MINUTES OF JUDICIARY COMMITTEE
March 16,1983

The meeting of the House Judiciary Committee was called to order in room 224A of the capitol building, Helena, Montana by Chairman Dave Brown. All members were present, including Brenda Desmond, Staff Attorney for the Legislative Council.

SENATE BILL 394

SENATOR BOB BROWN, District 10, stated that this bill allows a person sentenced to death to choose between hanging and a lethal injection; Montana is one of the four jurisdictions in the English-speaking world that still hangs its condemned prisoners; this bill also requires that the execution take place in the penitentiary rather than under the jurisdiction of the county sheriff in the county where the crime was committed; and he stated that it had some retroactive provisions amended in, so that it would apply to those who are sentenced to death at this time.

CHRIS TWEETEN, Assistant Attorney General, said that he was appearing on behalf of JOHN MAYNARD, who prepared written testimony, which was presented to the committee. See EXHIBIT A.

There were no further proponents and no opponents.

CURT CHISHOLM, Deputy Director of the Department of Institutions, said that this bill affects them directly in terms of being ultimately responsible for the execution of inmates; plus it changes the method of execution; it changes the designation of place of execution from the county in which the trial was heard; it changes the person responsible for supervising the execution from the sheriff of the county of conviction to the warden of the Montana State Prison; and it allows the warden to designate an official executioner. He indicated that the position of the department is that they support the method of execution proposed in this bill; but, because it is a burdensome responsibility, they would just as soon avoid the warden being responsible for the supervision of the execution; and in relation to the place of execution, he felt it made sense to have a centralized place or facility to accommodate the execution itself, especially if they are considering an execution by a chemical substance.

He continued that they do support the ability of the warden to designate and select an executioner - the one who would actually perform the act itself.

SENATOR BROWN said that every state in the nation, with the exception of Montana, does have the warden of the state prison carry out this task, if it has the right of capital punishment; and they do not expect this burden to be placed at the county level.

REPRESENTATIVE JAN BROWN wondered why on page 8, line 9, there had to be twelve witnesses. SENATOR BROWN replied that he did not know why, but they probably had to have some witnesses.

REPRESENTATIVE JAN BROWN asked if it would be difficult to find somebody or to train somebody to administer the injection and wondered if they have a problem with this in other states. MR. TWEETEN responded that there are people who are medically trained, but who are not physicians, who have the expertise that is required to perform this service and that registered nurses can administer continuous intravenous injections along with medical technicians, paramedics; and persons who have received medical training in the service are most commonly the ones who perform this type of service.

SENATOR BROWN commented that he could answer this no better, because their experience with death by lethal injection is extremely limited, but he would rather have a paramedic, a registered nurse or someone like that give a lethal injection, than have the county sheriff try to execute the person by hanging.

REPRESENTATIVE CURTISS asked if they know how many executions have taken place recently. SENATOR BROWN responded there was an execution in Texas just recently and several states have opted for the lethal injection and the state of Washington has already done what this bill proposes.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 194

SENATOR AKLESTAD, District 6, stated that they hoped this bill would help the clerks of the district courts by eliminating the capsule in selecting the jurors and amending the exemptions from jury service.

MARGE JACKSON, Clerk of the District Court in Glacier County and chairman of the Legislative Committee of the Montana Clerks' of the Court Association, testified that the clerks would like this bill passed because they feel that the changes requested will help them streamline their duties in regard to jury selection and save the taxpayers' dollars too. She presented to the committee copies of comments on amending sections of the jury selection law. See EXHIBIT B. She also gave a demonstration of how hard it is to use these ballot capsules.

KAREN BROWN, Clerk of the Court in Teton County, stated that she was in support of this bill; that their district judge was responsible for four counties; and he is not always available to draw jury panels. She also indicated that, the way the law is now, he is the one that has to excuse the jurors and it is really a hassle to get in touch with the judge to excuse the jurors.

ROBERT LAVA, Clerk of the District Court in Pondera County, exclaimed that they have worked hard to make it convenient for them and efficient for the office with no problems for anybody else. He said that he would like to see this bill pass.

There were no further proponents and no opponents.

SENATOR AKLESTAD advised the committee that all they were trying to do is make the system more efficient and more economical for the counties.

REPRESENTATIVE ADDY noted that the bill had been amended in section 6 to allow the jury commissioner to excuse jurors with the approval of the court; he received one piece of mail from Mr. Phillips, expressing concern about allowing jury commissioners to excuse jurors, because that is probably the most burdensome thing about jury selection; and he wondered if anyone had talked to the judges since this language was added. SENATOR AKLESTAD

replied that he had not - the amendment was put on in the Senate Judiciary Committee; and he believed that it was optional and the judge would have to give his permission. MS. JACKSON explained that they did amend that and that was because some of the judges felt that they would rather do it themselves; it is very inconvenient when the judge does not reside in the county; and there are always emergenicies. She advised that in selecting the panel, they could excuse jurors with a doctor's slip just as well as the judge could.

REPRESENTATIVE ADDY asked if they were saying that the judge could just write a blank check to the clerk of the court to allow him or her to choose who is excused or who is not excused from jury duty; or the other possibility would be that people would call in with excuses; and a list would be made of that and recommendations would be made individually. SENATOR AKLESTAD said this was how he understood the bill.

REPRESENTATIVE EUDAILY noted in section 6 on page 5, lines 12 through 14, this language is in reference to 3-15-507 and has been deleted; then on page 7, lines 21 to 23, this refers to 3-15-313 and it is deleted again; and he asked if they are taking away the ability to be excused, because it is deleted in both cases. SENATOR AKLESTAD responded that they did take away the ability to be excused in at least one area. MS. JACKSON expanded by saying that 3-15-313 was not considered here; it is still exactly the same as that was changed in the 1981 legislature; and they didn't change it at all.

