

Introduction to

The South Dakota

Supreme Court



and

Case Summaries for

Oral Arguments at the

October Term of Court

to be held

October 5 through October 7, 2020

University of South Dakota

Vermillion, South Dakota

David Gilbertson
CHIEF JUSTICE

Supreme Court
STATE OF SOUTH DAKOTA



October 5, 2020

To our Guests Observing the
October Term Arguments of the
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October 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

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The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure the well-being of all who attend its proceedings and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought and other bags and purses are subject to inspection and search by security personnel.



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, a third 4-year term in June 2009, a fourth 4-year term in June 2013 and a fifth 4-year term in 2017. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District, which includes Brown, Butte, Campbell, Clark, Codington, Corson, Day, Deuel, Dewey, Edmunds, Faulk, Grant, Hamlin, Harding, Marshall, McPherson, Perkins, Potter, Roberts, Spink, Walworth and Ziebach counties, and was retained by the voters in the 1998, 2006 and 2014 general elections.

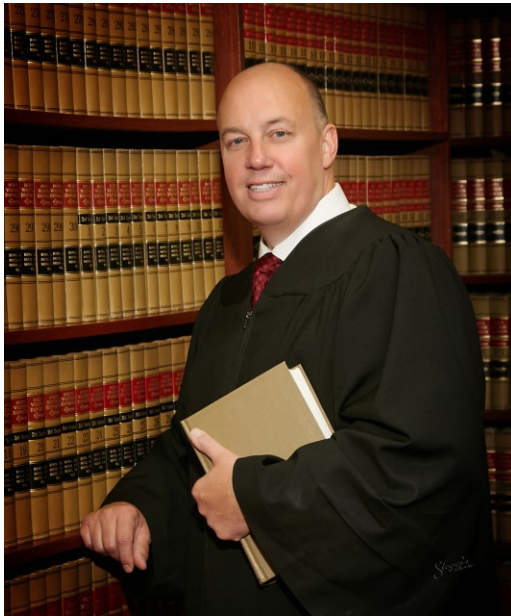
Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. He served as a Circuit Judge for the Fifth Judicial Circuit from 1986 until his appointment to the Supreme Court in 1995.

He served as President of the Conference of Chief Justices for the 2015-2016 Term. He has previously held the positions of Board Member, First-Vice President and President-elect and has chaired various committees. He also served as Chairman of the Board of Directors for the National Center for State Courts for its 2015-2016 Term. From 2010 to 2016 he served as the state court representative of the Criminal Rules Committee of the United States Courts. 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 was the recipient of the "Grass Roots" Award by the American Bar Association in 2014 also for his defense of judicial independence. He is the past President of the South Dakota Judges Association. He also 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. Chief Justice Gilbertson and his wife Deb, have four children.



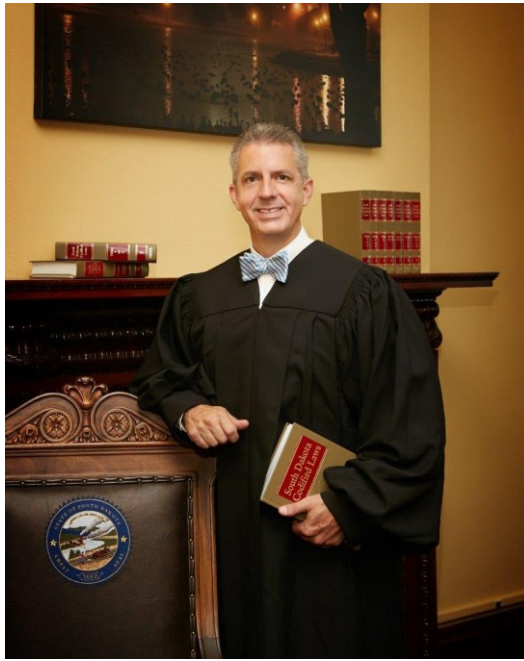
Justice Janine M. Kern

Justice Kern, who was appointed to the Supreme Court on November 25, 2014, by Governor Dennis Daugaard, represents the First Supreme Court District, which includes Custer, Lawrence, Meade and Pennington counties. She received a Bachelor of Science degree in 1982 from Arizona State University and a Juris Doctor degree from the University of Minnesota Law School in 1985. Justice Kern worked in the Attorney General's office from 1985–1996 serving in a variety of capacities including the appellate division, drug prosecution unit and as Director of the Litigation Division. She was appointed a Circuit Court Judge in 1996 in the Seventh Judicial Circuit comprised of Custer, Fall River, Oglala Lakota and Pennington Counties and served 18 years on the trial court bench. She is a member of the American Law Institute, the National Council of Juvenile and Family Court Judges, the State Bar Association, the Pennington County Bar Association, the American Bar Association Fellows and past President of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004–2013 and on the Federal Advisory Committee on Juvenile Justice from 2004–2008 and on numerous other boards and commissions. Justice Kern and her husband Greg Biegler make their home in the beautiful Black Hills.



