MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bruce D. Crippen, on January 18, 1989, at 10:00 a.m. in Room 325.

ROLL CALL

Members Present: Chairman Bruce D. Crippen, V. Chairman Al Bishop, Senators Tom Beck, Mike Halligan, Joe Mazurek, Loren Jenkins, R. J. "Dick" Pinsoneault, John Harp and Bill Yellowtail.

Members Excused: Senator Bob Brown

Members Absent: None

Staff Present: Valencia Lane, Staff Attorney and Rosemary Jacoby, Committee Secretary

Announcements/Discussion: There were none.

HEARING ON SENATE BILL 106

Presentation and Opening Statement by Sponsor: Senator R. J. "Dick" Pinsoneault of St. Ignatius, representing District 27, opened the hearing stating that it and the others being presented to the committee were requested by the Department of Justice, and all related to executions of prisoners who had received the death sentence.

List of Testifying Proponents and What Group they Represent:

Kim Kradolfer of the Attorney General's office, representing the state

List of Testifying Opponents and What Group They Represent:

Father Jerry Lowney, representing the Roman Catholic Diocese of Helena

Testimony:

Kim Kradolfer presented written testimony to the committee favoring passage of Senate Bill 106 (see Exhibit 1).

Father Jerry Lowney read written testimony to the committee (see Exhibit 2).

Questions From Committee Members: Senator Halligan asked why every warrant would have to include mention of the pregnancy situation. Kim Kradolfer said it just applies to a situation where a woman's execution has been suspended because of pregnancy. Senate Bill 108 also contains clarification language that "codes to what should be included in the death warrant, that mirror this situation with the exception of the pregnancy issue," she said.

Closing by Sponsor: Senator Pinsoneault said he would not like to get into debate, but stated he has been a criminal attorney for 26 years. He suggested that the Fr. Lowney read a recent article published in the Missoulian which told the history of the death penalty which depicts the heinous mind of the killer. He feels that a killer has forfeited his right to live. He urged passage of Senate Bill 106 saying it brings clarity in the law where there is currently confusion.

HEARING ON SENATE BILL 107

Presentation and Opening Statement by Sponsor: Senator R. J. "Dick" Pinsoneault of St. Ignatius, representing District 27, stated he was carrying the bill at the request of the department of justice and said the bill's intent was to clarify executive clemency.

List of Testifying Proponents and What Group they Represent:

Kimberly Kradolfer, Assistant Attorney General, representing the state of Montana

List of Testifying Opponents and What Group They Represent:

Fr. Jerry Lowney, representing the Roman Catholic Diocese of Helena

Testimony:

Kim Kradolfer presented written testimony as a proponent of the bill (see Exhibit 3).

Fr. Lowney presented written testimony as an opponent of the bill (see Exhibit 4).

Questions From Committee Members: Senator Mazurek said he had received a call from Tom Keegan who expressed concern about the language on the top of page two which essentially takes away the certain authority of the governor. He said he and other members of the parole board may disagree with the language of the bill. He also has a technical concern. He asked that I express concern of the board to the committee since he was unable to be here in person.
Apparently, Mr. Keegan registered surprise that the board wasn't represented at the hearing. Senator Beck asked if this had been a recommendation of the governor. Ms. Kradolfer said she hadn't talked to the current governor's office and that this was simply an attempt to codify the research that John North had done. She didn't think the governor was trying to get out from under it, but the department's interpretation was that the governor did not have the independent authority to grant the clemency recommendation. If the legislature determines it is appropriate that the governor have that authority, the department would have no problem with that. They simply wanted it clarified, so if the committee wanted to make that change, she said, the department would have no problem with it.

Senator Mazurek asked for clarification on her statement, saying he understood she had no disagreement with that, but was she saying in her opinion that it was not unconstitutional. She said she agreed with his statement.

Senator Halligan asked if other states already have criteria for clemency being granted. Miss Kradolfer said she wasn't sure. Currently, the board of pardons is allowed to look at the crime and the social conditions, even though those two things are not

particularly well defined. She thought it might be good that they are not tightly defined, and thought perhaps there should be some vague language to allow for discretion.

Senator Halligan asked if there were time frames as to when the governor must take action. Miss Kradolfer said there were not time frames as such, although there is a provision requiring the board of pardons to publish notice for two weeks prior to the hearing on any application for clemency in the county in which the conviction occurred. There is a second provision allowing the board to waive that requirement if there is impending death. In an acute situation where there is impending death, it is felt that publication with short notice, plus a hearing and a complete record of the hearing, in addition to persons being given an opportunity to testify resulting in a petition for respite presented to the governor is a satisfactory way to handle that situation. The department felt it would be inappropriate to restrain the governor with a tight time limit.

Senator Halligan asked if there was an automatic sentence review. Miss Kradolfer said that there wasn't an automatic review, but was something that must be filed for. There is, however, an automatic review for the death penalty whenever that sentence is imposed by the Montana Supreme Court. If the individual chooses not to appeal or to take the federal review, then that is the only review that takes place.

Senator Crippen questioned Miss Kradolfer about respite, asking if it effected a suspension of execution. Miss Kradolfer said it did.