REPRESENTATIVE EUDAILY indicated that they have striken subsection 3 on page 5. MS. DESMOND said that she cannot indicate why that language was striken, but on the bottom of page 4, subsection 1, it states "the court or jury commissioner shall excuse a person from jury service upon finding that jury service would entail undue hardship for the person or the public served by the person", so there is still language in the statute that would take care of this.

REPRESENTATIVE EUDAILY contended that that was existing language and also subsection 3 was exisiting language, so why do they need to take subsection 3 out of there. SENATOR AKLESTAD replied that he did not have an answer for that.

CHAIRMAN BROWN indicated that he has had about six phone calls from judges around the state, who are very adamently opposed to this bill and he wondered if the Senator had talked to any of these judges since the Senate took action on it. SENATOR AKLESTAD responded that he has not had any direct communication with the judges.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 7

SENATOR AKLESTAD, District 6, stated that this was a unique bill in that it permits a defendant that is sentenced to death and does not have a prescriped length of time in his sentence to be confined at the state prison at state expense. He indicated that in the state of Montana, under existing law, if an individual is sentenced to death, the county in which he was sentenced, still has to pay the board and the room and any major medical costs for that individual, who is incarcerated in the state prison. He advised the committee that right now they have one prisoner in Pondera County, Duncan McKenzie, and the county has a contract with the state of Montana so that they pay so much per day to the state for his incarceration.

REPRESENTATIVE UNDERDAL, District 12, testified that the McKenzie trial was first held eight years ago; the cost presently is probably in excess of $30,000.00; and he presented to the committee a copy of information that was obtained from the Attorney General's office in connection with this case. See EXHIBIT D.

REPRESENTATIVE ROUSH, District 13, Cut Bank, stated that he supported this bill; that there are presently three people on death row now and there are other cases pending in Pondera County and other counties in Northwest Montana.

REPRESENTATIVE CURTISS, District 20, said that this was one of the recommendations that came out of the joint subcommittee on judiciary and it is through no fault of the county that their security is such that they can't take care of these prisoners and it is only fair that the state assume this responsibility.

JO BRUNNER, representing herself, stated that she wants to support this bill; she is speaking as a taxpayer and a concerned citizen; and she feels very strongly that this is not the responsibility of the county to pay for the room and board of a person, who is traveling through that county, commits a crime and then they have to continue to pay for eight to ten years; and this did not seem very equitable.

CURT CHISHOLM, Deputy Director for the Department of Institutions, stated that they rise as a proponent in this piece of legislation simply because the fiscal impact on the state of Montana is almost negligible. He explained that typically, when they receive inmates on death row, they not only have a sentence of death, but they have a timed sentence for related offenses; and, therefore, this would automatically make them the responsibility of the Department of Institutions. He advised the committee that the inmate from Pondera County who is facing death has only this one sentence and, therefore, he is their responsibility under existing law.

WALTER HAMMERMEISTER, Sheriff of Pondera County, stated that they naturally support this bill; Pondera County has paid or owes $30,539.10 in the McKenzie case; the total cash outlay, which would include this $30,000.00 is in excess of $157,000.00; and the money that has gone into this in time and labor probably exceeds that figure two or three times over that amount.

There were no further proponents. There were no opponents.

SENATOR AKELSTAD said that there was really a flaw in the law and he hoped the committee would pass this bill and rectify this inequity.

REPRESENTATIVE ADDY noted that they were paying $10.00 a day to the prison to house this prisoner and he asked what was their actual cost. MR. CHISHOLM responded that it is about $33.00 a day; that the contract has not changed since it was negotiated back in 1975.

REPRESENTATIVE ADDY asked what the medical costs were. MR. CHISHOLM replied that the inmate in question here attempted suicide about two or three years ago and he required medical attention. He explained that this was born by the county as that was part of the contract.

REPRESENTATIVE BERGENE asked if there was another appeal pending for Mr. McKenzie. CHRIS TWEETEN, Assistant Attorney General, replied that there is at least one more appeal pending, if not more than that.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 2

SENATOR AKLESTAD, District 6, stated that this was a bill which deals with prohibiting appellate review of alleged errors not objected to during a criminal trial. He presented to the committee a petition signed by taxpayers, who supported this type of legislation. See EXHIBIT E. He indicated that the main thrust of the bill is to cut down on the abuse of the appeal system.

CHRIS TWEETEN, Assistant Attorney General for the state of Montana, offered prepared testimony prepared by JOHN MAYNARD, who could not appear on this date. See EXHIBIT F.

MARC RACICOT, Prosecution Coordinator for the County Prosecutor Services of the Department of Justice, said that he was appearing for the county attorneys and the primary reason they were in favor of this legislation is because the constant review and reexamination of these cases is eating up their resources. They feel that there is never a final decision ever made.

REPRESENTATIVE UNDERDAL, District 12, said that the continuous appeals of those under the death sentences have caused frustration by the law-abiding citizen, especially when the appeals are based, not on the question of guilt, but on technicalities.

JO BRUNNER, representing herself, said that she believed the appeal system is grossly misused and gave two examples in which she was involved in cases where they were appealed on technicalities.

REPRESENTATIVE CURTISS, District 20, testified that the interim committee spent many long hours trying to determine some ways to tighten up the appeals system and they found in their study that it is not the judiciary system itself that is the problem; it is not the law; the problem is in human error; and by use of the appeal system, the litigants are capitalizing on human error.

There were no further proponents.

BILL LEAPHART, representing himself and the American Civil Liberties Union, indicated that his objection to this bill is that it will allow the appeal court, under certain situations, to overlook jurisdictional defects. He contended that the Montana Supreme Court has not gone so far as to say that these defects can be overlooked is because that goes to the very heart of the judiciary - the power that the court has - either the court has the power or the court does not have the power; and it is a well-accepted legal principle that a jurisdictional defect cannot be overlooked.

There were no further opponents.