Justice Steven R. Jensen

Justice Jensen was appointed to the Supreme Court by Governor Dennis Daugaard. He was sworn in on November 3, 2017. Justice Jensen represents the Fourth Supreme Court District consisting of Union, Clay, Yankton, Hutchinson, Hanson, Davison, Bon Homme, Douglas, Aurora, Charles Mix, Gregory, McCook, Turner and Lincoln Counties. Justice Jensen grew up on a farm near Wakonda, South Dakota. He received his undergraduate degree from Bethel University in St. Paul, Minnesota in 1985 and his Juris Doctor from the University of South Dakota School of Law in 1988. He clerked for Justice Richard W. Sabers on the South Dakota Supreme Court before entering private practice in 1989 with the Crary Huff Law Firm in Sioux City, Iowa and Dakota Dunes, South Dakota. In 2003, Justice Jensen was appointed as a First Judicial Circuit Judge by former Governor Mike Rounds. He became the Presiding Judge of the First Judicial Circuit in 2011. Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the SD Judges Association, and has served on other boards and commissions. In 2009, Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C. Justice Jensen and his wife, Sue, have three children.



Justice Mark E. Salter

Justice Salter began as a member of the Supreme Court on July 9, 2018, following his appointment by Governor Dennis Daugaard. Justice Salter received a Bachelor of Science degree from South Dakota State University in 1990 and his Juris Doctor degree from the University of South Dakota School of Law in 1993. After clerking for a Minnesota state district court, he served on active duty in the United States Navy until 1997 and later served in the United States Naval Reserve. Justice Salter practiced law with the Sioux Falls firm of Cutler & Donahoe, where he became a partner before leaving in 2004 to return to public service with the United States Attorney's Office for the District of South Dakota. As an Assistant United States Attorney, Justice Salter focused on appellate practice and became the chief of the office's Appellate Division in 2009. He was appointed as a Circuit Court Judge by Governor Daugaard and served in the Second Judicial Circuit from 2013 until his appointment to the Supreme Court in 2018. Justice Salter served as the presiding judge of the Minnehaha County Veterans Treatment Court from its inception in 2016 until 2018. He also serves as an adjunct professor at the University of South Dakota School of Law where he has taught Advanced Criminal Procedure and continues to teach Advanced Appellate Advocacy. Justice Salter represents the Second Supreme Court District which includes Minnehaha County. He and his wife, Sue, have four children.



Justice Patricia J. DeVaney

Justice DeVaney was appointed to the Supreme Court by Governor Kristi Noem to represent the Third Supreme Court District. She was sworn in on May 23, 2019. Justice DeVaney was born and raised in Hand County and graduated from Polo High School in 1986. She received her Bachelor of Science degree in 1990 from the University of South Dakota, majoring in political science, and received her Juris Doctor degree from the University of Virginia School of Law in 1993. Justice DeVaney began her career of public service as an Assistant Attorney General in the South Dakota Office of Attorney General, where she practiced law from 1993 to 2012. She began her practice in the appellate division, then moved to the litigation division where she spent seventeen years as a trial lawyer, prosecuting major felony offenses as well as representing the State in civil litigation in both state and federal trial and appellate courts. During her tenure at the Attorney General's Office, she also handled administrative matters for state agencies and professional licensing boards. Justice DeVaney was appointed by Governor Dennis Daugaard as a Circuit Judge for the Sixth Judicial Circuit in 2012, where she presided over criminal, civil and juvenile proceedings, heard administrative appeals, and assisted as the second judge for the Sixth Circuit DUI/Drug Court. Justice DeVaney has served as the Secretary-Treasurer, and is currently the President-Elect, of the South Dakota Judges Association. She has also served on various other committees and boards in her professional capacity and in the Pierre community, where she resides with her husband, Fred, and their three children.



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.



2020-2021 Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the Justices with research and writing of the opinion on the cases under consideration. In the photograph above from left to right, Elle Onisciuc, Law Clerk for the Supreme Court; Jennifer Williams, Law Clerk for Justice DeVaney; Kristin Derenge, Law Clerk for Justice Jensen; Erin Schoenbeck, Law Clerk for Chief Justice Gilbertson; Cole Romey, Law Clerk for Justice Kern; and Jennifer Doubledee, Law Clerk for Justice Salter

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.

Has 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 or her request, on issues involving executive power.

Circuit Court

Circuit Court services are available in each county seat.

Counties are grouped into seven circuits, served by forty-four 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 \$12,000. 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.

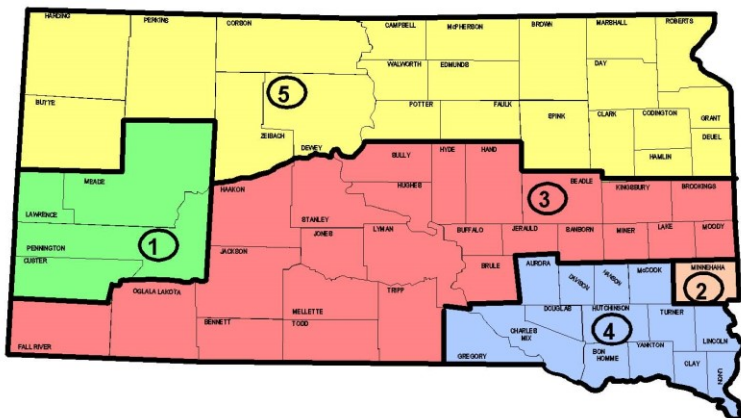
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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.

Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Kern was appointed in 2014 from District One. Justice Jensen was appointed in 2017 from District Four and Justice Salter was appointed in 2018 from District Two. Justice DeVaney was appointed in 2019 from District Three. Chief Justice Gilbertson was retained in the November 2014 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
October 2020 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.

