

MINUTES OF MEETING  
SENATE JUDICIARY COMMITTEE  
January 19, 1983

The tenth meeting of the Senate Judiciary Committee was called to order by Chairman Jean A. Turnage on January 19, 1983 at 10:00 a.m. in Room 405, State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL 109:

AN ACT TO REVISE THE LAW RELATING TO ENFORCEMENT  
OF SUPPORT; MAKING DEADLINES UNIFORM; ESTABLISHING  
FLEXIBLE HEARING DATE REQUIREMENTS; AMENDING  
SECTIONS 40-5-222, 40-5-226, AND 40-5-241, MCA.

Senator Towe, co-sponsor of this bill, explained to the Committee that SB109 was drafted at the request of the Department of Revenue. It was their feeling that there is a need for uniform deadlines and flexible hearing dates in the enforcement of support. This bill deals with the time frame for collection of support and the date of service for notice. Representative Fabrega, also a co-sponsor of SB109, was noted as being present.

Jon Meredith of the Department of Revenue was present to answer questions.

There being no opponents, the hearing was opened to questions from the Committee.

Senator Daniels questioned the grammatical wording of the amendment. Jon Meredith explained that it was prepared in this manner as it was taken directly from a district judge's order.

Senator Berg questioned how soon "reasonably soon" was as worded on page 3, line 2 of the bill. Jon Meredith advised "reasonably soon" referred to as quick as the Department of Revenue hearings officer could schedule the hearing.

Senator Mazurek questioned the deadline for notice to the responsible parent and Senator Towe acknowledged a need to be more specific here. It was the consensus of the Committee that SB109 should be amended to require notice to the parent a specified number of days prior to the hearing.

CONSIDERATION OF SENATE BILL 2:

AN ACT PROHIBITING, EXCEPT UNDER CERTAIN CIR-  
CUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS  
NOT OBJECTED TO DURING A CRIMINAL TRIAL; AMENDING  
SECTIONS 46-20-104 AND 46-20-702, MCA.

Senator Aklestad, advised the Committee that this bill was prepared at the request of the Joint Subcommittee on Judiciary. Senator Aklestad was also petitioned by many people of the Conrad, Montana area (see Exhibit "A" attached) as to the necessity for legislation to limit the number of appeals which the taxpayer must pay for. SB2 is an act to limit the issues which can be raised by a criminal defendant on appeal. It specifically will prohibit appellate review of alleged errors not objected to during a criminal trial. Senator Aklestad distributed an article from the Great Falls Tribune (Exhibit "B") which demonstrates the abuse of the appeal process, along with information regarding the case of State v. McKenzie (Exhibit "C").

John Maynard of the Attorney General's Office, spoke as a proponent to SB2. He explained that it is very technical and does have ramifications but that it applies only to criminal appeals. He stated that the bill will help reduce the delay now apparent in criminal appeals by preventing defense attorneys from planting error in the record to be used as a basis for later appeals. He said the exceptions on page 2, line 6 for prejudicial error should cover those instances of error similar to the "cause and error" exceptions to the federal contemporaneous objection rule, found in the case law of the federal courts.

Marc Racicot, representing the County Attorney's Association, also spoke in support of SB2. He stated this bill was proposed after a great deal of discussion and study by the interim Judiciary Subcommittee. There is a problem with too many long appellate court delays. Criminal trials are being used as a game of skill rather than a search for truth. SB2 would alleviate the appeals where the initial objections were not noted in the lower court. All the merits of the case should be brought forward during the initial trial, not saved for appeals when an appeal is necessary. The appellate courts are taking the attitude of disbelief that anything is done right at the lower court level. There is no finality to the process and the public is frustrated with the impotence of the system. The appellate process now reflects tentativeness and lack of resolve. SB2 would contribute significantly to finality of the process. The accused already has every advantage.

There being no further proponents, the hearing was opened to opponents of SB2.

