiality in the arbitration panel.

3. Whether the circuit court erred in concluding that the arbitration panel provided findings of fact and conclusions of law sufficient to support its decision.

Mr. Roger W. Damgaard and Mr. Sander J. Morehead, Attorneys for Plaintiff and Appellant DT-Trak Consulting, Inc.

Ms. Vanya S. Hogen, Attorney for Defendant and Appellee Dan Prue

Highmark v. Wells Fargo

This appeal involves a dispute about the priority of two mortgages on a home.

Neil and Kimberly Wood (Borrowers) received a $120,290 loan from First Franklin Financial Corporation (First Franklin) to finance the purchase of their home. First Franklin received a corresponding first-lien mortgage on the home to secure the loan. Approximately two years later, the Borrowers obtained a home equity line of credit from Highmark Federal Credit Union (Highmark). The line of credit agreement gave Highmark a second-lien position on the Borrower's home—meaning, if the Borrowers defaulted, First Franklin would typically be entitled to satisfy its loan in its entirety from the proceeds of a sale of the home before Highmark could collect from the sale.

The Borrowers later refinanced their home with Wells Fargo and received a $168,708.35 loan. The proceeds from the loan were used to pay off First Franklin, Highmark, and all other parties with a security interest. However, Wells Fargo did not, at this time, require the Borrowers to close their line of credit with Highmark. The Borrowers continued to use their line of credit and received an additional $24,000 from Highmark. When Wells Fargo provided Highmark a writing signed by Mr. Wood which asked Highmark to close the line of credit, Highmark stopped making additional advances to the Borrowers.

The Borrowers later defaulted on their loan with Highmark, leading Highmark to bring this foreclosure action. Highmark joined Wells Fargo as a co-defendant because of its mortgage on the Borrowers' home. Subsequently, Highmark and Wells Fargo each brought a motion for summary judgment.

Each of the competing motions asked the trial court to conclude that the respective moving party had a first-lien position on the home as a matter of law. Highmark argued that it had priority because it filed its mortgage prior to the date Wells Fargo filed its mortgage. Wells Fargo argued that because its loan was used to pay-off First Franklin, which had a first-lien position on the home, it was entitled to priority under the doctrine of equitable subrogation. The trial court agreed with Wells Fargo and granted its motion.

Highmark appeals, arguing that:

> The trial court erred in applying the doctrine of equitable subrogation and recognizing Wells Fargo's lien position as superior to Highmark's.

Mr. Rodney C. Lefholz, Attorney for Plaintiff and Appellant Highmark Federal Credit Union

Mr. David C. Piper, Attorney for Defendant and Appellee Wells Fargo Financial South Dakota, Inc.

State v. Most

In 2009, K.D. reported that Dennis Most, Sr., her grandmother's boyfriend, had sexually molested her. She stated that the abuse started when she was four and ended when she was eleven. The State charged Most with rape and alternatively, with sexual contact with a child under the age of sixteen. Most pleaded not guilty to all charges and asserted a general denial. During interviews with authorities, Most claimed that he often tickled and wrestled with K.D. He said that he may have touched her breasts, inner-thighs, and vaginal region during these times, and that some of the touching may have been inappropriate, but that all touching was accidental and unintentional.

Prior to trial, the State moved to introduce evidence that Most had sexually abused his niece and step-daughter when they were young. Most admitted to the sexual molestation. The State asserted that the evidence was permitted under SDCL 19-12-5, allowing other acts evidence to show opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Most resisted the motion, arguing that the acts were too remote, as they occurred many years prior to the alleged abuse of K.D. After a hearing, the trial court granted the State's motion and denied Most's corresponding motion in limine, holding that the evidence was relevant to show intent and absence of mistake or accident. The trial court also held that the probative value of the evidence outweighed the danger of unfair prejudice in this case.

In addition, Most moved to introduce evidence that K.D. had previously falsely reported a sexual assault. In 2007, K.D.'s step-father reported that K.D.'s former boyfriend made an unwanted sexual advance toward K.D. The former boyfriend admitted to most of the allegations. However, K.D. refused to press charges. The former boyfriend was never charged or prosecuted for the incident. After a hearing, the trial court denied Most's motion to introduce evidence of this alleged false report, holding that Most did not demonstrate that K.D.'s report was "demonstrably false" as required by South Dakota case law.

Most waived his right to a jury trial. After a four-day bench trial, the trial court found Most guilty of four counts of sexual contact with a child under the age of sixteen.

Most appeals, raising three issues:

1. Whether the trial court abused its discretion in denying Most's motion in limine and admitting prior acts evidence.

2. Whether the trial court abused its discretion in denying Most's motion to introduce evidence of a prior false allegation of sexual assault.

3. Whether there was sufficient evidence to support Most's convictions.

Mr. Marty J. Jackley, Attorney General and Mr. Donald E. Tinklepaugh, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Michael J. McGill, Attorney for Defendant and Appellant Dennis Most

Estate of Hamilton

On the night of October 10, 2009, Blair Hamilton was drinking in his home with his friend Lyndon Hart and another person. Hamilton put a gun to his own head in a simulated game of Russian roulette and accidentally killed himself. Hamilton owned a large ranch in Harding County, South Dakota. Hart lived on the ranch in separate housing and worked for Hamilton.

In his will, Hamilton named Hart as the personal representative. Hart's appointment was challenged by Hamilton's live-in girlfriend and other members of Hamilton's family. The alternate personal representative was appointed in December 2009.

Hart was diagnosed with post-traumatic stress disorder in February 2011 from witnessing this event. Hart consulted with an attorney. On May 12, 2011, an intern in the attorney's office sent a letter to the attorney for the Estate, requesting information about Hamilton's estate and the incident in order to assess a potential claim against the Estate. The personal representative filed a verified statement for informal closing of the Estate on June 2, 2011. Counsel for the Estate responded on June 3, 2011, that all claims against the Estate were barred under SDCL 29A-3-803.

In August 2011, Hart filed a petition to extend time to file a creditor's claim against the Estate under SDCL 29A-3-804(c). Hart wanted to file an "unliquidated claim against the Estate of Blair Hamilton for the negligent and intentional infliction of emotional distress caused by the actions of Blair Hamilton on the night of October [10], 2009." The circuit court denied the petition.

Hart appeals the denial of his petition to extend time to file a claim. Hart asserts that the South Dakota Probate Code, specifically SDCL chapter 29A-3, does not have a statute to control claims against an estate that arise *at or after the death* of a decedent. Therefore, Hart contends that the applicable statute of limitations for his claim against the Estate is three years under SDCL 15-2-14(3).

After briefing, the Estate submitted a supplemental brief asserting that the Court lacks jurisdiction under *Estate of Geier*, 2012 S.D. 2, ___ N.W.2d ___. The Estate argues that *Geier* requires service of notice of appeal on all heirs and service was not completed in this case. Hart served his notice of appeal on the Estate's attorney. Hart argues *Geier* does not apply because he has not been permitted to file a claim against the Estate. Furthermore, Hart argues that under SDCL 29A-3-804(a)(1) and (2), he is not required to serve the claim on all the heirs.

On appeal, we address the following issues:

1. Whether all required parties were served with notice of appeal.

2. Whether the circuit court erred in denying Hart's motion to extend time to file a creditor's claim.

Mr. Richard D. Casey and Ms. McLean A. Thompson, Attorneys for Appellant Lyndon Hart

Mr. Dwight A. Gubbrud, Attorneys for Appellee Estate of Blair Hamilton

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.

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