Senator Crippen asked what would happen if an execution was set for March 1 and the respite ended before March 1. Miss Kradolfer said that the death warrant would still be in effect. If the respite was granted enough before the execution, then it wouldn't stay the death warrant. The situation last December was that the governor granted respite last November 29 or 30th and the execution was scheduled for December 1, she said. That was a 45-day respite, and the way in which it was granted stated that, if clemency had not been granted at the end of that time, then the execution would occur on that day.

Senator Crippen asked how Miss Kradolfer would answer Father Lowney's question of what difference who signs the petition. Miss Kradolfer said the approach the courts take, including the Ninth Circuit and the Supreme Court, say it is fairly arrogant of society to think it has the right to ask for clemency when the prisoner has made peace with himself and his God to face the death penalty and does not want to pursue further means to escape the penalty.

Senator Crippen asked if it wasn't arrogant to think that society had no right to request review of judgment. Miss Kradolfer didn't agree. The court reviews the sentence to see if it was perfectly imposed and was not extreme as compared with other similar crimes, she commented. If this legislative body decided that every prisoner must request a petition to the board of pardons, then that would be appropriate, she said. But, she said, if the decision is made for him when he doesn't desire it, she felt it was wrong for someone to take the decision away from him. One decision the courts looked at is that an individual has a right to make his own decisions.

Senator Mazurek said there is a question of competency when a person does not request a petition. If there is any question about that, and there has been no court-appointed guardian appointed, no conservator, no consent on the part of the individual, then he felt the bill did not cover the whole situation to ask for review. He felt review should be only when the person has made the decision consciously and competently, but that was not what the bill stated, he said. It states "only if there has been a formal determination of incompetence." Miss Kradolfer said, if there is any evidence that the prisoner is not competent to act in his own interest, then the court will allow someone to file legal proceedings in his behalf. In the Cameron Keith case, the Department of Justice went through protracted hearings on competency. Two psychologists and two psychiatrists studied him two years ago and came to the conclusion his decision was completely rational, even though it was not a decision they would make, she said. But, they felt it was a decision he had a right to make, she told the committee. She said there are other avenues to pursue regarding the competency question, including having guardians appointed. Another question to pursue was whether or not to go ahead and litigate in the state and federal

courts, and to have a guardian or conservator appointed. Then, she stated, a petition for clemency could be filed.

Senator Mazurek asked if the hearing with the psychologists and psychiatrists was in the course of the trial or afterwards. She answered that it was many years afterwards.

Closing by Sponsor: Senator Pinsoneault said he wanted to clarify that he did not ask to sponsor the bills. He said that one thing a practicing attorney needs is procedure. He said he was an active right-to-life proponent but he respected the justice system. He felt that Keith's case had nearly turned into a charade, and had not remained a formal, comprehensive consideration. If three board members feel the death warrant should be binding, he agreed that it should. He urged the committee to give a Do Pass recommendation on the bill, and closed the hearing.

HEARING ON SENATE BILL 108

Presentation and Opening Statement by Sponsor: Senator R. J. "Dick" Pinsoneault of St. Ignatius, representing District 27, opened the hearing stating he did so at the request of the department of Justice.

List of Testifying Proponents and What Group they Represent:
Kim Kradolfer, Assistant Attorney General, representing the Department of Justice

Nick Rotering, Department of Institutions

Father Jerry Lowney, representing the Roman Catholic Diocese of Helena

Mike Sherwood, Montana Trial Lawyers Association, asked if he could appear neither as a proponent or opponent, but wished to be present for questioning.

List of Testifying Opponents and What Group They Represent:
None

Testimony:

Kimberly Kradolfer, read written testimony (see Exhibit 5) which she presented to the committee.

Fr. Jerry Lowney appeared before the committee as a proponent saying said he especially supports the portion of the bill which keeps the executioner anonymous. Being involved in the right-to-life movement, he said there is a tremendous trauma for anyone who has taken the life of another person. Years later, treatment may be necessary. He found problem with medicalizing execution by use of injection. The people closest to an execution suffer the most, he stated, so he felt keeping the executioner a secret was an excellent idea in order to minimize the suffering.

COMMENTS: Mike Sherwood handed testimony to the committee secretary and said he wasn't appearing for the MTLA but would be present for questioning by the committee.

Questions From Committee Members:

Senator Beck asked why the state gave the option of death by injection, why it wasn't automatic. Miss Kradolfer said the language went back to the time when a number of prisoners were sitting on death row and had been sentenced to death by hanging. The option was provided to answer potential questions of "cruel and unusual punishment."

Senator Mazurek asked if she could see any legal entanglements that could result from the executioner becoming known inadvertently. Would it postpone the execution, he asked. She said the reason that secrecy was included was to protect the executioner, but she didn't see any legal entanglements, because it wouldn't go against the validity of the conviction.

Senator Crippen asked if the executioner was masked at the last execution in Montana. Kim Kradolfer said she didn't know, that there was no indication in the records on storage at the historical museum. In many cases, she stated, the condemned person has been a heavy drug user and the condition of his veins is such that a person with suitable training must be used to insert the catheter into which the injection is inserted. She also mentioned the use of a screen for the privacy issue.