SENATOR AKLESTAD said that they have heard some innuendos, but he would hope that this committee would look through the smoke and see the trees and the trees, in this case, are the people that they are representing; and the people of this state are very concerned about the abuses to the appeal systems. He emphasized that they are not wanting to take the appeal system away from the people, but they are just trying to tighten it up.

REPRESENTATIVE KEYSER asked if the language on page 2, lines 4 through 16 did not basically handle any legitimate problems with an attorney who did not represent his client the first time and any legitimate appeals. MR. RACICOT replied that, in his view, yes and in the view of all the people who worked on this in the subcommittee on judiciary for many months.

CHAIRMAN BROWN inquired if it was not true that after more thorough research through the records after the trial that a question will come up that is not necessarily due to the caginess of the counsel during the course of the trial. MR. RACICOT replied that he felt that occurs, but it is a rare occasion and if it is so substantial, it is going to reflect on the effectiveness of the counsel, this bill allows this on page 2, lines 13 through 16.

CHAIRMAN BROWN indicated that he thought that in some parts of this bill they are penalizing clients for having ineffective counsel. MR. RACICOT replied that he can understand that viewpoint, but he does not see it that way.

REPRESENTATIVE JENSEN asked Mr. Tweeten if he would acknowledge that there are different levels of competence among attorneys in general. MR. TWEETEN replied certainly.

REPRESENTATIVE JENSEN asked if this was true with defense attorneys particularly. MR. TWEETEN responded certainly.

REPRESENTATIVE JENSEN questioned if it is possible that someone on the less competent end of that scale would without being intentionally devious not raise an objection to an error. MR. TWEETEN responded that he did not want to give the impression that all defense attorneys are devious; he felt that, in many cases, when a defect is not objected to during the trial, the attorney may have overlooked it; but there certainly are cases where the defense attorney does try to deceive the court.

REPRESENTATIVE JENSEN inquired that, if that attorney honestly overlooked an error and after the trial upon consideration or review, he realizes this error and it reflects on poor or incompetent representation, is this attorney likely to raise that error. MR. TWEETEN responded

that he felt it depended to a great extent on what kind of error it is and to the extent on which it reflects on the attorney's competence; that he personally has argued appeals wherein an attorney has requested that the court not hold against the defendant the counsel's incompetence. He also indicated that there are many cases wherein the the attorney prosecuting the appeal is not the same attorney that tried the case.

REPRESENTATIVE JENSEN wondered in those situations where the same attorney is involved and there is an error that would reflect against that attorney, who, in fact, raises that there was an error; if the attorney does not raise that error, would the defendant have the ability to recognize that there was an error. MR. TWEETEN answered that he would not; that is why the bill allows for the consideration of this kind of a problem by affording collateral review.

REPRESENTATIVE JENSEN asked who raises that. MR. TWEETEN responded that the defendant would have the option of raising it himself; if he is sent to prison, the jail house lawyer could point this out to him and he could write on this matter; or if he has money, he could retain another attorney.

REPRESENTATIVE JENSEN asked if there is some guarantee here that that individual won't be denied an appeal on the basis of a real error. MR. TWEETEN answered that no there is no guarantee that he is going to be able to raise that issue: and if the individual is not perceptive enough to recognize that the attorney has been ineffective, he is not going to raise that issue.

REPRESENTATIVE BERGENE commented that she generally is in support of this bill but she is troubled about the possibility of the unconstitutionality of it. MR. TWEETEN replied that the bill incorporates standards for review and to this extent they can assume that it is constitutional.

REPRESENTATIVE CURTISS noted on the bottom of page 1, lines 24 and 25, the language reads "substantial rights" and she wondered what this would mean. MR. TWEETEN responded that this would mean any constitutional defect, i.e. erroneous rulings involving certain seizures issues, etc.

REPRESENTATIVE CURTISS asked if it was his considered opinion that a person's constitutional and substantial rights would still be protected under this bill. MR. RACICOT replied yes.

CHAIRMAN BROWN indicated that he was always mindful, when he went to the doctor, that half of them graduated in the bottom half of their class, and he viewed lawyers in the same light. He wondered, in the discussions that led to this bill, if there was concern about competency of counsel and what that would do to the rights of the defendant. SENATOR AKLESTAD replied that it was brought up during the interim by some of the individuals; he felt that they have taken care of all the aspects that they possibly could; and that the individual is being protected as much as possible and still have a bill. He emphasized that he hoped they did not get hung up on technicalities, when the vast majority of the people in the state of Montana are concerned and feel that something has to be done.

There were no further questions and the hearing on this bill was closed.

SENATOR AKLESTAD indicated that REPRESENTATIVE KEYSER would carry the bill on the floor of the House.

EXECUTIVE SESSION

SENATE BILL 7

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. REPRESENTATIVE JENSEN seconded the motion. The motion carried with all voting aye.

The committee took a break at 10:25 a.m. and reconvened at 10:45 a.m.

SENATE BILL 394

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE BERGENE stated that she both supports the bill and opposes it; the thing that bothers her is the responsibility they are placing on the warden to make that decision; he will have to supervise that whole thing; she talked with Mr. Chisholm and he asserted that this would make a terrible difference as far as the attitude of the inmates to the warden and she felt that one of the protections to the warden is the way the inmates view that warden.

REPRESENTATIVE JENSEN informed the committee that in Billings, they have put together a gallow that is available for use around the state and he sure hates to interfere in free enterprise by having this bill and he indicated that they could vote how they want to, but he is going with the marketplace.

REPRESENTATIVE KEYSER said that he can see where the Department of Institutions is coming from and he can see how the warden feels, but that it just makes sense that the prison is where this should take place - this man is in prison; he is there; they are talking about taking a very dangerous criminal, transporting him clear across the state of Montana back to the county in which he was tried, etc., and then somebody there has to take the responsibility of this and this could have a reflection on the sheriff and the prisoners he has.

