MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 10, 1981

The thirty-ninth meeting of the Senate Judiciary Committee was called to order by Senator Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF HOUSE BILL 689:

PROVIDING FOR THE COMPULSION OF INCRIMINATING TESTIMONY OF WITNESSES BEFORE COURTS, STATE AGENCIES, AND THE LEGISLATURE.

Rep. Matsko, District 38, presented the bill on behalf of Rep. Keyser, saying that it was closely patterned after federal guidelines, and that its purpose is to remove the transactional immunity that is currently in state law.

Tom Honzel, representing the County Attorneys Association, supported the bill, stating that there is another bill to be heard later this week in this committee which should have some of its language included in HB 689 if it passes the committee.

Speaking in opposition, Karen Mikota, representing the League of Women Voters, said that her group feels that the committee should very carefully consider the sweeping change brought about by changing from transactional immunity to use immunity. She said that on page 3, line 4, "shall" should be changed to "may", and she objected to the repealer on 46-4-305.

Rep. Matsko said that repealing 46-4-305 was a change which he did not know about, and agreed that it should be stricken.

Senator Anderson asked him to check back with his researcher to find out why the repealer had been included, and to give the information to this committee.

Senator Halligan stated that he did not feel from the testimony presented that a definite problem exists with the current law, and for that reason questioned the need for the bill. Rep. Matsko replied that too often the guilty parties who testify walk away free and clear, even though they were principals in the crime.

Senator Mazurek asked Rep. Matsko to comment on Karen Mikota's point relative to page 3, line 4. He replied that the bill was drafted intentionally to remove some of the discretion from the judges. Senator Mazurek said that he feels this would remove the discretion from the judge and give it to the county attorney. Matsko replied that it already lies with the county attorney relative to a law-abiding citizen.

CONSIDERATION OF HOUSE BILL 690:

TO GENERALLY REVISE AND CLARIFY CHAPTERS PERTAINING TO POSTCONVICTION AND HABEAS CORPUS RELIEF.

This bill was presented by Rep. Keedy, on behalf of Rep. Keyser. Rep. Keedy said that it was hoped that this bill will induce a defendant to seek relief in a shorter period of time so that witnesses, prosecutors, etc., are still alive and able to be located. Another purpose of the bill is to prevent retrying over and over grounds which have been found deficient.

John Maynard, assistant attorney general, who had helped draft the bill because of problems in his office with postconviction relief cases, spoke in support of it. He said that nothing about this bill restricts the defendant's access to the courts. When a defendant is convicted he has four avenues open -- appeal, postconviction relief (the only area affected by this bill), executive clemency, or going to the federal courts. This bill, in affecting only the one stage, helps to promote the finality of convictions, to avoid piecemeal litigation of claims, and to expedite the processes.

Tom Honzel supported the bill on behalf of the County Attorneys Association.

Senator O'Hara asked if this bill was an attempt to correct some of the current unhappiness people have with the legal system, and Mr. Maynard said that it is, and quoted the McKenzie case as an example.

Senator Mazurek asked about the relationship between sections 2 and 7 with habeas corpus, and Mr. Maynard discussed the other avenues which would be open to a defendant if habeas corpus were not.

In closing, Rep. Keedy said that the people of Montana seem to want this legislation.

CONSIDERATION OF HOUSE BILL 626:

TO REPEAL THE "EXCLUSIONARY RULE";

PROVIDING A CIVIL REMEDY FOR VIOLATION OF A PERSON'S CONSTITUTIONAL PRIVACY AND RIGHTS.

Rep. Keedy, District 18, Kalispell, presented the bill, saying it would repeal the exclusionary rule of evidence. He said that it would offer many forms of relief to people who had been subjected to unlawful police activity, rather than the constitutional freedoms now enjoyed by suspects. The evidence obtained illegally could be used; however, liability would attach to the offending police officer and his employing agency. Keedy continued that the exclusionary rule is not a constitutional mandate, but a policy adopted by the supreme court, so it is appropriate for the legislature to consider changing that policy. He stated that the exclusionary rule is not working as it should, and produces many unfortunate and unintended results; it is a tool of the guilty, and does nothing to protect the innocent victim of unlawful police conduct; it is more a search for error than a search for truth; it does not distinguish between major and minor infractions of the fourth amendment to the Constitution, or between serious and non-serious crimes; it does not promote a greater respect for the law among police officers, and inspires harrassing activity on their part; it discourages adequate internal disciplinary actions in police forces.