Sen. Beck asked who, actually, is the executioner. If a nurse was involved, would she be considered the executioner, he asked. Kim Kradolfer said it would depend upon the individual situation. You can't require the medical profession to provide an executioner. There may be a team assigned.

Sen. Crippen asked for clarification on Fr. Lowney's appearance as a proponent. Fr. Lowney said it was only insofar as keeping the executioner anonymous. He reiterated that he was opposed to the death penalty. But the church's bishops feel the use of injection is a misuse of medical knowledge. When executions were administered in a county, he said, there were fewer executions, because juries did not wish to have them in their own town. He said being separated from executions makes their acts more acceptable to society.

Closing by Sponsor: Sen. Pinsoneault said he wished to comment about the last hanging in Montana. He understood that three men were involved and that they all put their hands on the trap door, so that no one person would be the executioner. As to finding persons to be executioners, he said he didn't want to be funny, but that he had had several people call offering to do it. The main reason for the bill is clarification. He closed the hearing.

HEARING ON SENATE BILL 103

Presentation and Opening Statement by Sponsor: Senator Greg Jergeson of Chinook, representing District 8, opened the hearing saying it was straight-forward legislation to prohibit a felon from recovering civil damages if injured while in the commission or fleeing from the commission of a crime. He stated the County Commissioners Association said they would support the bill as well.

List of Testifying Proponents and What Group they Represent:

John Conner, Department of Justice, representing the County Attorneys Association

Gary Marbut, vice president of the Montana Rifle Association, Western Montana Fish and Game Association, Montana Active Shooting Council, and the Big Sky Practice Shooting Club

Mike Sherwood, Montana Trial Lawyers Association

List of Testifying Opponents and What Group They Represent:

None.

Testimony:

John Connor said this bill originated from a particular county attorney who had experienced a problem. The association saw this as a victim's rights bill. Felons have become increasingly litigious, and he felt they should not have the options to file suits of this type. He commented that some of the committee had some reservations about the bill because of the question of constitutionality. He asked for an opportunity to work on the language to come up with an acceptable version.

Gary Marbut said he felt all responsible gun owners felt suits brought against a crime victim infringed upon the citizen's rights of self-defense. The crime victim may have to put up with being attacked twice, once in the commission of the crime and once in court. He felt seeking redress in court had certain limitations and thought they should apply in this instance.

Mike Sherwood, said his organization opposes the bill, saying there was no basis for the statement that there has been a flooding of the courts with these cases, other than in federal courts where corporations are suing each other. He felt the bill is unconstitutional and that the supreme court would throw it out. It is broad in that it prohibits recovery from non-law enforcement personnel. He mentioned a person fleeing a crime, getting hit by a drunk and not being able to sue the drunk. The only case he knew of where this applied occurred about ten years ago, in which a young boy was shot in the back and who did have some recovery. Currently, law enforcement officers are only liable if they use force in excess of what is reasonable under the circumstances.

Questions From Committee Members: Senator Jenkins asked if it would be a misdemeanor to step on a person's land and Mr. Sherwood answered yes.

Senator Jenkins asked if it wasn't just his personal opinion that the Supreme Court would find this unconstitutional. Mr. Sherwood said he felt that if 10 lawyers were asked about it, they would unanimously agree. He felt it was incredibly broad and incredibly restrictive. He was as sure as he could be.

Senator Beck asked if CI-30 were on the books, would this be as unconstitutional and Mr. Sherwood said he wasn't sure.

Senator Halligan referred to a motorcyclist fleeing from a policeman, was shot in the head and was charged with a misdemeanor and he wondered if misdemeanors should be addressed by the bill. Mr. Sherwood said the original concept of the bill was addressing crimes of a more severe nature.

Senator Mazurek said, as he read the bill, it might prohibit a victim fleeing from a felony to have redress. Mr. Connor said he could see what Senator Mazurek meant and said that was not intended and hoped that could be clarified with a simple word insertion.

Closing by Sponsor: Senator Jergeson said it is our responsibility as legislators to address the concerns of our constitutients. It is not their duty to determine the constitutionality, but is the court's. He closed the hearing.

ANNOUNCEMENTS: Senator Crippen announced the scheduling of Senator Rasmussen's bill dealing with abortion. He said the bill would be highly controversial, and that it had been scheduled for Monday, January 23.

Chairman Crippen said he would like to act on Senate Bill 10 as soon as possible. Valencia Lane said, in her opinion, the bill needed a fiscal note because of publication of a pamphlet, who was going to handle it and how much it was going to cost, in addition to the reduction of filing fee.

Chairman Crippen mentioned that the judges' bills would be coming up. He told the committee that he had asked

staff attorney, Valencia Lane, to prepare a gray bill on Senate Bill 92, including the amendments bringing the bill in line with Minnesota law. He asked that committee members study it so that action could be taken up on it as soon as possible.

ADJOURNMENT

Adjournment At: 11:30 a.m.