Tammen and Jurgens v. Tronvold

On August 1, 2016, shortly after 6:00 p.m., Gerrit Tronvold was driving southwest on Grey Goose Road in an extended cab pickup towards the controlled “T-intersection” with South Dakota Highway 1804. Tronvold failed to yield the right of way, driving through the stop sign and turning left onto Highway 1804. As he crossed the oncoming lane of traffic, he did not see a motorcycle, ridden by Randall Jurgens and Lisa Tammen (Plaintiffs), in the oncoming lane. The Plaintiffs crashed into the side of Tronvold’s pickup truck near the rear bumper, sandwiching the Plaintiffs’ left legs between the motorcycle and the truck bumper. Both suffered life-threatening injuries, which included amputation of their left legs above the knee. Tronvold was not injured.

On the evening of the accident, Tronvold, a “rookie member” of the Pierre Volunteer Fire Department (PVFD), was traveling the 10 miles from his home to the Pierre fire station to attend a monthly meeting scheduled for 6:30 p.m. Tronvold was not responding to an active fire call or emergency at the time of the collision. Although it is disputed whether attending the monthly meeting was mandatory, Tronvold was required by City ordinance to attend all PVFD meetings.

As a result of the accident, Plaintiffs brought a negligence suit against Tronvold individually, the City of Pierre (City), and the PVFD alleging vicarious liability under the doctrine of respondeat superior. The City had a governmental liability and auto policy through its participation in the South Dakota Public Assurance Alliance (SDPAA), a government risk-sharing pool. The governmental liability coverage agreement contained an

Exclusion precluding coverage for “Fire Department, Fire Fighting activities or Fire Department vehicles.” The PVFD was insured through a policy from Continental Western Insurance Company providing coverage for general liability and automobile property damage. The policy contained an Endorsement retaining governmental immunity to the extent available under state law.

The PVFD and the City moved for summary judgment alleging they were not vicariously liable for Tronvold’s actions under the “going and coming” rule which provides that an employee is not acting within the scope of employment while commuting back and forth to work. Additionally, they argued they had governmental immunity from suit. In response, Plaintiffs asserted that the PVFD’s transportation requirements for its volunteer firefighters placed Tronvold within the “required vehicle exception” or the “special errand” exception to the “going and coming” rule. They further alleged that the City and PVFD waived governmental immunity to the extent of their liability coverage. The circuit court granted summary judgment to the City and PVFD concluding Tronvold’s commute was not within the scope of his agency and that the City and PVFD were immune from suit. The court held, however, that if the agency determination was reversed there would be a question of fact for the jury whether Tronvold’s actions were grossly negligent precluding the immunity available for nonprofit fire departments under SDCL 20-9-45.

Plaintiffs raise the following issues on appeal:

1. Whether the circuit court erred in failing to apply one of the exceptions to the “going and coming” rule, which would place Tronvold’s acts within the scope of his employment or agency, thus rendering the City and PVFD vicariously liable for his actions.

2. Whether the circuit court erred in holding that the City of Pierre and the PVFD did not waive governmental immunity by obtaining liability insurance.
3. Whether the PVFD's Governmental Liability Endorsement is void against public policy because it defeats the intent of SDCL 21-32A-1 and is unfair to injured third-parties.

Mr. Edwin E. Evans, Mr. Mark W. Haigh, and Mr. Tyler W. Haigh, Attorneys for Appellant Lisa A. Tammen

Mr. John R. Hughes and Mr. Stuart J. Hughes, Attorneys for Appellant Randall R. Jurgens

Mr. Michael L. Luce and Ms. Dana Van Beek Palmer, Attorneys for Appellee Pierre Volunteer Fire Department

Mr. Robert B. Anderson and Mr. Douglas A. Abraham, Attorneys for Appellee City of Pierre

State v. Rus

On June 25, 2019, Les and Arla Crago's mailbox was damaged. Mr. Crago notified the authorities. He provided Chad Rus's name as the individual he believed was responsible for the damage. Unbeknownst to Mr. Crago, Rus called and left a voicemail on Mr. Crago's cellphone. In the message, Rus notified Mr. Crago that, due to a flat tire, he drove into the couple's mailbox. Rus offered to replace the mailbox.

Acting on Mr. Crago's belief, law enforcement officers drove to Rus's residence and observed a vehicle with damage to its front passenger side parked in the driveway. To determine Rus's location on the evening of the incident, law enforcement officers requested surveillance videos from a nearby bar and elevator. On July 1, 2019, officers interviewed Rus. Rus admitted to hitting the Crago's mailbox, but denied driving under the influence.

On July 11, 2019, the Aurora County State's Attorney filed a complaint charging Rus with misdemeanor counts of: (1) driving a motor vehicle while under the influence of an alcoholic beverage (SDCL 32-23-1(2)); (2) reckless driving (SDCL 32-24-1); and failure to report an accident (SDCL 32-34-6). A detailed report of the law enforcement officers' investigation was attached to the complaint.

Based on the complaint and report, the Aurora County magistrate judge issued a felony warrant for the arrest of Rus. On July 25, 2019, officers arrested Rus. Later that day, Rus was released on bail. On September 6, 2019, Rus moved for a preliminary hearing. In the alternative, he requested the circuit court to hold that, if he is convicted of the charged misdemeanors, he will only face misdemeanor, not felony, punishment.

Under SDCL 32-23-4, if a defendant is convicted of a third driving under the influence (DUI) offense, the defendant's punishment is enhanced from a misdemeanor to a class 6 felony. Under SDCL 23A-4-3, a defendant "charged with an offense punishable as a felony" is entitled to a preliminary hearing; unless, the defendant waives his or her right to the hearing. At a preliminary hearing, the court determines whether an offense occurred and whether probable cause exists to believe the defendant committed the offense. It provides the court an early opportunity to dismiss groundless accusations.