Tom Honzel supported the bill on behalf of the County Attorneys Association, quoting the case of United States v. Williams when saying that this bill is not unconstitutional.

Mark Racicot supported the bill, having researched it for the County Attorneys Association, and described it as a meaningful alternative to the exclusionary rule. He said that a tremendous price has been paid over the years for the exclusion of truth.

John Matsko, Representative for District 38, supported the bill, with certain reservations. He felt a change should be made, as he did not feel that the police should be singled out as the individuals to bear the entire responsibility for violations of rights. He presented amendments to this effect (attached Exhibit A).

Sheriff Chuck O'Reilly spoke in opposition to the bill, as Sheriff of Lewis & Clark County and a member of the board of directors of the Montana Sheriffs & Peace Officers Association. He said that it was unfair to charge law officers with being so corrupt that they are responsible for returning criminals to the streets. He read from a newspaper article on drug use, and said that the problem would get much worse under this proposed law because no peace officer would be willing to sign

an affidavit of probable cause. He added that under current law whenever any law officer violates a constitutional right of the criminal he is investigated by the FBI and the incident is published in the papers. To a public official who is beholden to the voting public, this is adequate control of the problems which arise. He felt that this bill would give the criminal yet another edge over the peace officers, and that there should be a change in the exclusionary rule which does not burden peace officers additionally. He asked that the committee either amend the bill accordingly or kill it.

Jack Williams, representing the Montana State Chiefs of Police, opposed the bill, saying that the police officers should not be made the scapegoats for the errors of the prosecuting attorney or judge. He cited numerous instances throughout the bill where "shall" should be changed to "may" to allow more discretion to the judges.

John Scully, representing the Sheriffs & Peace Officers Association, opposed the bill because the peace officers would be civilly liable for violations of rights.

Karen Mikota, representing the L.W.V., opposed the bill because it would cause irreparable damage to non-criminal citizens, and is too high a price to pay to try to correct the problems with the exclusionary rule. She said that sections 10 and 11 in the Montana Constitution would be attacked under this bill, and that by making the obtaining of a search warrant optional it would allow random searches. She said that there is already a right to sue if one's rights have been violated. She objected to striking "lawfully" on page 7, line 20, and said that the repealer is unreasonable.

Mike Meloy, representing the Trial Lawyers Association, opposed the bill because of philosophical problems as well as legal questions. He suggested changes be made, while urging that the bill be not concurred in. He said that subsections 2 and 3 of section 4 are in conflict; that "in bad faith" should be inserted following "acting" on page 3, line 3; that "personal injury" on page 4, section 6, subsection (b), should be spelled out (invasion of privacy, damage to reputation, etc.); and that there is a technical problem on page 6, line 19, where "district court" should be "trier of fact". He said that he knows of only two suppression cases, and feels that private citizens who make such searches should not be subjected to punishment for incorrect search. He presented amendments (attached Exhibit B).

In closing, Rep. Keedy said that none of the objections which had been raised were valid in his opinion.

Senator Anderson asked what other countries have to take the

place of the exclusionary rule. Keedy replied that he did not know, but that the evidence is used in trials, and he assumed that adequate disciplinary measures are taken to ensure protection of rights.

Senator Mazurek asked if this type of legislation has been passed in any other states. Mr. Racicot said that it has been considered in Utah and California but not passed as yet.

Senator S. Brown said that on page 4, subsection 2, by removing the limitations, the individual who brought a suit could collect unlimited punitive damages. Keedy agreed. Senator Brown asked whether there is a conflict between subsections 2 and 3 of section 4, as Mike Meloy had suggested. Rep. Keedy said that in his opinion there is not a conflict. Senator Brown then asked whether in a lawsuit a local government isn't going to be encouraged to say that the peace officer acted in bad faith in order to absolve themselves of any liability. Keedy replied that if the employee acts in good faith the employer would be liable.