SENATOR BRUCE D. CRIPPEN, Chairman

BDC/rj

minutes.118

ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date 1-18-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN			✓
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

Kradolfer
Dept of Justice

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 1-18-99
BILL NO. SB 106

Senate Bill 106

A bill to clarify the authority of the governor to issue a death warrant when execution of the death warrant when execution of the sentence has been suspended because the person to be executed is a pregnant woman

Summary of the testimony of Kimberly A. Kradolfer, Assistant Attorney General

Section 46-19-204, MCA, currently provides that the execution of the death sentence shall be suspended if a determination is made that the woman under sentence of death is pregnant. Currently, section 46-19-204 simply refers to the governor issuing "his warrant" appointing the day of execution at such time as the governor is satisfied that the woman is no longer pregnant. Nothing defines this death warrant or what information should be contained within it.

This bill defines what should be included in a death warrant and mirrors the language in SB 108 so that both court issued and governor issued death warrants contain the same information, although the governor issued death warrant in this situation will also indicated that the original execution of judgment was suspended due to pregnancy and that the governor is satisfied that the woman is no longer pregnant.

The death warrant should recite:

-the conviction
-the judgment
-the method of execution
-that the execution of judgment was suspended due to pregnancy
-that the governor is satisfied that the woman is no longer pregnant
-the appointed date for the execution

Fr. Jerry Lawney
Ex. 2
SB 106 1-18-89

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 1-18-89
BILL NO. SB 106

I would like to applaud the intent of Senate Bill #106 to save the life of an unborn child. This is a stand consistent with an ethic of the sacredness of human life. My church has consistently taught the sanctity of all human life. Thus, I support any attempt to save any human life.

On the other hand, I am struck by the irony of this bill in two ways:

First, should the bill pass and become law, it would place the State of Montana in a position of supporting the life of an unborn child when the mother is scheduled to be executed at the same time that the State permits the aborting of thousands of unborn infants each year under other circumstances. Next Monday I will be the speaker at the Rally for Life breakfast at Jorgenson's Holiday Motel. In that speech I will present the consistent position of the Catholic Church that abortion is wrong and violates the sanctity of human life.

Thus, at the same time, I must point out the inconsistency of taking the life of the mother of the child while, at the same time, saving the life of the child. The Catholic bishops of Montana and the National Council of Catholic Bishops have pointed out repeatedly in the last several years that there is no justification for the death penalty in the United States. It does not deter crime. It devalues human life. It restores nothing to the victim. It increases violence in degrading the value of human

life. There are many other alternatives available other than the taking of another human life.

I would ask this committee to consider other alternatives to uphold the life of the mother in such circumstances as well as the infant.

Fr. Jay Lawrey, PhD
Associate Pastor
St. Helena's Cathedral

Kradolfer
Dept. of Justice

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 1-18-89
BILL NO. SB 107

Senate Bill 107

A bill to clarify the laws relating to executive clemency

Summary of the testimony of Kimberly A. Kradolfer, Assistant Attorney General

Sections 46-23-301 through 46-23-315, MCA, set forth the statutes pertaining to executive clemency. This bill amends sections 46-23-301 and 46-23-315 to clarify three areas: (1) who has standing to file an application for executive clemency; (2) that the governor's power to exercise executive clemency is dependent upon a recommendation from the Board of Pardons that clemency be granted; and (3) defining the nature and effect of "respite."

The bill was drafted to eliminated several problems or potential problems which arose during the course of approaching the then scheduled execution of David Cameron Keith. It is intended to codify the conclusions which were reached through the research conducted by the attorney general's office and the research of the governor's legal counsel in trying to determine the answers to legal questions which arose in facing that execution date.

1. STANDING TO FILE APPLICATION FOR CLEMENCY

One concern that arose as the execution date approached was that someone without any legal standing and without the consent of the defendant would attempt to file an application on behalf of Keith and that it would require resetting the date and having everyone go through the waiting and preparation period, with its attendant financial and emotional costs, over and over again. In the Keith case, as in the Gary Gilmore case and others which have been less celebrated,it appeared likely that outside groups opposed to the death penalty would attempt to delay a scheduled execution repeatedly through such legal manuevers. Courts have developed criteria for determining who has standing to bring a legal action on someone's behalf. This bill incorporates those standards to clarify the legality of an application. Under the bill, an application may be filed by:

-the person convicted of the crime;
-an attorney acting on behalf of the person convicted of the crime and acting with his consent;
-a court-appointed guardian or conservator acting on behalf of the person convicted of the crime

2. GOVERNOR'S AUTHORITY TO GRANT CLEMENCY DEPENDENT UPON RECOMMENDATON OF CLEMENCY FROM THE BOARD OF PARDONS

In researching the governor's power to grant clemency independent of a recommendation for clemency from the Board of Pardons, both the governor's legal counsel and the attorney general's office concluded that there is no such independent power. That conclusion was based upon some of the statutory language contained in the current statutes and upon an examination of the history of the constitutional provision granting the governor power to grant clemency. The statutory language seemed to contemplate action by the governor only if a recommendation had been made by the Board of Pardon to grant clemency. (Example: section 46-23-307 discusses the procedure for the Board of Pardons to make a decision and to forward it to the governor for consideration. It appears that a decision of the Board is transmitted to the governor for action only if the decision is to recommend clemency: "(I)f such decision be made to recommend clemency, the copy of the decision together with all papers used in each case shall be immediately transmitted to the governor.")