Rus, prior to this case, received two separate convictions for DUI on November 1, 2016 and February 1, 2011. Rus claims he is entitled to a preliminary hearing. He argues, if convicted of the charged DUI, he may receive a felony punishment under SDCL 32-23-4. A preliminary hearing, he argues, will properly inform him of the charges he faces and the charges' maximum punishments.

On September 25, 2019, the circuit court held a hearing. The court denied Rus's motion for a preliminary hearing and his alternative request to limit his punishment to a misdemeanor. The court reasoned, at this stage of the proceeding, Rus's charged offense was a misdemeanor, since the State had not filed a supplemental information enhancing the offense's punishment to a felony. Therefore, he could not receive the statutory rights accompanying a felony, which include a preliminary hearing.

On October 22, 2019, the State filed a supplemental information informing the circuit court that the charged offense was Rus's third DUI offense. The State notified the circuit court that if Rus is found guilty of the charged DUI offense, Rus is eligible for the DUI sentence enhancement. The enhancement will elevate his offense from a misdemeanor to a class 6 felony.

Rus appealed the circuit court's ruling. The South Dakota Supreme Court granted Rus's petition for appeal from the intermediate order.

Rus raises the following issues on appeal:

1. Whether a defendant is guaranteed a preliminary hearing when charged with an offense punishable as a felony.
2. Whether denial of a preliminary hearing, when charged with an offense punishable as a felony, deprives a defendant of due process of law guaranteed by the U.S. Constitution, Sixth Amendment (through the Fourteenth Amendment's 'Due Process' Clause) and Article VI, § 2 of the South Dakota Constitution.

Mr. Steven J. Bucher and Mr. Bert S. Bucher, Attorneys for
Appellant Chad Rus

Mr. John R. Steele and Ms. Rachel Mairose, Attorneys for
Appellee State of South Dakota

Koenig v. London

On January 7, 2015, Donald London shot and injured Trooper John Koenig of the South Dakota Highway Patrol. The incident occurred during a standoff with law enforcement officers at a family member's farmhouse in rural Kimball, South Dakota, where Donald was staying.

Donald, forty-two years old at the time of the shooting, was previously diagnosed with paranoid schizophrenia and had sought treatment. Donald's thoughts could be detached from reality and included his belief that his deceased wife was, in fact, alive and being held captive by law enforcement or a foreign intelligence agency.

In the days leading up to the standoff, officers had grown increasingly concerned with what they believed to be Donald's erratic and dangerous behavior. On the evening of January 5, law enforcement was contacted by a local bar due to Donald's involvement in an altercation. Officers later found Donald, intoxicated and hysterical, walking on a county road in bitter cold temperatures after his truck broke down. They released him to his father, Michael London.

The next morning, January 6, Donald's mother, Bonita (Bonnie) London, called law enforcement dispatch, requesting an ambulance be sent to the farmhouse after receiving a troubling call from her daughter about Donald's condition. Bonnie was out of town caring for her mother. Officers went to the farmhouse and recovered several weapons after resolving an armed confrontation with Donald in the basement. They confiscated three of the weapons and secured the others in a gun safe, providing the key to Michael. Officers elected not to seek a mental health hold based on Michael's agreement to obtain immediate mental health assistance for his son. Donald was

evaluated by a mental health provider in Mitchell and returned to the farmhouse later that day.

The standoff with officers the following day, January 7, began with a law enforcement response to Donald's threat to shoot two local law enforcement officers. As officers from multiple agencies arrived at the farmhouse, they established a perimeter. Initially, Bonnie was at the farmhouse with Donald and Michael, but left and was detained by officers.

Later, during the actual standoff, Donald left the farmhouse armed and began walking toward an officer's position when Trooper Koenig, stationed nearby, intervened and gave Donald commands to drop his weapon. Donald initially complied but returned to reclaim the weapon and then began firing, eventually hitting Trooper Koenig in the left shoulder blade, seriously injuring him.

Donald pled guilty but mentally ill to three counts of aggravated assault on a law enforcement officer. One count related to Trooper Koenig's shooting and the other two involved Donald pointing a firearm at several other officers who were not injured. The sentencing court imposed sentences for the three offenses totaling thirty years in prison.

Once the criminal proceedings were completed, Trooper Koenig and his wife, Karen (the Koenigs), brought this civil action against Donald and Bonnie. Michael passed away ten months after the shooting. The Koenigs originally named Michael's estate as a defendant but later dismissed their claim against the estate.

The Koenigs asserted a general negligence claim against Bonnie and further alleged that she negligently supervised Donald and negligently entrusted him with firearms. They claim specifically that Bonnie breached a legal duty by falsely telling Donald hours before the standoff began that the Bureau of

Alcohol, Tobacco, Firearms, and Explosives (ATF) were coming to the farmhouse, causing Donald's mental health to spiral out of control. The Koenigs also contend that Bonnie assumed a duty to supervise Donald's conduct and effectively entrusted him with weapons.

Bonnie moved for summary judgment on the negligence claims, and the circuit court granted the motion. The court found that Bonnie did not owe a legal duty to the Koenigs because she lacked sufficient control over her emancipated adult son and because his act of shooting Trooper Koenig was not foreseeable. The circuit court also determined that Bonnie did not assume a duty to supervise Donald and that she did not have control over the firearms she was alleged to have entrusted to Donald.