Senator O'Hara asked about the possibility of an ordinary citizen getting sued after having made an incorrect search, and Rep. Keedy replied that the bill does not address civilian search and seizure. Mike Meloy said that under a decision of the Montana Supreme Court an individual making the search becomes an agent of the police, and as such would fall under the coverage of the penalties applied by the bill.

Senator Anderson drew the committee's attention to a set of proposed amendments submitted by Senator Ryan (attached Exhibit C), and the committee agreed to let Ryan speak at a future date.

In response to a question of Senator S. Brown, Tom Honzel said that four out of nine justices of the United States Supreme Court feel that the exclusionary rule should be done away with, but they want a workable alternative before it is taken out.

Senator S. Brown said that the United States Supreme Court is gradually chipping away at this rule, and that the legislature should not be in a position of jumping into that process.

Senator Mazurek asked why the responsibility for seeking punishment of a law officer is placed on the shoulders of the victim of an incorrect search; why it was not instead the responsibility of the government agency employing the officer. Rep. Keedy responded that the disciplinary proceeding would be more apt to be initiated by the victim than by the government agency working with the offending peace officer.

Senator Mazurek then pointed out that under this bill the superior officer would only have the remedy of suspending or firing an offending officer, but could take no other action. Rep. Keedy replied that if it is written that way, it should be changed, as that was not the intention; and he stressed the importance of review by a police commission.

Senator Mazurek felt that granting an appropriation to a convicted felon with a valid civil claim against the investigating officer might be met with reluctance on the part of the hiring governmental agency to appropriate such money for this purpose.

Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date March 10, 198

NAME	PRESENT	ABSENT	EXCUSED
~~Anderson, Mike, Chr. (R)~~	✓		
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

NAME: Tom Honzel DATE: 3-10-91

ADDRESS: Helena

PHONE: 443-5555

REPRESENTING WHOM? County Attorneys

APPEARING ON WHICH PROPOSAL: HB 689 - 690 - 626

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Karen Tuikota DATE: 3/10/81

ADDRESS: 406 W. Ewing

PHONE: 443-6287

REPRESENTING WHOM? League of Women Voters of Montana

APPEARING ON WHICH PROPOSAL: HB 626 HB 689

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: HB626 reaction to the exclusion of illegally obtained evidence. This remedy is more damaging than the problem. Reversal of premise - innocent until proven guilty. Attacks 4th amend of U.S. Constitution & Sections 10 & 11 of Montana right to privacy & searches & seizures. Essentially makes obtaining a warrant optional. Opens door to random searches & seizures.
We already have federal remedy if civil rights are infringed upon.

Striking lawfully on pg 7 & the repealer are totally unreasonable.
rule intended to keep judiciary free from partnership in unlawful behavior.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

The spirit of the 4th amendment is to prohibit!
The exclusionary rule is a stronger approach than HB 626

(pg 2)

NAME: _____ DATE: _____

ADDRESS: _____

PHONE: _____

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: HB 689

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? V

COMMENTS: _____

completely alters commonly accepted definition of immunity - changes from transactional to use immunity - is this a change you want to make - if so should we do aware with judicial discretion

Repeals 46-4-305 section(2) nothing in this part requires a witness to divulge the contents of a privileged communication unless the privilege is waived as provided by law

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: John Maynard DATE: 3/10/81

ADDRESS: Rm. 225 - State Capitol

PHONE: 449-2026

REPRESENTING WHOM? Attorney General

APPEARING ON WHICH PROPOSAL: HB690

DO YOU: SUPPORT? L AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Chuck O'Reilly DATE: 3-10-81

ADDRESS: Helena

PHONE: 458-9146

REPRESENTING WHOM? Mt. Sheriffs & Peace Officers

APPEARING ON WHICH PROPOSAL: HB 626

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Carl Williams DATE: 3-10-81

ADDRESS: Helena

PHONE: 442 3123

REPRESENTING WHOM? Montana State Chiefs of Police

APPEARING ON WHICH PROPOSAL: HB 626

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: John Sivell DATE: 3/10

ADDRESS: 2303 Sundance Rd.