Additionally, the constitutional provision granting pardon power to the governor is limiting in that the governor only has power to the extent provided by law:

> Art. VI, section 12. PARDONS. The governor may grant reprieves, commutations and pardons, restore citizenship, and suspend and remit fines and forfeitures subject to procedures provided by law.

In researching the constitutional provision, I reviewed the provision in the 1889 constitution and the minutes of the 1972 constitutional convention. The equivalent provision in the old constitution was Art. VII, section 9. In December of 1954, that provision was amended by referendum vote of the people to include the Board of Pardons as a constitutional board that would act to buffer the executive's decisions. While the new constitution eliminated the constitutional status of the Board of Pardons (which had originally consisted of the governor, the attorney general and the state auditor), the minutes of the convention demonstrate a clear intention of making the governor's power subject to the procedures prescribed by law. See, e.g., pages 962-64 of the verbatim transcript,attached hereto.

On the basis of the above research, the attorney general's office and the legal counsel for the governor concluded in November 1988 that the governor had no power to grant executive clemency in the absence of a recommendation for executive clemency from the Board of Pardons. This bill simply clarifies the statutes to reflect those conclusions.

3. RESPITE

The third area which arose in researching the area of executive clemency concerns the nature of respite. The statute as it now exists does not define the nature and extent of respite and what effect it has on a death warrant.

When the governor was asked to grant respite, the question arose as to what effect, if any, respite would have on a death warrant. After researching the question, the attorney general's office and the legal counsel for the governor concluded that the nature of respite is temporary and of a definite period. It also appeared that where respite affects the scheduled date of an execution, it serves only to stay a death warrant, which will then be in immediate effect upon expiration of the stay. The governor's power to "start" the execution process again when it was stayed by his exercise of respite power seems logical. (Cf. SB 106: governor's power to issue death warrant when execution of pregnant woman was stayed on the basis of executive branch action.)

This bill clarifies that any respite granted by the governor must be of temporary duration for a definite period of time. It also provides that where grant of a respite results in staying a scheduled execution, that the respite serves to suspend the death warrant and the warrant is back in effect at the expiration of the respite if clemency is not granted. In that event, the execution will take place on the date the respite expires.

CLERK HANSON: "Section 12, Pardons. The governor shall have the power to grant reprieves, commutations and pardons after conviction, reinstate citizenship, and may suspend and remit fines and forfeitures subject to procedures prescribed by law." Mr. Chairman, Section 12.

CHAIRMAN GRAYBILL: Mr. Joyce.

DELEGATE JOYCE: Mr. Chairman. I move that when this committee does arise and report, after having had under consideration Section 12 of the Executive Article, that it recommend that the majority report, as read by the clerk, be adopted.

Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Joyce.

DELEGATE JOYCE: On this section, the minority report—there is a difference between the two, and perhaps it is then in order for you to recognize Mr. Wilson to move the minority report.

CHAIRMAN GRAYBILL: Do you want to make any explanation of the majority report?

DELEGATE JOYCE: Yes, I would like to.

CHAIRMAN GRAYBILL: Why don't you explain it, and then we'll take his.

DELEGATE JOYCE: All right. What the majority of the committee has done on Section 12 is undertaken to amend Section 9 of the current Montana Constitution, which is on page 21 of the blue book, if anyone wants to get it. It's Section 9 of Article VII, the Executive Article. As currently written, this is an amendment that was put through by a vote of the people in December, 1954. Prior thereto, under the original Constitution, the Board of Pardons consisted of the Governor and the Attorney General and the State Auditor. In 1954, on our constitutional amendment, that was changed to provide that there would be a Board of Pardons appointed by the Governor, and in this particular section the majority report is adopting the language of the first four lines of the current Constitution and is striking the proviso thereafterwards. We did this after—on recommendation of the reorganization director and with the concurrence of the present Chairman of the Board of Pardons—that is, what I mean to say there is, they didn't tell us to do that, but they had no objection to doing that. And the reason we did it is we believe that the present section—deleting after the proviso—or the revised section, in which we delete everything in the current Constitution after the proviso with reference to the Board of Pardons—is proper in that we believe that the Governor should have the power to grant reprieves, commutations and pardons. Then we say, it shall– his power in that connection is made subject to procedures prescribed by law, and the Legislature has now appointed—provided for an appointive board of lay pardons, and it, no doubt, will continue to do so. And yet it seemed to a majority of the committee unnecessary to require it, and the Executive Reorganization director and the present Chairman of the Board of Pardons recommended the deletion. The historical power of the Chief Executive to show mercy should be retained, and the majority believe that there is no constitutional need for a buffer board appointed by the Governor. And the key word there is "constitutional", the idea being that the Legislature can and may set up a board, and further than that, the Governor can request the Board of Pardons to make recommendations before he does commute sentences or exercise his executive clemency. But all we were doing in the majority, here, is we are not requiring him to get the prior approval of the Board of Pardons. The Board of Pardons is a constitutional office by virtue of being contained in the present Article VII, Section 9. And, we—the majority submits it's unnecessary to have this board as a constitutional office. When it got down to being enacted on by the Legislature, they combined this constitutional Board of Pardons with the legislative Board of Parole, and they call it the Board of Pardons and Parole. And, of course, 98 percent of their work is in connection with paroles. But, under the present situation, the point at issue is this—if a prisoner is in the state prison, he cannot be pardoned by the Governor unless he gets the prior approval of this Board of Pardons, and we submit that any Governor can still use that Board of Pardons and make—or the Legislature can require that prior approval by the Board of Pardons, but it's not necessary to continue on this Board of Pardons in the Constitution. I might further add that, by making no reference to the Board of Prison Commissioners in Section 20 of the majority committee report—I'll correct that—by making no reference to the Board of Prison Commissioners, which is presently provided for in Section 20 of Article VII, we are in effect repealing that, and the reason why we are repealing it is that for many years now, the Board of Prison Commissioners set up in the Constitution, which also consisted of the Governor and the Attorney General and the State