The Koenigs raise the following issues on appeal:

1. Whether the circuit court erred when it added a "duty to prevent a third party's misconduct" as an element of Trooper Koenig's negligence claim against Bonnie for Bonnie's own negligence.
2. Whether the circuit court erred when it determined that Donald's aggressive behavior toward law enforcement was not foreseeable after construing the disputed facts against the non-moving party, Trooper Koenig.
3. Whether the circuit court erred when it dismissed Trooper Koenig's negligent supervision claim against Bonnie.

Mr. Derek A. Nelsen, Mr. Eric T. Preheim, and Mr. Andrew
T. Fick, Attorneys for Appellants John Koenig and
Karen Koenig

Mr. Richard L. Travis and Mr. Aaron A. Fox, Attorneys for
Appellee Bonita London

State v. Evans

Harry David Evans and S.B. met through an online dating site in 2016. At that time, she was going through a divorce and was looking for companionship and help with taking care of her large property in Pennington County where she raised horses. Their relationship eventually turned romantic, and Evans spent many nights at S.B.'s home while he continued to help take care of her property.

In December 2016, S.B. attempted to end their relationship because Evans was controlling, possessive, and threatening. He had at least twice threatened to kill her and then himself, and S.B. had called law enforcement multiple times because of Evans's conduct. However, she did not completely sever her ties with Evans and continued their off and on intimate relationship until approximately July 2017, when, on advice from law enforcement, S.B. obtained a protection order against Evans. By this time, S.B. had moved to a new property in Custer County near Hermosa. Despite the protection order, Evans continued to contact her. He would leave treats in S.B.'s mailbox, farm related items at the end of her driveway, and love letters near her vehicle. He also sent her threatening text messages. S.B. believed Evans was stealing her mail and was going through her trash. She reported this to law enforcement, who set up game cameras around S.B.'s property in August 2017.

On the evening of September 5, 2017, after receiving what she perceived to be a threatening message from Evans, S.B. notified law enforcement. Around 11:30 p.m., Marshal Daggett responded and searched her property and home, finding no signs of Evans. After the Marshal left, S.B. took a bath, had a glass of wine, took a sleeping pill, and fell asleep around 1:00 a.m.

Before the sun rose, S.B. awoke to the sound of Evans's voice beside her in bed. She tried to get away, but Evans overpowered her, forced sleeping pills into her mouth, and put duct tape around her mouth, hands, arms, and legs. S.B. testified that Evans wrapped her in a blanket and dragged her down the stairs and outside into her vehicle. S.B. explained that she blacked out and when she awoke, she was back at her house. She described how Evans then cut away some of the duct tape and raped her while her arms were still bound. Later that morning, Evans forced S.B. to give him a ride to his truck he had parked down the road. S.B. returned home, and shortly thereafter, the Marshal arrived to check on her. She told him what had happened and was taken to the hospital for a sexual assault examination while law enforcement investigated the incident.

During the investigation, state and tribal law enforcement located Evans at the Prairie Winds Casino and Hotel on the Pine Ridge Indian Reservation. State law enforcement obtained warrants from a state circuit court judge for Evans's arrest and to search his vehicle and hotel room. After Evans was arrested, a grand jury indicted him on six counts, including rape, kidnapping, aggravated assault, and burglary. Evans pled not guilty.

Prior to trial, the State filed a notice of intent to admit other act evidence, namely testimony from Evans's ex-wife about Evans's threatening behavior toward her in 1993 and 1994. Over Evans's objection, the circuit court found the evidence relevant and admissible to prove motive and common plan.

Evans filed a pretrial motion to suppress evidence seized as a result of law enforcement's entry into and search of his hotel room and the search and seizure of his vehicle that had been parked outside the hotel. Evans, a non-Indian, asserted that state law enforcement lacked jurisdiction to search and seize

property located on an Indian reservation, despite the fact that the crime being investigated occurred off the reservation. The court denied the motion to suppress.

At the beginning of voir dire, 24 prospective jurors of the 55-member jury panel raised their hands when the circuit court asked whether the length of the trial or nature of the charges would “make it impossible for you to sit and be fair and impartial jurors.” The court then recessed in chambers with counsel, Evans, and the court reporter to individually address each juror’s concerns. After brief questioning, almost entirely by the court, and without either counsel raising a challenge for cause, the court dismissed 20 of the 24 prospective jurors. Neither counsel objected to this procedure, and after jury selection continued in the courtroom, both counsel for Evans and the State passed the jury for cause.

During the five-day trial, multiple witnesses testified, including S.B., Evans’s ex-wife, the sexual assault nurse examiner, and multiple law enforcement officers. Evans’s theory of defense was that he and S.B. were still engaged in a consensual, sexual relationship on the date of the incident and that S.B. claimed he raped her to cover up her decision to allow Evans into her home in violation of the protection order.

The jury found Evans guilty on all counts. Evans appeals, asserting the following issues:

1. Whether the circuit court abused its discretion in admitting other act evidence from Evans’s ex-wife.
2. Whether the circuit court failed to follow the statutory procedures during jury selection such that a structural error or other reversible error occurred.

3. Whether the court erred in denying Evans's motion to suppress.
4. Whether the court abused its discretion in admitting Special Agent Globe's testimony that the physical evidence corroborated S.B.'s story.