PHONE: 587-1365

REPRESENTING WHOM? Sheriff & Peace Officers

APPEARING ON WHICH PROPOSAL: _____

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Mike Meloy DATE: 3/10/87

ADDRESS: Securities Bldg Hln.

PHONE: 442 9430

REPRESENTING WHOM? MTLA

APPEARING ON WHICH PROPOSAL: HB 626

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Exhibit A

AMENDMENTS TO HOUSE BILL 626

1. Page 2, line 25 line 1, page 3.
Following: "liable" on line 25
Strike: remainder of line 25 through "agent," on line 1

2. Page 3.
Following: line 22
Insert: "(6) No employee or agent conducting an otherwise lawful search under the authority of a search warrant or signed consent to search is liable under [this act] in any action that may be brought even though the search warrant or signed consent is subsequently declared invalid."

Exhibit E

AMENDMENTS TO HB 626

1. Amend Page 3, line 3 after "acting" by adding "in bad faith".

2. Amend Page 4, line 15 after "injury" by adding ",including, but not limited to, ridicule, loss of reputation, invasion of privacy, and mental pain and suffering associated therewith".

3. Amend Page 4 at line 15 by striking "and" and inserting "(c) Punitive Damages; and".

4. Amend Page 4 at line 16 by striking "(c)" and inserting "(d)".

5. Amend Page 6 at line 19 by striking "district court" and inserting "trier of fact".

Exhibit C

AMEND HOUSE BILL NO. 626

1. Page 2, line 7.
Following: "seizure"
Strike: "."
Insert: ",against any agent or employee of the state or any of its political subdivisions who knowingly or through gross negligence causes or commits a violation of the constitutional or statutory rights of another and who was not then acting for the immediate preservation of human life."

2. Page 2, line 21.
Following: "seizure"
Insert: "knowingly or through gross negligence"

3. Page 2, line 22.
Following: "subdivisions"
Strike: "."
Insert: ", who was not then acting for the immediate preservation of human life."

4. Page 3, line 6.
Strike: Subsection (3) in its entirety
Renumber: the following subsections accordingly

5. Page 4, line 20.
Following: "subdivision"
Strike: "do not"
Insert: "shall"

6. Page 5, lines 1, 2 and 3.
Following: "judge"
Strike: the remainder of line 1, line 2, through "or" on line 3.

7. Page 6, line 11.
Following: "subdivisions"
Strike: "has"
Insert: "who was not then acting for the immediate preservation of human life and who knowingly or through gross negligence caused or"

8. Page 7, line 4.
Following: "(3)"
Strike: the remainder of the paragraph in its entirety
Insert: "The disciplinary actions provided for herein are in addition to and not in limitation of the employing agency's rights to otherwise discipline."

Patrick L. Ryan

PATRICK L. RYAN
Senator, District 19

3

Bob: Could you please place this in the testimony file minutes on HB 690? I inadvertently forgot to give it to you.
Mike Halligan

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

STATE CAPITOL, HELENA, MONTANA 59601 TELEPHONE (406) 449-2026

MEMORANDUM

13 March 1981

To: THE HONORABLE SENATOR JOE MAZUREK
State Capitol Building
Helena, Montana 59601

From: JOHN H. MAYNARD
Assistant Attorney General

Re: HB 690

Persons who have been convicted of crimes generally have four (4), and arguably five (5), avenues by which they can seek relief. These include (1) direct appeal [46-20-101 et seq., MCA]; (2) postconviction relief [46-21-101 et seq., MCA]; (3) state habeas corpus [46-22-101 et seq., MCA]; (4) executive clemency [46-23-301 et seq., MCA]; and (5) federal habeas corpus [42 U.S.C. 2254]. Since 1967, when the current statutes relative to postconviction relief were enacted, the distinction between postconviction relief and state habeas corpus has been hazy. Among other things, HB 690 clarifies that distinction. The bill only addresses postconviction relief and state habeas corpus. The three remaining statutory avenues for obtaining relief from a criminal conviction are not affected by HB 690.

The bill changes current law by addressing three areas of concern in criminal justice: finality of judgments, repetitious litigation, and efficiency of the process. Each of the eight suggested changes in the law is based on one or more of these three concerns.