Auditor, has not, in fact, been functioning; rather, the prison is being controlled under the Department of Institutions; and so we are in effect making constitutional what the state has been doing all these years and relieving these three people from violating the present Constitution, and we recommend repeal to conform to the facts as they really are.

CHAIRMAN GRAYBILL: The Chair would recognize Mr. Wilson.

DELEGATE WILSON: Mr. President, I move an amendment to Section 12 of the majority article to include—to adopt the minority proposal. You'll find that on page 51. Would you have the—have it read, please.

CHAIRMAN GRAYBILL: Or page 42. Very well. Mr. Wilson, your amendment to provide for the minority report for Section 12 is accepted. Do you wish to discuss it?

DELEGATE WILSON: Would the clerk read it, please.

CHAIRMAN GRAYBILL: Oh, all right, excuse me. Mr. Clerk, would you read it. Mr. Wilson, the first paragraphs are identical, isn't that correct?

DELEGATE WILSON: Yes.

CHAIRMAN GRAYBILL: So the clerk will read the second section, the second paragraph, which is an addition in the minority report.

CLERK HANSON: Second paragraph, minority report, page 42. "This action by the governor shall be upon the recommendation of a board of pardons. The legislative assembly shall by law prescribe for the appointment and composition of said board of pardons, its powers and duties; and regulate the proceedings thereof." Mr. Chairman, second paragraph to Section 12, minority report.

CHAIRMAN GRAYBILL: Mr. Wilson.

DELEGATE WILSON: We agree with the majority of the Executive Committee, except that we feel it is appropriate to establish constitutionally the Board of Pardons. The pardon power of the Governor is of such importance that it should not be exercised without the prior advice and consultation of a board of lay and professional persons responsible for the state correctional program. Mr. President, in talking with some of the former Governors and different people, they felt that this was a necessity that this be provided for in the Constitution, that they would have these people for the Governor to consult with. It is an important decision that he would have to make, and without some consultation and advice, he would be at a loss to know how to proceed. So it is with the thought in mind that we would provide the board for the Governor, to assist him in making these decisions. Mr. President, I move the adoption of the minority report.

CHAIRMAN GRAYBILL: Very well. The issue is on the substitute—or the amendment by Mr. Wilson to add the second section of the minority report to the existing section of the majority report, which is identical to the first paragraph of the minority report.

Mr. Roeder.

DELEGATE ROEDER: Mr. Chairman, I rise in opposition to Mr. Wilson's attempts to preserve the Board of Pardons, and I wonder if Mr. Dahood would yield to a question.

CHAIRMAN GRAYBILL: Mr. Dahood?

DELEGATE DAHOOD: I yield, Mr. Chairman.

DELEGATE ROEDER: Mr. Dahood, you're a prominent lawyer, and I wonder if—[you] would give us your opinion on this issue. Do you think that if we removed the Board of Pardons, the Governor would suddenly release upon society all the cons from Deer Lodge?

DELEGATE DAHOOD: I don't think there's any such chance that that could happen under any circumstance, and I think the Governor, if he's going to be a strong executive, should have the type of power that we're talking about; and so, consequently, I would submit that I would agree with the majority report.

CHAIRMAN GRAYBILL: Mr. Kamhoot.

DELEGATE KAMHOOT: Mr. Chairman, I believe Mr. Dahood did a little more than answer the question, but that's all right. It just saved him getting on the floor again. (Laughter) I can't help but recall last night, when we battled around in this chamber and we finally decided that an 18-year-old could hold the office of Governor. Now, are we really serious when we say that anybody 18 years old—I don't care how smart they are—not belittling anyone 18 years old at all—I've talked to

many of them and they say, "Why, we don't even care too much about taking the responsibility to vote, let alone being Governor."—now, are we actually serious when we're talking about an 18-year-old making decisions of releasing someone from prison, commuting death sentences, if we retain that, without a Board of Pardons for advice. I think we'd better get back on the ground here and kind of get a little realistic about these things. I thank you, Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Harper.