REPRESENTATIVE JENSEN noted that Mr. Chisholm's comment was that it should take place at the prison, but the question was if the local sheriff should supervise it at the prison and thereby relieve the warden and the internal administrators of that problem.

REPRESENTATIVE DARKO said the thing that bothers her is there are two options and she felt that if they are looking for a human way to do this, why leave hanging in the law.

REPRESENTATIVE DAILY indicated that he felt just the opposite of Mr. Chisholm, i.e., that if they were to execute

a prisoner or two at the Montana State Prison, then maybe again the warden and guards could start running the prison and the prisoners might have a little more respect for the warden, especially if he pulled the rope.

REPRESENTATIVE BERGENE stated that she felt the volume of the prison population would make that difference between the sheriff setting up the execution in the prison as opposed to him and that would make a little difference.

REPRESENTATIVE JENSEN commented that, as he recalls, there is no gallows at the prison; that they can't hang somebody down there. REPRESENTATIVE KEYSER noted that there were tourist gallows.

REPRESENTATIVE HANNAH indicated that in Yellowstone County they put gallows up, they take them down and there is a lot of wasted man hours there and there was a waste of time of the volunteer group who built the gallows. He felt sure that they would have citizens in Deer Lodge, who would be more than happy to volunteer their time and material to do the same; and would save counties around the state the expense and hassle of finding other concerned citizens to do that.

REPRESENTATIVE ADDY affirmed that this was the right location to do this, if it has to be done; in 1952, the last prisoner was sentenced to death; he was subsequently retried in Havre; there was a great debate over where they were going to have the hanging; and they did not want to stigmatize any place where people had picnics or other events. He said that he has problems with the bill just because it gives a more human alternative to capital punishment; he would hate for them to be desensitized to the fact that they are discussing putting someone to death; that he would like to maintain hanging as one of the alternatives that the state will adopt unless the prisoner choses another alternative; he has some problems with the bill, but he thought he could vote for it.

REPRESENTATIVE CURTISS commented that if the sheriff is required to do this, he is going to have to live with that for a long time; and the people in the smaller communities are not going to forget that either. She felt that the state prison is the place for it and is as impersonal as it can be.

REPRESENTATIVE EUDAILY indicated that he had a problem with the bill on page 8, lines 15 through 17, wherein it authorizes a pharmacist to dispense such drugs to the warden, without prescription; he did not understand, if a doctor is available to the prison, why they would not have the doctor prescribe these drugs; he thought that there might be a problem where the designee might be getting getting these drugs for use for something else.

CHAIRMAN BROWN thought this relates to the oath that doctors take.

REPRESENTATIVE IVERSON noted that the type of drugs you are talking about here are not the type that people would buy for dispensing for sale in the prison as these are fast-acting lethal drugs.

REPRESENTATIVE EUDAILY said that he was sure in the codes, there is a section that says a pharmacist must have a prescription to issue drugs and he wondered if they amended that section. MS. DESMOND said that she thinks he is right and she will try to find that section.

REPRESENTATIVE DARKO commented that they had a bill in Human Services Committee that would allow the Humane Society to administer a drug without the veterinarian's O.K. and it was killed on that very same reason in the Senate.

REPRESENTATIVE JAN BROWN indicated that the injection itself concerns her; if she had to administer an I.V., she would not like to think of herself as an executioner; and on T.V., they had two solutions running in and they had two people dumping the components in so neither knew who administered the actual lethal dosage.

REPRESENTATIVE JENSEN noted that there could be medical problems with a lethal injection, i.e. if someone is resisting the injection by muscle contraction, this presents some problem as it does make it difficult to administer.

CHAIRMAN BROWN felt this was no great problem. He suggested that they leave this bill for awhile to allow Ms Desmond to check out the problem on the pharmacist.

SENATE BILL 194

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE JAN BROWN.

CHAIRMAN BROWN pointed out that he has had calls from six judges in the state who do not like this bill as well as three clerks of the court who do not believe that the change should be made from the judge to the clerk of the court.

REPRESENTATIVE JENSEN commented that the problem they have here is one of control and some judges want to retain that maximum amount of control; one problem is that judges are doing more than judging - they are administrating; they are not trained to be managers and some time we are going to have to move away from this and let judges judge and managers manage.

REPRESENTATIVE ADDY indicated that he had received a letter from Judge McPhillips of Shelby and his concern was that the question of whether a juror should be excused or not is a fairly delicate question; that it is easier for the judge to withstand buddyness or the "good friend" syndrome than the clerks; but this letter was predicated before the amendment "with the approval of the court" was adopted. He felt that there were two ways for the court to give this approval; (1) the judge could give blanket approval if he thought it was appropriate or (2) there could be a tenative list of everyone who has requested an excuse; and he felt that a judge who had great reservation about giving this discretion to the clerk could limit the amount of control.

CHAIRMAN BROWN informed the committee that he read that amendment to all six judges and they all indicated that, as far as they were concerned, they would not relinquish that control to the clerks of the court.

REPRESENTATIVE CURTISS asked if the term "jury commissioner" is statutorily provided for.

REPRESENTATIVE RAMIREZ asserted that one of the problems they have right now is that it is too easy to get excused from jury duty and, as a result, they end up with juries, that, in his view, are not a cross-section; they do not represent the full spectrum of the community

because there are too many people getting excused. He felt this would make it easier to get excused rather than more difficult; he thought it should take almost a death in the family for someone to get out of jury duty or they are going to lose their job, but anything short of that, he did not think they should be excused.

REPRESENTATIVE HANNAH commented that the reason they don't have good juries is the fault of the judges in letting people off; one of the main jobs in a trial is for the attorneys to try and weed out as many people as they can who do not feel have an open mind on the case and get them out of there; and he did not know if there was as big a problem as Representative Ramirez thinks there is.

REPRESENTATIVE SPAETH indicated that he did not think they should make it any easier for people to get out of jury duty; he did not think the group should be stacked ahead of time; they could end up with a jury of nine housewifes and three postal workers; and this is not right. He continued as far as the ballot capsules is concerned, he thought it was a silly system they have now and no matter what they do with the other part, they should keep that ballot part in there.