First, HB 690 seeks to eliminate unnecessary delay in adjudicating petitions for postconviction relief by removing the provision that an individual justice of the supreme court may "vacate, set aside, or correct the sentence." (page 1, line 25.) According to rules to be used in postconviction proceedings, promulgated by the supreme court in 1979, only

the court as a whole may act on a petition for post-conviction relief. Therefore, when someone not unfamiliar with the rules of court petitions an individual justice, delay can result in cases where the justice may be on vacation or may not have time to read the petition for several weeks before, realizing what it is, he submits it to the full court for consideration.

The second change (page 2, line 4) in the law establishes a 5 year limit within which a person seeking relief must file a petition for postconviction relief. After 5 years he may still seek relief through executive clemency or federal habeas corpus. This provision promotes finality in criminal proceedings and encourages potential petitioners to proceed expeditiously in seeking remedies. Along that line it prevents a person with a colorable claim from waiting to present it until a time when the state might be unable to re-prosecute him if he is successful. If, for example, a person withdraws a guilty plea after ten years, the chance that the state could convict him at a trial after so much time has passed is almost nonexistent. The necessary evidence would have been lost.

The third change (page 2, line 16) presented in HB 690 speeds up the process by which petitions are handled by requiring that the petitioner's arguments in support of his petition be submitted at the same time he submits his petition. This also allows the state to respond more intelligently to the petition because it is often difficult to understand the nature of a claim that is unaccompanied by any argument.

The fourth change (page 2, line 24) requiring petitioner's to raise all of the claims they are aware of in their first petition, is designed to discourage piecemeal litigation of claims. If a person has five issues he wishes to present he should be required to present them all at once in the same petition rather than being allowed to present them one at a time in successive petitions. In this way a single hearing could be sufficient whereas five might be necessary when the individual is permitted to present new issues time and again without ever reaching the end.

The fifth change (page 3, line 3) prevents repetitious litigation by encouraging persons to raise all of the issues they intend to raise on direct appeal and not save issues for presentation at a later time in a petition for post-conviction relief. As a practical matter many persons would raise all of the issues they are aware of the first time

around. But in some cases, especially cases involving the death penalty, saving issues delays the finality of the conviction and therefore becomes a part of the strategy in pursuing relief in those cases.

The sixth change (page 3, line 14) providing for a written response from the State prior to a hearing on the petition, furthers the interest of expediting the process of handling petitions for postconviction relief. It establishes a procedure which in many cases, will eliminate the need for a hearing when the petition is frivolous and lessen the possibility that there would need to be more than one hearing in cases where it is not.

The seventh change (page 4, line 10) changes the time within which a person must decide to appeal a denial of post-conviction relief from 6 months to 60 days. In many cases this will speed up the process of finally determining the claim and it will conform the time limit to the time limit present for all other criminal and civil appeals.

Finally, the eighth, and perhaps most important change (page 4, line 14) distinguishes between postconviction and habeas corpus relief in the Montana Code. This eliminates a great deal of confusion which now exits among those affected by these statutes and avoids repetitious litigation of identical claims.

Because of the changes proposed in this bill, one might ask why not eliminate postconviction relief altogether. Among other things postconviction relief can be a relatively quick way of correcting errors which may have been made by the trial court, the court which in all fairness should have the first opportunity to review and respond to allegations of error.

DATE March 10, 1981

COMMITTEE ON JUDICIARY

HB 689
HB 690
HB 626

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Karen Mikota	LWV of Montana	689 690		✓ ✓
Jack [illegible]	State Chiefs of Police	626 HB 626		✓ ✓
John Maynard	Attorney General	690	✓	
[illegible] Peterson	intern	[illegible]		
Susan Peterson	Lg. Aide	626		
[illegible] Petty	Mt. Sheriffs Assoc.	626		✓
[illegible]	URF			
Chuck O'Reilly	Mt. Sheriffs Assoc	626		✓
John Scully	" "	626		✓
ALAN O[illegible]	Commis[illegible] Crime [illegible]			
Rep. John G. [illegible]	[illegible]	626	✓ w/amend	

(Please leave prepared statement with S[illegible]