DELEGATE HARPER: Would Mr. Joyce yield to a question?

CHAIRMAN GRAYBILL: Mr. Joyce, will you yield?

DELEGATE JOYCE: I yield.

DELEGATE HARPER: I'd just like to be clear on this. If we take the reference to the Board of Pardons out of the Constitution, does that mean that we automatically do away with the Board of Pardons?

DELEGATE JOYCE: No, it's still on the statute books.

DELEGATE HARPER: And until the Legislature—excuse me, may I ask another question, Mr. Chairman?

CHAIRMAN GRAYBILL: You may.

DELEGATE HARPER: Until, then, the Legislature strikes that, then the Board of Pardons will remain in effect with pretty much its same composition and way of working?

DELEGATE JOYCE: Yes, and this constitutional provision provides that the Legislature may set up procedures for the Governor to exercise his pardon powers so that the Legislature can, in effect, limit the Governor's power by law, and it's simply, I guess, a quibble over whether or not it should be in the Constitution or whether we should trust the Legislature to continue to have a Board of Pardons or—and to give the Legislature some flexibility of how many would be on or how they would do this in the future. That's the substance of the dispute, as I understand it.

CHAIRMAN GRAYBILL: Very well. The issue is on Mr. Wilson's amendment, which adds the second sentence to Section 12 on Pardons. The language added is: "This action by the governor shall be upon recommendation of a board of pardons. The legislative assembly shall by law prescribe for the appointment and composition of said board of pardons, its powers and duties; and regulate the proceedings thereof." So many as shall be in favor of the motion to add that sentence as an amendment, please say Aye.

DELEGATES: Aye.

CHAIRMAN GRAYBILL: Opposed, No.

DELEGATES: No.

CHAIRMAN GRAYBILL: The Noes have it, and so ordered. Very well. The issue, then, is on the basic Section 12. Members of the committee, you have before you the recommendation of Mr. Joyce that when this committee does arise and report, after having under consideration Section 12 on Pardons, that the same shall be adopted. All in favor of that motion, say Aye.

DELEGATES: Aye.

CHAIRMAN GRAYBILL: Opposed, No. (No response)

CHAIRMAN GRAYBILL: The Ayes have it, and so adopted. Will the clerk read subsection 1 of Section 13.

CLERK HANSON: "Section 13, Militia; subsection 1. The governor shall be commander-in-chief of the militia forces of the state, except when these forces are in the actual service of the United States, and shall have power to call out any part of the whole of said forces to aid in the execution of laws, to suppress insurrection or to repeal invasion."

CHAIRMAN GRAYBILL: "Repel invasion."

CLERK HANSON: "Repel."

CHAIRMAN GRAYBILL: Mr. Joyce.

DELEGATE JOYCE: Mr. Chairman, I move that when this committee does arise and report, after having had under consideration Section 13 of the proposed Executive Article, that it recommend the same be adopted.

Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Joyce.

Fr. Lavney

SENATE JUDICIARY
EXHIBIT NO 4
DATE 1-18-89
BILL NO SB 107

I would like to speak in opposition to Senate Bill #107.

In speak as a Catholic priest and as a Sociologist who has worked in, researched and written about criminology for many years.

Sen. Pinsonault has maintained in his statements to the press that this bill had nothing to do with the David Keith case. This would appear to be true because David Keith signed his own petition for clemency in my presence. No one else petitioned for him except his attorney who, in the normal lawyer-client relationship, acted on his behalf.

On the other hand, it would appear that the Keith case caused a re-examination of the present legislation and brought about this bill.

I oppose the bill as a Catholic priest because it is inconsistent with an ethic of respect for life. Any attempt to lessen the chances of a life being saved is not consistent with upholding the sanctity of each human life.

It would appear that there could be cases in which an accused or convicted person refuses to sign a petition. Even though the person may have passed psychiatric examination to be competent to stand trial, it does not mean that the person at a later date is capable of making such a decision. This is particularly true in the case of the sociopath who desires to be

punished. The death penalty increases the likelihood that such persons will commit violent acts to be killed.

In effect, the State of Montana would be abetting a suicide by such an individual. Competent professional should be allowed to present a petition to board and the board should be allowed to make a recommendation to the Governor. Should we close the doors to all the various situations that might arise? I do not think so.

In addition, I oppose the bill because it would further restrict the authority of the governor. I would like the present legislation to be amended so that the governor could accept or reject the recommendation of the Board of Pardons. This is done with most recommendations of most boards. Why should this be different? In most states, the governor has the final right to grant clemency. Are we so eager to take human life so that we refuse to give our governor this authority?