Karla Gray, representing the Montana Trial Lawyer's Association, spoke in opposition to this bill. She felt that the Committee should leave the statute as it now reads. The statute as it now reads says the Supreme Court "may" take notice of constitutional defects and it is her opinion that this wording is sufficient. She stated that an error not included in SB2 is where defendant's counsel did not make a timely objection. She also felt that SB2 would penalize a criminal defendant if he had an appointed counsel

who did not represent him effectively. She said the focus on appeal under SB2 would turn from the plain error rule to inadequacy of counsel.

Wes Krawczyk, representing the American Civil Liberties Union, also spoke as an opponent to SB2. He felt that innocent people should not be made to suffer from an attorney's failure to object and that SB2 limits the grounds to appeal and could be considered unconstitutional.

There being no further proponents and opponents, the hearing was opened to questions from the Committee.

Senator Halligan questioned the shift from the plain error rule to that of inadequacy of counsel and John Maynard explained that the real place SB2 is effective is when the defendant alleges error.

Senator Crippen expressed his concern for the search for truth. He felt that this search for truth continues into and through the appeal process and he questioned if SB2 would be limiting that search. Marc Racicot replied that the search should be confined to the record. Chairman Turnage stated that the search for truth is usually unilateral in that defense attorneys are not much interested in the truth.

Senator Aklestad closed by stating that people lack confidence in the judicial system. It was not the intention of this bill to take away the appeal process, only to discourage the abuses and prolonged appeals.

There being no further questions from the Committee, hearing on SB2 was closed.

CONSIDERATION OF SENATE BILL 25:

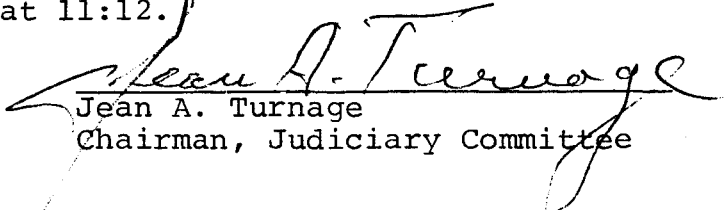
AN ACT TO PROVIDE THAT THE MONTANA SUPREME COURT MAY, AFTER INITIAL REVIEW OF THE FACTS AND LAW OF A CASE DECIDED BY A DISTRICT COURT, BY WRITTEN ORDER GRANT OR DENY AN APPEAL ON THE MERITS OF THE CASE; REQUIRING THAT APPEALS ON THE MERITS BE HEARD IN CERTAIN INSTANCES; AMENDING SECTIONS 3-2-204, 3-2-601, 46-20-104, 46-20-105, 46-20-201, 46-20-203 THROUGH 46-20-205, 46-20-405, 46-20-406, 46-20-513, 46-20-603, AND 46-20-701, MCA; REPEALING SECTIONS 46-20-101 THROUGH 46-20-103 AND 46-20-202, MCA; AND PROVIDING A CONTINGENT EFFECTIVE DATE."

Senate Judiciary Committee  
January 19, 1983  
Page 4

Senator Aklestad, sponsor of this bill, stated that SB25 was a companion to SJR2. He suggested that perhaps the Committee should consider tabling it.

Senator Crippen moved to TABLE SB25. This motion carried unanimously.

ADJOURN: There being no further business before the Committee the meeting was adjourned at 11:12.

  
Jean A. Turnage  
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983

Date 1-19-83

NAME	PRESENT	ABSENT	EXCUSED
<u>Berg, Harry K. (D)</u>	✓		
<u>Brown, Bob (R)</u>	✓		
<u>Crippen, Bruce D. (R)</u>	✓		
<u>Daniels, M. K. (D)</u>	✓		
<u>Galt, Jack E. (R)</u>	✓		
<u>Halligan, Mike (D)</u>	✓		
<u>Hazelbaker, Frank W. (R)</u>	✓		
<u>Mazurek, Joseph P. (D)</u>	✓		
<u>Shaw, James N. (R)</u>	✓		
<u>Turnage, Jean A. (R)</u>	✓		

Each day attach to minutes.



EXHIBIT "A"  
January 19, 1983

Conrad, Montana  
March 20, 1981

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 Andersen -

306 Horizon Lodge, Conrad Mt.

Kath B. Andersen

" "

Lore E. K.