Mr. Jason R. Ravnsborg, Attorney General, and Quincy R. Kjerstad, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Mr. John R. Murphy, Attorney for Appellant Harry David Evans

State v. Leader Charge

In April 2019, a jury found Sean Leader Charge guilty of two counts of sexual contact with a child under 16 (SDCL 22-22-7). The victim is the sister of Mr. Leader Charge's girlfriend. On various occasions throughout 2018, Mr. Leader Charge touched the ten-year-old victim's chest, buttocks, and vaginal region over her clothing.

The case was brought before the Honorable John L. Brown in White River, South Dakota. Ms. Brandis, the City's Finance Officer, was a potential juror for the case. During the jury selection process, Ms. Brandis, Judge Brown, and Mr. Leader Charge's attorney, Mr. Love, partook in the following exchange:

MR. LOVE: Is there anybody who has, you know, a plane ticket to Maui tomorrow morning, you know, some other pressing reason that makes you think, you know, I just cannot sit here in this courtroom for the next day and a half, two days possibly and not have that on my mind? . . .

MS. BRANDIS: I'm the city finance officer and I am the only person in my office.

MR. LOVE: Okay.

MS. BRANDIS: I got water bills, payroll. I know both sides of the family and I just don't feel I can be a fair juror.

MR. LOVE: So it sounds like the city of White River is going to stop if you're --

MS. BRANDIS: Yeah, it will. These people won't get their water bills.

MR. LOVE: Well, you know, don't say that. They might ask me to keep you all week. But it sounds like it would put you quite a bit behind in your job?

MS. BRANDIS: Yes, it would, sir.

MR. LOVE: And in addition, something we haven't really gotten to yet but you said you know the family?

MS. BRANDIS: Yeah. I deal with them when they come in my office.

MR. LOVE: Is there anything about your interaction with the family that you think would make it difficult for you to be here today?

MS. BRANDIS: The victim comes through my alley because I live right across from the high school. She goes to the playground and I visit with her. I just don't feel I can do this.

MR. LOVE: You don't think you could be fair --

MS. BRANDIS: No.

MR. LOVE: -- and judge this case based just on what you hear here today?

MS. BRANDIS: Right.

MR. LOVE: I guess I would ask that Ms. Brandis be excused, Your Honor.

THE COURT: Ma'am, I typically don't grant excuses for job-related reasons. Obviously, everyone is busy and I appreciate that there are time frames to meet. We've got people here that are in the middle of calving, important issues. There's always an excuse for that. I guess what my question really is is we are trying to find a jury that can be fair and impartial and

judge the facts of the case based solely on what comes in through the evidence presented here in court. I know that a job like you have, you're the only one. It would certainly be inconvenient for you. But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel you cannot listen to the evidence here --

MS. BRANDIS: No --

THE COURT: -- and present a fair verdict?

MS. BRANDIS: -- I can't.

THE COURT: I'm going to deny the request to excuse then at this point. Thank you.

MR. LOVE: Good try (The attorney continued questioning potential jurors about work conflicts.)

Mr. Love passed the jury, containing Ms. Brandis, for cause. The parties each had ten peremptory challenges. Neither party used a challenge on Ms. Brandis resulting in her placement on the jury. After a two-day trial, the jury found Mr. Leader Charge guilty of both counts.

Mr. Leader Charge filed a motion for new trial on the grounds of jury misconduct and irregularity. Circuit courts have broad discretion when determining juror qualification. To reverse a judgment of conviction, the circuit court must have committed an error, and the error must have caused a material prejudicial injury. Under SDCL 23A-20-13.1, a prospective juror may be dismissed for cause when, among other reasons, a prospective juror: holds substantial knowledge and an opinion of the case; or is bias against a party, witness, or attorney; or cannot try the issue impartially.

At the motion for a new trial hearing, a witness testified that, prior to the trial commencing, she discussed the case with Ms. Brandis. Mr. Leader Charge's girlfriend also testified that she spoke with Ms. Brandis, prior to the trial, about the case; and, during the trial, she observed Ms. Brandis by reading her lips saying, "I don't want to do this." Ms. Brandis testified that she had a short conversation with Leader Charge's girlfriend, prior to becoming a juror, but did not speak with her during the trial. She also testified that she had not spoken to the testifying witness about the case; she knew Mr. Leader Charge, but not personally; she only considered evidence presented at trial; she did not remember the voir dire process; and she did not know the victim in the case. The jury's bailiff did not observe any juror making inappropriate contacts.

The circuit court found the jury did not consider extraneous information during deliberations; no prejudice occurred due to Ms. Brandis's prior knowledge of the case; and any presumption of prejudice as to knowledge of the case, a juror's ability to be fair and impartial, or inappropriate contacts between a juror and a witness were rebutted and shown to be harmless. The circuit court denied Mr. Leader Charge's motion for a new trial.

Mr. Leader Charge appeals his conviction and sentence alleging the sole issue:

1. Whether the circuit court erred by denying the removal of juror thirty-one Ms. Brandis for cause.

Mr. Jason R. Ravensborg, Attorney General and Ms. Brigid C. Hoffman, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Mr. Robert T. Konrad, Attorney for Appellant Sean Leader Charge

Frye-Byington v. Rapid City Medical Center

Jodie Frye-Byington sought medical care at Rapid City Medical Clinic (RCMC) from 2008 to 2014 for complaints of a constant cough, hoarseness, neck pain and swelling, difficulty breathing, and chest pain. Several radiographic images taken during this timeframe revealed a mass in her chest, but Jodie asserts she was not initially told of its presence. Over time, the mass grew to about seven centimeters in length, and doctors at the Mayo Clinic removed the mass in September 2014. The mass, known as a mediastinal mass, was determined to be benign thyroid tissue that regrew after doctors removed her thyroid prior to 2008.