REPRESENTATIVE JENSEN said that the question of a jury makeup is a real concern to a lot of people and asked if Representative Ramirez was going to amend this.

REPRESENTATIVE RAMIREZ replied that they might go a little beyond the bill if they did that; he would propose that they amend out the part that permits the jury commissioner to excuse and put back the status quo; then maybe address that next time. He stated he would like to move that concept and have Ms. Desmond come up with the precise language.

CHAIRMAN BROWN suggested that they work on this and come back to it the first part of next week.

REPRESENTATIVE FARRIS noted that it might be, especially in counties where the judges are not residents of that county, that the jury commissioners might be stricter;

the people could call up thinking that the judge doesn't know me and he will buy this excuse and get excused that way where if they are known to the jury commissioner, they could be stricter.

REPRESENTATIVE KEYSER thought that the language says that this has to be done with the consent of the judge; that is the way they do it now; he advised that he had a bill four years ago to try and toughen the jury exemptions so people could not be exempted so easily (he thought it passed one House and not the other); it was a very extensive bill; then to come in with this bill that deals with another issue and try to get in with as complex a bill as that bill was that this just wouldn't work.

REPRESENTATIVE ADDY commented that he agreed with Represenative Farris.

CHAIRMAN BROWN indicated that they would hold this and work on the amendments.

SENATE BILL 394

MS. DESMOND indicated that she found this section and she was not certain which schedule this drug was in - either 2 or 3 - but they could put language in saying, "except as provided in this act, no dangerous drug in whichever schedule could be dispensed without a prescription". She commented that as it stands now a pharmacist could refuse to issue the drug.

REPRESENTATIVE EUDAILY moved that they amend this bill appropriately to cover this matter. The motion was seconded by REPRESENTATIVE IVERSON. The motion carried unanimously.

REPRESENTATIVE KEYSER moved that the bill BE CONCURRED IN AS AMENDED. REPRESENTATIVE SEIFERT seconded the motion.

The motion carried with REPRESENTATIVE JENSEN, REPRESENTATIVE DARKO, REPRESENTATIVE VELEBER and REPRESENTATIVE BERGENE voting no.

CHAIRMAN BROWN advised that the committee will not be meeting on Thursday and Friday; and on Monday, they will have four bills.

REPRESENTATIVE KEYSER moved that the meeting be adjourned at 11:21 a.m.

DAVE BROWN, Chairman

Alice Omang, Secretary

STANDING COMMITTEE REPORT

March 16, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 7

third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT PERMITTING A DEFENDANT SENTENCED TO DEATH TO BE CONFINED AT THE STATE PRISON AT STATE EXPENSE PENDING EXECUTION; AMENDING SECTION 46-19-103, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Respectfully report as follows: That SENATE Bill No. 7

BE CONCURRED IN

~~DO PASS~~

DAVE BROWN,
Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 394 DATE March 16, 1983

SPONSOR SENATOR B. BROWN

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Chris Tweeten	Helena	Attorney General	✓	
~~Kit Stemp~~				
Carolyn Curtiss		Dist 20	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exh. 6, 7 + A
3/16/83
SB 394

SENATE BILL NO. 394

TESTIOMONY OF JOHN H. MAYNARD,

ASSISTANT ATTORNEY GENERAL

Senate Bill 394 provides an alternative method of execution to hanging by providing for lethal injection at the election of the defendant. The bill goes on to provide that the place of execution is the State Prison, as opposed to what is currently the law, the county in which the defendant was convicted. Finally, the bill provides for retroactive application and an immediate effective date. SB 394 is based on the similar laws in Oklahoma, Texas, New Mexico, Idaho, Washington, Massachusetts, and Utah.

Montana is one of only two states that retains hanging as its exclusive method of execution. While hanging was the predominant form of execution in the United States in the 19th century, it has been supplanted over the years by electrocution, the gas chamber and by lethal injection. Because Montana is one of the last states to retain hanging, the issue has arisen in our capital cases of whether hanging constitutes cruel and unusual punishment. A recent Washington case, State v. Frampton, 627 P.2d 922 (1981),

details the evidence that opponents of hanging have presented in support of their claim that hanging does violate the constitutional prohibition against cruel and unusual punishment. Passage of Senate Bill 394 would effectively eliminate that issue from Montana's three capital punishment cases, thereby obviating the need for an evidentiary hearing on the issue by any of the courts that may be presented with that claim. Senate Bill 394 also eliminates the security risks that accompany the transporting of a death row inmate from the state prison to the county in which he was convicted. Executions which take place in counties present local facility security risks in addition to the transportation risks. Finally, SB 394 concentrates any expertise in terms of conducting executions and eliminates the possibility of any political exploitation of a sensitive issue.

A number of common objections raised to provisions like those contained in Senate Bill 394 do not on balance, outweigh the reasons to pass the bill. Some have argued that the place of execution should be near the place at which the crime was committed. However, this is not the case under current law. Each of Montana's death row inmates were tried in counties other than the counties in which they committed their crimes. Another objection that has been raised is that conducting an execution at the prison would create security risks and necessarily involve prison personnel.

The fact is that the prison is probably the most secure site within the state and that any persons involved in the conducting of the execution would remain anonymous.