509 " "

Eana Kockler

511 Horizon Lodge Conrad

Donna Kockler

301 Central Conrad

Roger Zier

6 North Front Conrad, Mt.

Roger Moan

Shirley Mullinger

216 Horizon Lodge Conrad, Mt.

William Kist

Charlotte McLean

Horizon Lodge # 412

Hannie G. Melan

Horizon Lodge 106

Eana Kockler

Horizon Lodge Conrad, Mt.

Steve Kovatch

Kath J. Wenzel

Horizon Lodge

Mrs. A. Ma

Horizon Lodge # 301

Mrs. A. Ma

Horizon Lodge 104

Clara F. Yeager

405 Horizon Lodge Conrad Mt.

Mr. & Mrs. A. E. Sperleder

apt. 506 Horizon Lodge " "

Howard V. Alley

Horizon Lodge apt # 213 Conrad Mt.

Mary Kirk Alley

Horizon Lodge # 213 Conrad Mont

Paul Bowman Ekland

Horizon Lodge Box 313 Conrad Mont 59425

Paul Bowman Ekland

Horizon Lodge # 313 - Conrad Mont 59425

Paul Bowman Ekland

Horizon Lodge Box 518 - Conrad Mont 59425

Paul Bowman Ekland

Horizon Lodge Conrad Mont 59425

Paul Bowman Ekland

Horizon Lodge Conrad, Mont. 59425

Paul Bowman Ekland

Horizon Lodge Conrad, Mont. 59425

Paul Bowman Ekland

Horizon Lodge Conrad, Mont. 59425

Paul Bowman Ekland

Horizon Lodge Conrad Mont 59425

Paul Bowman Ekland

Horizon Lodge Conrad Mont 59426

Paul Bowman Ekland

Horizon Lodge " " " "

Paul Bowman Ekland

Horizon Lodge Conrad Mont

Paul Bowman Ekland

Horizon Lodge Conrad Mont

Name

"A"

Address

Etilla C. Larson #403. Horizon Lodge 59425  
Oscar Berland Horizon Lodge Room 404  
Minnie Berland Horizon Lodge Room 404  
Ethel T. Seferl Horizon Lodge Room 524  
Alice M. Fockler Horizon Lodge Room 205  
David Vas Horizon Lodge 310  
Jessie Shay Horizon Lodge 411  
Ernie Baumgardner Horizon Lodge 312  
Lottie Thomas " " 101  
Katherine H. Tracy Horizon Lodge Room 202  
Hena Berland Horizon Lodge Room 214  
Alba Miles Horizon Lodge Room 309  
Leo Zier Horizon Lodge apt. 311  
Hans Klemenhagen 1000 4th S W. Conrad, Mt.  
Olive Whealy Conrad  
Shady M. Pourboy Conrad, Mont 212  
Laurie Tinsley Horizon Lodge 206  
Barbara Wolvert Conrad Mont.  
Wilma Caldwell Conrad, Mt. 59425



Conrad, Montana  
March 24th, 1981

Senator Gary Aklestad  
Montana State Capitol  
Helena, Montana 59601

Dear Senator Aklestad:

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

NAME

ADDRESS

Allen Bellamy	Rt 1 Bx 12 Conrad 59425
Kathryn M. Tracy	Conrad - H. Lodge 59425
Catherine Lundgren	Conrad. H. Lodge 59425
Blanche Moritz	Conrad H. Lodge - 59425
Mike Moritz	" " " "
Pastor Dennis E. Bro	" Box 457 "
Simon J. Nigg	" " 59425
Clyde Bellamy	" " "
Alice Venetz	" 408 So. 2nd 59425
Norma Keel	" 701 S 2nd 59425
Vernon Venetz	" 408 So 2nd 59425
Dorothy Fladstol	" 511 S. 3rd 59425
Erna Messenger	Box 773 Conrad Mont.
Violet Belling	" 13th. Maryland, Conrad
Lucille Mortensen	519 - So. Melanore
Lea Mortensen	519 - So. Melanore
J.P. Strandberg	506 " "
Erlyn Strandberg	506 " "
Edith M. Foster	404 So. Iowa, Conrad, 916. 59425
Edna Dornier	
Wendha Enrick	Horizon Ldg Conrad
Madge Fourney	Horizon Ldg Conrad
Bena Wittmick	
Erna Hale -	Horizon Lodge, Conrad Mt.
Bob Ferguson	Horizon Lodge Conrad Mont
Elaine Conrad	Horizon Lodge Conrad "
Marjorie	Horizon Lodge Conrad Mont