In July 2016, Jodie commenced this action against RCMC and three of its physicians alleging malpractice for misdiagnosing her condition and failing to inform her of the mass. Jodie's principal claim was that Dr. Robert Burgess, an Ear, Nose and Throat Specialist (ENT), was negligent for not telling Jodie about the mass in 2008 when it was first seen on a CT scan. Her claims against Dr. Michael Rafferty and Dr. Gary Welsh, both family practice physicians, were that they similarly failed to advise her of the mass. Jodie's expert witness, a family practice physician, concluded that the standard of care for a physician required disclosure of the mass to the patient in all instances.

Dr. Burgess moved for summary judgment, arguing that Jodie's claim against him was time-barred under South Dakota's two-year medical malpractice statute of repose. The circuit court denied Dr. Burgess' motion based upon the continuing tort doctrine, which provides that an action may be deemed timely even though the civil wrong began outside of the repose period if it continues until a point within the repose period.

During the six-day jury trial, the Appellees objected to Jodie's expert witness' testimony, alleging some of her opinions were not previously disclosed. The Appellees also objected to Jodie's effort to support her malpractice allegations by claiming additional negligent conduct by an RCMC doctor not named in her suit. The court overruled these objections. Additionally, Jodie's counsel asked to call two rebuttal witnesses after the defense rested, arguing they were necessary to introduce two documents to rebut Dr. Burgess' testimony that he had not previously seen the documents. The court denied the request, explaining that Jodie's counsel should have offered the documents as exhibits in its case in chief.

At the close of Jodie's case and again the at the close of evidence, the Appellees moved for judgment as a matter of law arguing Jodie's expert failed to produce testimony establishing Dr. Burgess' standard as an ENT specialist was not met. In addition, the Appellees moved for judgment as a matter of law contending Jodie's expert had failed to provide testimony sufficient to support the malpractice claim against all of the named providers. The court denied these motions and also denied Jodie's proposed jury instruction describing RCMC's liability for the negligent conduct of its medical providers.

The jury returned a verdict in favor of RCMC and the named physicians. Jodie raises the following issues on appeal:

1. Whether the circuit court abused its discretion when it denied her request to call two rebuttal witnesses.
2. Whether the circuit court abused its discretion when it denied her proposed jury instruction.

By notice of review, the Appellees also raise the following additional issues:

1. Whether the circuit court erred when it denied Dr. Burgess' motion for summary judgment.
2. Whether the circuit court erred when it denied Dr. Burgess' motion for judgment as a matter of law.
3. Whether the circuit court erred when it denied the Appellees' motion for judgment as a matter of law.
4. Whether the circuit court abused its discretion when it allowed expert testimony alleged to be previously undisclosed.
5. Whether the circuit court abused its discretion when it allowed evidence of an unnamed provider's alleged negligent care to be attributed to the named defendants.

Mr. R. Shawn Tornow, Attorney for Appellant Jodie M. Frye-Byington

Mr. Lonnie R. Braun, Mr. Gregory J. Bernard, and Ms. Kimberly Pehrson, Attorneys for Appellees Rapid City Medical Center, LLP, Gary L. Welsh, M.D., Robert C. Burgess, M.D., and Michael C. Rafferty, M.D.

State v. Vortherms

In the early morning hours of Saturday, July 1, 2017, Shannon Fischer and his girlfriend, Anna Mason, were driving home in their Subaru from the Luverne, Minnesota drive-in theater. Fischer's eleven-year-old daughter, S.F., was sleeping in the backseat.

Near the Brandon exit on I-90, Defendant Joshua Vortherms attempted to pass the Subaru in his white truck. Vortherms had consumed alcohol before driving. He was travelling at approximately 95 miles-per-hour, seconds before he lost control of his vehicle and crashed into the Subaru. Both vehicles veered into the ditch, and the Subaru flipped over onto its passenger side.

Fischer and Mason both died at the scene due to multiple blunt force trauma. S.F. was pinned in the backseat of the Subaru. First responders removed her from the vehicle. She was treated at the hospital for a broken leg. Vortherms suffered a gash to his head and was bleeding heavily when officers arrived. He was taken by ambulance to Avera McKennan Hospital in Sioux Falls.

At the hospital, a state trooper ordered a draw of Vortherms's blood. The trooper did not obtain a search warrant because he did not believe he had time before Vortherms went into surgery. Hospital staff drew Vortherms's blood approximately one hour after the accident was first reported to law enforcement. The draw produced a BAC of .159.

Vortherms was charged with vehicular manslaughter and driving under the influence. Vortherms filed a motion to suppress the blood draw prior to trial, arguing that a warrant was required for the blood draw under *Missouri v. McNeely*, 133 S.

Ct. 1552 (2013). The circuit court denied the motion, holding that the draw was permitted under the exigent circumstances exception to the Fourth Amendment. A jury convicted Vortherms on vehicular homicide and driving under the influence. The court sentenced Vortherms to fifteen years in the state penitentiary.

Vortherms appealed and raises the following issues:

1. Whether the trial court erred when it denied Vortherms's motion to suppress a warrantless blood draw by applying the exigent circumstances exception to the Fourth Amendment.
2. Whether Vortherms's trial counsel committed cumulative errors that amounted to ineffectual assistance of counsel under the Sixth Amendment.