Another objection to changing the method of execution at this time is that it might raise an ex post facto issue in current cases, thereby extending what has already been a very lengthy process. However, when balanced against the possibility of an evidentiary hearing being granted on the issue of whether hanging constitutes cruel and unusual punishment, any claim regarding lethal injection that might be raised could be handled very expeditiously. Significant authority has upheld its constitutionality and its applicability to persons originally sentenced, particularly in the state of Texas prior to its adoption as a form of execution in that state. Ex parte Granviel, 561 SW.2d 503 (1978); Dobbert v. Florida, 432 U.S. 282 (1977). Finally, objections have been raised by physicians because of their inability, by virtue of the hippocratic oath, to participate in an execution by lethal injection. However, other persons are qualified and trained in Montana and in other parts of the country to give intravenous injections. That list of people would include persons who have served as medics in the service, emergency medical technicians, and para medics in the State of California. Others could and have been trained. The number of persons who could administer a

lethal injection should also be considered against the number of persons who have participated in or conducted hangings. The claim is made in Montana's cases that there are no experienced hangmen in this country at all. For the foregoing reasons, adopting this form of execution and this place of execution in Montana are important.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 194 DATE March 16, 1993

SPONSOR SENATOR AKLESTAD

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
K.A. Humphrey	Stanford	Clerks of Court	X	
Margaret Shaw	Dillon	✓ ✓ ✓	X	
Marjie Jackson	Cut Bank	✓ ✓ ✓	X	
Ruth Sharone	Great Falls	myself	X	
Rep. G. Rush	Cut Bank	myself	X	
Florence McGlenney	Great Falls	Clerk of Court	X	
Karen Brown	Choteau, Mt.	Clerks of Court	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

WITNESS STATEMENT

Name Margie Jackson Committee On

Address Cut Bank, Mt. Date 3/16/83

Representing Glacier Co. Support X

Bill No. SB 194 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit A-1
SB 194
3/16/83

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

For the Record, my name is Margie Jackson, Clerk of District Court from Glacier County, and chairman of the Legislative Committee of the Montana Clerk of Court's Association.

The Clerks very much appreciate the efforts of Senator Akelstad and Representative Roush in sponsoring this bill for us because we feel the changes requested will help us streamline our duties with regard to jury selection and save taxpayer dollars too.

Basically, this bill was worked on by 4 Clerks, one from a small county, 1 from a medium county, and 2 from large counties so we feel it is going to be workable for courts in all counties.

I do not want to take a lot of your time going through this whole bill so I prepared a handout with a few comments on each section and a short explanation of the changes made, so you can look this over at your convenience.

It might be helpful if you bear in mind as you are reading this bill, that there are 3 different times that a drawing is made when a jury is selected. So along with my comments I have designated which drawing it is.

The first drawing is for the main panel, which usually serves for one year. Usually 150 to 1000 names are drawn, depending on the size of your county, and how often you expect to use your jurors.

The second drawing is for a panel to sit on a specific case. Usually 35 to 50 jurors are drawn from the main panel, again depending on how many the judge thinks he will need.

The third drawing is done in the courtroom to pick the order in which the jurors are seated. For instance the first name drawn takes juror box #1, and so on.

The statutes now provide for using capsules in the 2nd and 3rd drawings. At one time we didn't use them but there were some changes made in the 1981 legislative session on jury selection and I think they got put back in then. I don't know if it was an oversight or not. Anyway capsules are very time consuming and inefficient.

We have prepared a little demonstration on this for you and I am going to ask Kathryn Humphrey, Clerk from Judith Basin County, to show you why we want the capsules removed from the statutes.

Exhibit B SB194
3-16-83

3-5-510
3-5-511
3-15-204
3-15-205

These four sections are mostly housekeeping in nature. Certificates to the treasurer are no longer used by the court, and with the modern means of paying jurors, such as with computers and peg board systems you don't use the old checks with stubs. Also when the 6 mil levy came in the jurors are paid out of the district court fund instead of the general fund.

3-15-312
3-15-313

Both these statutes are changed to provide that the Jury Commissioner shares the duties of excusing and discharging jurors as set forth by statute. It's a routine matter to excuse an unqualified juror or one that presents a medical excuse. The jury commissioner can take care of this. The jury commissioner can usually take care of emergency excuses but jurors have a way of coming up with a lot of phony excuses and the jury commissioner feels it is best for the Judge to take care of that. If the duty is shared it would be more convenient and save the judge some time. Something he has precious little of. This change would be especially helpful to counties where the judge is not in residence and the jurors find him hard to reach to ask for an excuse.

3-15-501

This applies to the First Drawing. The way this section is written now the court is required to call in the entire panel at the beginning of the jury term. The entire panel may consist of 150 to 1000 persons, depending on the size of the county and you pick your panel to act for 1 year. The jurors may be needed for just one case, thus you would need only 12-13 jurors, but you would still have to pay each of these 150 to 1000 jurors for reporting. We feel that if the court has the discretion to summon jurors as needed there would be a savings of tax dollars.

3-15-502

Jury Commissioner and Clerk are synonymous. We need to be able to appoint a deputy to take care of these duties if the Clerk is not available or as in the larger counties where they have more than one courtroom.

3-15-505

This applies to the First Drawing. In this section the Supreme Court was to designate a form to give notice to jurors. They authorized the Clerks to use whatever form they desired, so we thought it unnecessary to keep this in. Jury Questionnaires have always been distributed to jurors at the request of the various district judges although they carry no statutory weight. The questions asked on the jury questionnaire allows the court to determine in advance if the person is qualified to act as a juror. Questions such as age, citizenship, residency requirements, etc. are asked. Qualifying a jury by questionnaire is much cheaper than calling the jurors in and paying them to answer in person the same questions as appears on the jury questionnaire.

3-15-507

Eliminates use of capsules in the drawings. Capsules are very time consuming and inefficient. We have substituted the word ballots for capsules so if any court desires to continue using capsules nothing in the change would preclude them from doing so anyway. Yet those courts that do not wish to use capsules would not be required to.

B

7-33-2314 The 1981 Legislature passed a bill removing all exemptions for
7-33-2315 jury duty. The statute exempting fireman was overlooked. These two changes simply conform the statutes to comply with the intent of the 1981 legislation.