"A"

William Berg	Horizon Lodge	Conrad, MT
Theresa M. Kautz	"	"
Helen Sill	"	"
Adeline Emerson	"	"

Opal Miller	Horizon Lodge	Conrad Mt.
Ed McClain	"	"
Archie Jensen	16 No. Maryland	Conrad MT
John Tandy	Horizon Lodge	Conrad MT

Lyttie Kaymer	Horizon Lodge #401,	Conrad, MT.
Robert R. Emrick	Route 3 Box 21	Conrad
Mrs. Betty Emrick	Route 3 Box 21	Conrad
Anna Ranney	Star Rt. Box 225	Conrad
Pearl P. Kautz	Horizon Lodge #	"
John Newby	404 S. Iowa,	Conrad

# Prolonged court appeal process is criticized

By CHARLES S. JOHNSON  
Tribune Capitol Bureau

HELENA — With little discussion, the House Judiciary Committee endorsed a resolution Thursday calling for a between-sessions study of the state's criminal appeal system.

The resolution is sponsored by Sen. Gary Aklestad, R-Shelby, who is upset with the number of appeals filed by lawyers for Duncan McKenzie.

McKenzie was convicted of murder in 1975 and sentenced to death for the 1974 murder of Lana Harding, a Pon-derra County teacher, but numerous appeals have kept him from the gallows.

In an unrelated action, the committee also recommended an interim study to investigate the state's eminent domain laws.

The two resolutions, if adopted, will join the numerous other requests for legislative studies.

Legislators will individually rank the study proposals in order of preference, and interim committees will be appointed to undertake the top-ranking studies.

Aklestad's SJR30 drew support from Senate President Jean Turnage, R-Polson, and the attorney general's office. No one opposed it.

The Shelby senator said he doesn't want to eliminate the rights of an accused person to appeal his conviction. But Aklestad said he hopes the study can find ways to close some loopholes that allow convicted criminals to keep filing appeals.

Aklestad said he would like to see criminals limited to filing a single, all-encompassing appeal to resolve all issues rather than a string of individual appeals.

He said the situation has gotten "ridiculous" in the McKenzie case in which his lawyers filed one 700-page brief when the normal length is 30-40

pages.

McKenzie's appeal already has been before the U.S. Supreme Court and the Montana Supreme Court three times each, the senator said.

Aklestad said he has petitions from numerous persons who want to "take the abuse the the appeal system"

**Senate President Jean Turnage: "Delay always benefits the criminal. If you're trying to delay, you can grasp at anything at all... You let the grass grow on the victim's grave and you've got a better shot at it."**

away from McKenzie. He acknowledged, however, that the study probably wouldn't affect the McKenzie case but could prevent similar delays in the future.

Turnage, a lawyer, cited appeals by defendants in the workman's compensation cases as another example of abusing the appeal system.

He, too, backed the idea of a single appeal.

Otherwise, he said, lawyers for a defendant who is "guilty as sin" will "dribble in the applications one at a time."

"Delay always benefits the criminal," he said. "If you're trying to delay, you can grasp at anything at all. It doesn't have to be meritorious."

"You let the grass grow on the vic-

tim's grave and you've got a better shot at it," he added.

The net effect of the delays caused by appeals, Turnage said, is "you can have someone like McKenzie die of old age" before his sentence is carried out.

Turnage rejected suggestions that the study also investigate delays in civil cases.

The Montana Supreme Court has "slapped the hands" of attorneys who have filed frivolous appeals in civil cases but has never done so over criminal appeals, Turnage said.

John Maynard, an assistant attorney general, backed the study as a method that could lead to clarification of the laws.

It also could be used to gather information for legislators and their constituents "so some of the sluggishness of the criminal justice system could be understood," he said.