Mr. Jason R. Ravensborg, Attorney General, and Ms. Brigid Hoffman, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Ms. Nichole A. Carper, Attorney for Appellant Joshua Vortherms

Sierra Club v. Clay County Board of Adjustment

Travis and Jill Mockler applied for a conditional use permit in February 2019 to operate a concentrated animal feeding operation (CAFO) in Clay County, South Dakota. The Clay County Planning Commission granted the permit, and Sierra Club appealed. After multiple hearings, the Clay County Board of Adjustment affirmed the permit decision with additional conditions.

In September 2019, Sierra Club filed a petition in circuit court seeking a writ of certiorari and reversal of the decision to grant the Mocklers' permit. It alleged that its members' due process rights were violated because the wrong County entity (Board of Adjustment rather than Board of County Commissioners) heard the appeal from the Planning Commission's decision and because they were not provided a fair and impartial hearing. Sierra Club further claimed that the Board failed to regularly pursue its authority when it approved the permit and that its decision was illegal in light of Clay County's ordinances governing CAFOs.

The Mocklers filed a motion under SDCL 15-6-12(b)(1) to dismiss Sierra Club's petition for lack of subject matter jurisdiction. They asserted that Sierra Club does not have direct standing to seek relief because it is not a person aggrieved by the Board's decision. They further claimed that Sierra Club does not have representational standing because Sierra Club's members are not persons aggrieved, and even if they are, the claims asserted or relief requested requires participation of the individual members. The Clay County Board of Adjustment joined the Mocklers' argument.

The circuit court granted the Mocklers' motion to dismiss, concluding that Sierra Club failed to establish on the face of its petition that it has direct or representational standing

to appeal under SDCL 11-2-61. The court determined Sierra Club lacks direct standing because it is not a person aggrieved by the Board's decision and lacks representational standing because it "cannot prove [its] members are aggrieved without evidence from those members." The court also rejected Sierra Club's argument that its petition sought a mandamus relief under SDCL 11-2-35, noting the petition did not plead or request such relief, and under SDCL 11-2-16.1, a writ of certiorari is the exclusive avenue to appeal a decision to grant a conditional use permit.

Sierra Club appeals, asserting the circuit court erred in determining that it lacked direct standing under SDCL 11-2-61 and representational standing under SDCL 11-2-35 and SDCL 11-2-61.

Mr. Mitchell A. Peterson and Mr. Reece M. Almond, Attorneys
for Appellant Sierra Club

Mr. James Simko, Attorney for Appellee Clay County Board of
Adjustment

Mr. Brian J. Donahoe and Mr. Daniel B. Weinstein, Attorneys
for Appellees Travis Mockler and Jill Mockler

State v. Ostby and Olmsted

On March 20, 2019, two Deadwood law enforcement officers responded to a tip about potential drug trafficking activity at an apartment complex where Carrie Lynn Ostby resided. Ostby's next door neighbor, April Roberts, reported that she found a baggie, containing what she believed to be methamphetamine, in the only dryer located in the community laundry room, immediately after she observed Dana Olmsted take the clothes out of the dryer and return to Ostby's apartment. Roberts further reported that a few weeks earlier, she had found a similar baggie, with what she believed to be methamphetamine, in the hallway of her apartment complex, and that she observed heavy traffic in and out of Ostby's apartment.

The officers field-tested the substance in the baggie found in the dryer, and it tested positive for methamphetamine. One of the officers was also aware of an ongoing drug investigation into Ostby's apartment after there had been other reports of foot traffic in and out of the apartment at all hours of the day and night. He was also aware that another officer, a month earlier, had observed a man enter Ostby's apartment while leaving his vehicle running outside and the driver's door left open, and return after two minutes. After leaving Ostby's apartment, the man was stopped for a traffic violation and methamphetamine was found in his possession during the stop.

Knowing this information, officers decided to talk to Olmsted. They knocked on Ostby's apartment door, and once Olmsted asked who was at the door, the officers announced: "Police." After they identified themselves, Olmsted did not respond. They knocked again, but nobody came to the door. The officers heard movement inside the apartment and decided to enter the apartment to prevent the possible destruction of

evidence of criminal activity. Officers asked the property manager to unlock the door but had to force their entry because the door was held shut with a knife. Once inside, the officers arrested Olmsted. Ostby was not present at the apartment. While one officer secured the apartment, the other officer obtained a search warrant for Ostby's apartment, her vehicle, and Ostby's and Olmsted's urine. Finding probable cause, the magistrate judge granted the officer's request.

The subsequent search of the apartment produced several baggies containing methamphetamine. Olmsted and Ostby also tested positive for methamphetamine. Olmsted and Ostby were indicted on charges of possession of a controlled substance and unauthorized ingestion of methamphetamine. Olmsted and Ostby both filed motions to suppress the evidence obtained as a result of the search warrant, arguing that the affidavit in support of the warrant lacked probable cause.

The circuit court granted both motions to suppress finding that the search warrant was not based upon probable cause. The court granted the State an intermediate appeal. The State, now raises the following issues:

1. Whether the affidavit in support of a search warrant contained sufficient evidence to show probable cause.
2. Whether the good faith exception applies to the exclusionary rule.

Mr. Jason R. Ravnsborg, Attorney General, and Ms. Erin E. Handke and Ms. Brenda Harvey, Assistant Attorney Generals, Attorneys for Appellant State of South Dakota

Mr. Ellery Grey, Attorney for Appellee Carrie Lynn Ostby

Mr. Robert D. Pasqualucci, Attorney for Appellee Dana Olmsted

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.

NOTES