25-7-202 This is the 2nd drawing made for a panel to sit on a specific case. It provides that the drawing be made by either the Judge or the Jury Commissioner. In counties where a Judge is not in residence it is often difficult and inconvenient for the Judge to come up just to make a drawing. To preserve the anonymity of jurors it is provided that the drawing be made in the presence of two witnesses. If counsel for both sides so stipulate jurors selected in this drawing may be seated in the order drawn. This eliminates the 3rd drawing in the courtroom. Alot of the attorneys like this because they know in advance which jurors are going to be in the first 24 seats.

25-7-203 The only change here is eliminating capsules for ballots.

25-7-204 This refers to the 3rd drawing, which is done in the courtroom. Sometimes the Judge prefers to have the Clerk do the drawing so provision is made for this. This drawing would be eliminated if counsel stipulated to have them pre-picked as provided in Section 25-7-202, and this saves the court time, too.

25-7-206 This drawing is conducted during the trial if you find you have an insufficient number of jurors present. If it is provided that the jury commissioner do the drawing the court can instruct him to do so and remain on the bench while the jury commissioner gets more jurors to come in.

25-7-208 The only changes in both these statutes would be in the elimina-
25-7-209 tion of capsules for ballots.

46-17-202 The list of registered voters, which is where you get the main panel of jurors from, is prepared by the Clerk & Recorder and the County Commissioners. In this statute they are referred to as the Jury Commission and there has been some confusion with that and Jury Commissioner. The change would merely eliminate the confusion.

82-1-304 The Clerk of Courts are the trustees under this section and since it already provides that 1/2 of the interest earned on the trust be used to defray the costs of administration it should be credited to the district court fund rather than the general fund.

March 16, 1983:

Exhibit C
SB194
3-16-83

RE: S.B. #194, Jury Selection Bill:

House Judiciary Committee
DAVE BROWN, Chairman
KELLY ADDY, Vice Chairman
and
ALL COMMITTEE MEMBERS;

In support of the above bill I will deal with Section 10, which refers to 3-15-507, MCA.

This section deals with the drawing of jurors in the courtroom on the day trial begins. Paragraph (1) the word ballots has been substituted for capsules. Ballots are less cumbersome to handle and eliminate an unnecessary cost when additional capsules are needed. The section on excuses is eliminated, at this point all excuses should have been heard and any excuses for cause will be covered in voir dire of the prospective jurors.

Paragraph (2), names of jurors on ballots with the elimination of capsules. Also, eliminates the phrase "in the presence of the Court." At this point all jurors present can be assumed to be qualified jurors without legitimate cause for excuse, it saves time and confusion to have their names in the box before going into Court. The paragraph goes on to the type of box for drawing names for the seating of jurors for the trial. I hope this demonstration will show why we feel the anonymity of jurors can be preserved just as well with ballots as it can be with capsules.

Respectfully submitted by:

Kathryn A. Humphreys
Clerk of District Court
Judith Basin County
Stanford, Mt. 59479

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 7 DATE March 16, 1983

SPONSOR SENATOR AKLESTAD

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Walter L. Hammermeister	Conrad	Pondera Co. Sheriff	X	
Rep. G. A. Roush	Cut Bank	Dist. 13.	X	
Rep Melvin Underdal	Shelby	Dist 12	✓	
Judge Curtis	Dist 20		✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

WITNESS STATEMENT

Name Walter L. Hammermeister

Committee On Judiciary in House

Address Conrad, Mont

Date March 16, 1983

Representing Pondera County Sheriff's office

Support Yes

Bill No. S. B. 7

Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. As of today in one specific case the amount of ~~the~~ Pondera Co has paid $30,539.10 for Board & Room & medical expense of one prisoner while the prisoner has been confined in Mont. St. Hospital.

2. This S.B 7 can be a concern ~~of~~ and benefit to every county in Montana.

3. Approximately 2 weeks ago the Sheriff of Lake County was expressing an appreciative interest in the passage of S.B. 7 as they had a convicted person awaiting sentence - that the sheriff was hopeful of getting a execution sentence (the convicted person ended up by receiving an approximately 130 year sentence.)

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 2 DATE March 16, 1983

SPONSOR SENATOR AKLESTAD

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Chris Tweeten	Helena	Attorney General	✓	
Walter L. Hammermeister	Conrad	Sheriff	✓	
Rep. C. Pinsk	Cut Bank	H. Dist #13	✓	
Rep Melvin Underdal	Shelby	H Dist 12	✓	
Bill Leaphart	Helena	ACLU		✓
Evelyn Lester		Dist 20	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

SB2
Exhibit D

3-16-83

Following is information obtained from the Attorney General's office:

STATE VS. MCKENZIE

Date of Offense	1-21-74
Date of Conviction--District Court Jury Trial	2-01-75
Appeal submitted following argument before Montana Supreme Court	9-03-76
Decision issued	11-12-76
Rehearing denied	1-10-77
Judgment vacated and care remanded by United States Supreme Court	6-27-77
Case re-submitted following argument before Montana Supreme Court	3-13-78
Decision issued	6-07-78
Rehearing denied	7-25-78
Judgment vacated and case remanded by United States Supreme Court	6-25-79
Case re-submitted following argument before Montana Supreme Court	10-29-79
Decision issued	2-26-80
Rehearing denied	3-31-80
Certiorari denied by United States Supreme Court	12-08-80
Filed for post-conviction relief	1-07-81
Denied	2-27-81
Appealed to Montana Supreme Court	3-03-81

This is where the case stands at this time.

SB2

Exhibit E

Conrad, Montana
March 20, 1981

3-16-83

Senator Aklestad
Montana State Capitol
Helena, Montana 59601

Dear Senator Aklestad:

We the undersigned wish to support your efforts to plug the holes to limit the number of appeals that the tax payer must pay for as reported in the Independent Observer issue of March 19, 1981 under the title "Its time to quit making a mockery out of the McKenzie Case". Anything you can do to end this will be appreciated.