Although no one opposed the resolution, Rep. Dan Yardley, D-Livingston, also a lawyer, said the U.S. Supreme Court's indecisiveness on the death penalty had contributed to the many appeals filed in cases involving capital punishment.

EXHIBIT "B"  
January 19, 1983

SB 2

EXHIBIT "C"  
January 19, 1983

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 case 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.\*

NAME: John Maynard DATE: 1/19/83

ADDRESS: Justice Building - 215 North Sanders

PHONE: 449-2026

REPRESENTING WHOM? Attorney General

APPEARING ON WHICH PROPOSAL: SB 2

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: see attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

## TESTIMONY - SB 2

JOHN MAYNARD - ASSISTANT ATTORNEY GENERAL

I SUGGESTED THIS BILL TO THE JOINT SUBCOMMITTEE ON THE JUDICIARY BECAUSE OF MY EXPERIENCE IN TWO CAPITAL CASES AND IN THE CASE OF SANDSTROM V. MONTANA, AS WELL AS NUMEROUS SUBSEQUENT APPEALS AND PETITIONS FOR POST CONVICTION RELIEF. THE BILL APPLIES ONLY TO CRIMINAL APPEALS.

§ 46-20-702 CURRENTLY CONTAINS TWO SENTENCES. 1) THE FIRST SETS A STANDARD FOR REVIEWING ALLEGED ERRORS ON APPEAL. ERRORS FOUND TO BE "PREJUDICIAL TO SUBSTANTIAL RIGHTS" ARE DISREGARDED. THIS IS COMMONLY CITED BY OUR SUPREME COURT AS THE STATUTORY BASIS FOR "HARMLESS ERROR". 2) THE SECOND SENTENCE SPEAKS OF JURISDICTIONAL OR CONSTITUTIONAL RIGHTS AND PERMITS THE MONTANA SUPREME COURT TO REVIEW THEM REGARDLESS OF WHETHER THE ALLEGED ERROR WAS OBJECTED TO AT TRIAL. "PLAIN ERROR"

TAKEN AS A WHOLE THE STATUTE IS VAGUE AND ELASTIC IN APPLICATION AND NEEDS SOME CLARIFICATION BY THE LEGISLATURE. THE BILL'S RAMIFICATIONS REACH BEYOND OUR MONTANA SUPREME COURT, HOWEVER, AND SHOULD BE UNDERSTOOD.

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 WITH INCREASING PRISON POPULATIONS IT SIMPLY MEANS STATE COURT AND THEN FEDERAL COURT. AND IT IS BECAUSE OF THE ABSENCE OF A 'CONTEMPORANEOUS OBJECTION' PROVISION IN OUR LAW THAT VIRTUALLY ALL CLAIMS CAN BE LITIGATED IN BOTH FORUMS. (USUALLY CLAIMS ARE BASED ON DUE PROCESS)

BECAUSE OF THE BURDEN ON FEDERAL COURTS RESTRICTIONS HAVE BEEN ESTABLISHED IN CASES SUCH AS WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND ENGLE V. ISAAC, 102 S.Ct. 1558 (1982). MONTANA CANNOT AVAIL ITSELF OF THESE RULES BECAUSE OF INCONSISTENT APPLICATION OF OUR CONTEMPORANEOUS OBJECTION REQUIREMENT DEVELOPED IN CASE LAW AND THE EXISTENCE OF THE "PLAIN ERROR" RULE.

THE BILL IS BASED ON CONGRESSIONAL HABEAS CORPUS BILL DEVELOPED BY FLORIDA ATTORNEY GENERAL JIM SMITH. SUBSEQUENT TO ITS DEVELOPMENT THE U.S. SUPREME COURT DECIDED ENGLE V. ISAAC, ELABORATING ON WAINWRIGHT V. SYKES.

WAINWRIGHT ADDRESSED ENDLESS LITIGATION, SABBAGGING CLAIMS, AND "PLANTING ERROR", THE ULTIMATE DEFENSE TACTIC. SB 2, ADDRESSES THE PROBLEMS OUTLINED IN WAINWRIGHT AND ENGLE AND MAKES THEIR WAIVER PRINCIPLES APPLICABLE IN MONTANA