Name	Address
Martha Copenhaver	306 Horizon Lodge, Conrad Mt.
Keith B. Copenhaver	" "
Doris E. Reed	509 " "
Edna Hostetler	511 Horizon Lodge Conrad
Myn Cardwell	301 Central Conrad
Roger Moan	6 North Front Conrad, Mt.
Silver Mullinger	216 Horizon Lodge Conrad, Mt.
William Kitty	
Charlotte McElhany	Horizon Lodge # 412
Hannie C. Milam	Horizon Lodge 106
Eva Hale	#410 Horizon Lodge Conrad, Mt.
Steve Kovatch	"
Ruth F. Wenzel	Horizon Lodge #301
Mr. & Mrs. Dean	104
Mrs Clara F. Yeager	405 Horizon Lodge Conrad Mt.
Mr. & Mrs. A. E. Spelleder	apt. 506 Horizon Lodge " "
Howard V. Alley	Horizon Lodge apt 213 Conrad Mt
Mary Kirk Alley	Horizon Lodge #213 Conrad Mont 59425
Pearl Bowman Eklund	Horizon Lodge Box 313 Conrad Mont
Oscar Eklund	Horizon Lodge #313 - Conrad Mt. 59425
Doris Dunmore	Horizon Lodge Apt 518 - Conrad Montana 59425
Florence McWalater	Horizon Lodge Conrad Mont.
Lillian Krueger	219 Horizon Lodge Conrad, Mont. 59425
Blanche Moritz	406 Horizon Lodge, Conrad, Mt. 59425
Mike Mout	419 " "
Gladys Pourroy	212 Horizon Lodge Conrad Mt 59425
Harry Yeager	215 Horizon Lodge Conrad Mont 59425
Tlvin F. Boetitz	413 " " " " "
Eva Mikkum	401 Horizon Lodge Conrad Mont.
Olga Swanson	Horizon Lodge, Conrad Mont

Name	Address
Estella C. Fetrow	#403. Horizon Lodge. Conrad, Mont. 59425
Oscar Berland	Horizon Lodge Room 404
Minnie Berland	Horizon Lodge Room 404
Ethel L. Seifert	Horizon Lodge Room 504 " "
Alice M. Fockler	Horizon Lodge Room 205
David Vos	Horizon Lodge 310
Jessie Shay	Horizon Lodge 411 A
Irene Baumgardner	Horizon Lodge 312
Lettie Thomas	" " 101
Kathryn H. Tracy	Horizon Lodge Room 202
Nina Berland	Horizon Lodge Room 214
alba milis	Horizon Lodge Room 309
Leo. Zier	Horizon lodge apt. 311
Marie Klemenhagen	1000 4th S W. Conrad, MT.
Olive Wheeler.	Conrad.
Gladys M. Pomeroy	Conrad, Mont 212
Louise Kingelberg	Horizon Lodge 206
Barbara Wolverton	Conrad Mont.
Wilma Caldwell	conrad, mt. 59425

TESTIMONY OF JOHN H. MAYNARD

ASSISTANT ATTORNEY GENERAL

SENATE BILL 2

HOUSE JUDICIARY COMMITTEE

MARCH 16, 1983

Exhibit F
SB2
3-16-83

Senate Bill 2 was suggested to the joint subcommitte on the judiciary because of our experience in capital cases, Sandstrom v. Montana, and numerous subsequent appeals and petitions for post-conviction relief. The bill applies only to criminal appeals.

Section 46-20-702, MCA, currently contains two sentences.

> 46-20-702. Types of errors noticed on appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the trial court.

The first sentence sets a standard for reviewing alleged errors on appeal. Errors not found to be "prejudicial to substantial rights" are disregarded. This is commonly cited by our Supreme Court as the statutory basis for "harmless error." The second sentence speaks of jurisdictional or constitutional rights and permits the Montana Supreme Court to review those errors regardless of whether the alleged error was objected to at trial. This is commonly referred to as "plain

error." Taken as a whole, the statute is vague and elastic in application and needs clarification by the legislature. The bill reaches beyond the Montana Supreme Court, however, and into federal court review of state court convictions.

When enacted in 1967, the purpose of this section, modeled after Illinois law, was to permit a problem to be settled in state court rather than in federal court. Fifteen years later, however, the statute simply means that the error can first be reviewed in state court and then in federal court. It is because of the absence of a contemporaneous objection provision in our law that virtually all claims must be fully litigated in both forums.

Because of the burden on federal courts, restrictions have been established with respect to which claims can be brought to their attention in federal habeas corpus actions. Those cases include Wainwright v. Sykes, 433 U.S. 72 (1977); and Engle v. Isaac, 102 S. Ct. 1558 (1982). Montana cannot avail itself of these well founded rules, however, because of inconsistent application of our contemporaneous objection requirement in case law and the existence of a rather ambiguous plain error rule. The bill is based on a congressional habeas corpus bill developed by Florida Attorney General Jim Smith. Subsequent to its development the United States Supreme Court decided Engle v. Isaac elaborating

on Wainwright v. Sykes, and further spelling out the concerns involved in contemporaneous objection policies. Wainwright addressed piecemeal litigation, sandbagging claims, and "planting error," the ultimate defense tactic of questionable ethics. This bill permits the state court to review every issue and more than a federal court must review in light of Engle v. Isaac. In order to bring an error to the attention of a federal court or, under this bill, in state court, where the error has not been objected to, a defendant must demonstrate cause for his failure to object and prejudice resulting from his failure to object. These are the principles of Wainwright v. Sykes, and Engle v. Isaac. They inject finality in criminal proceeding, which under the current state of the law in Montana is impossible to achieve.

Senate Bill 2 does not mean that an individual cannot appeal his conviction. It does not mean that he cannot raise any issue that he wishes to raise on appeal. It simply means that the trial court must have the opportunity, in the first instance, to correct the alleged error and permit the trial to proceed. This fairness in relation to the state and state court system enhances justice and encourages active defense by encouraging the quick identification of alleged error and resolution at the time an error is alleged.