Rev. Jerry Lowney, PHD
Associate Pastor, St. Helena's Cathedral

Senate Bill 108

A bill to clarify the procedures for execution of a death sentence; providing a time for choosing the method of execution; providing that the identity, selection, and training of the executioner are confidential; providing for a description of the contents of the death warrant and for its return

Summary of testimony of Kimberly A. Kradolfer, Assistant Attorney General

Section 46-19-103, MCA, sets forth the procedures for executing a death sentence. Several of its provisions need clarification because they are not well defined in the current statute. In approaching the then scheduled execution date of December1,1988, for the David Cameron Keith execution, a number of questions arose which needed guidance that was not provided by the statute. This bill serves to provide statutory answers to those questions.

The areas of concern which needed to be addressed are: (1) when and how must a condemned prisoner elect lethal injection, rather than hanging, if he is going to do so; (2) what should be included in the contents of a death warrant and who should issue it; (3) the need to protect the anonymity of the executioner; and (4) the manner in which the death warrant should be returned after the execution.

1. ELECTION OF LETHAL INJECTION

The current statute does not address when and how a condemned prisoner must elect lethal injection, rather than hanging. This becomes a problem if the prisoner insists that he can make the decision at the last minute or, as happened in the David Cameron Keith case, the district court is of the opinion that since the statute does not speak to it, the prisoner can wait to elect or can change his election up to the last minute. This places the prison officials in the position of having to be ready to go forward with either hanging or lethal injection and would require preparation of both the trailer facility for lethal injection and the building of a gallows in the yard, with a building built around it to provide screening. It would also complicate training of the executioner(s), security, etc.

This bill requires a defendant who wishes to elect lethal injection to make the election at the hearing at which an execution date is set. If he does not do so, lethal injection as an option for the execution is waived. This will require a defendant facing a possible death sentence to be prepared to make an election at the conclusion of the hearing on mitigating and aggravating circumstances, if the judge imposes the sentence and sets the date at that time.

2. CONTENTS OF THE DEATH WARRANT

The statute as it now exists mentions the death warrant only in subsection (6), where it states:

> "After the execution, the warden shall make a return upon the death warrant showing time, mode, and manner in which it was executed."

This bill will clarify that the district court shall issue the death warrant within 5 days of setting an execution date. The death warrant shall be attested to by the clerk of court with the seal of the court. The warrant and a certified copy of it shall be delivered to the warden of the state prison. It must be directed to the warden and it shall recite:

-the conviction
-the judgment
-the method of execution
-the appointed date of the execution

3. ANONYMITY OF EXECUTIONER

The statute currently provides that the warden shall select the person to perform the execution and the warden or his designee shall supervise the execution. There is no statutory provision which specifically sets forth that the privacy interests of the executioner outweigh the public right to know his identity. Historically, however, the identity of the executioner has always been protected.

As the then scheduled December1, 1988, execution date for David Cameron Keith approached, the warden was confronted by a member of the press who directly asked the identity of the executioner. When the warden declined to answer that question, the reporter then drafted a series of questions pertaining to the selection and training of the executioner which were designed to identify the executioner or executioners. If the warden answered only some of the questions and declined to answer others, the refusal

to answer some would provide information which could be used to provide the identity of the executioner or executioners. When the warden refused to answer the questions for that reason, I was contacted by James Reynolds, attorney for the Associated Press on several occasions. Mr. Reynolds indicated that if the questions were not answered, the Associated Press would pursue legal action if necessary in order to obtain answers to the questions which were presented. Mr. Reynolds did indicate that it was not the intention of the Associated Press to obtain the actual name of the executioner (that conflicts with the direct question to that effect originally put to the warden). When respite was granted, Mr. Reynolds sent a letter indicating that if clemency was denied, the matter would be pursued further. (I would also note that the warden asked a member of his staff to contact other states which have had fairly frequent executions, such as Texas, Louisiana, Georgia, and Florida, to determine how those states have responded to similar inquiries regarding the identity and/or selection and training of their executioners. None of the states contacted had ever had a reporter make such inquiries and all were amazed that one would do so.)

In reviewing this question, several members of the attorney general's office reached the conclusion that in the case of an executioner, the individual's right of privacy would outweigh the public's right to know the executioner's identity and, additionally, information which would make it possible to identify executioner based upon his training and experience. That is particulary true where the entire execution is carried out in front of 12 or more witnesses, including up to 3 selected by the condemned prisoner, and where information on the executioner or executioners selection and training would make him or them readily identifiable to the witnesses, if not to the public at large.

This bill asks the Legislature to set forth in statute the policy determination that the anonymity of the executioner is a matter of individual privacy which as a matter of law outweighs the public's right to know his identity or information which could be used to deduce his identity.

4. RETURN ON DEATH WARRANT

The statute currently provides that after the execution, the warden shall make a return upon the death warrant showing the time, mode, and manner of death. It provides no deadline for doing so and does not indicate where it should be returned to. The bill sets a 20 day deadline and provides that the return be made to the clerk of the court from which it was issued and that time, mode, and manner of death shall be noted on the warrant.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE: 1-18-88
BILL NO. SB 10

NAME: Michael Sherwood

ADDRESS: 401 N. Washington, Missoula

PHONE: 721-2729 (Helena 443-6792)

REPRESENTING WHOM? MTLA

APPEARING ON WHICH PROPOSAL: Sen 103

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

COMMENTS:

1) There is no flood of litigation in this field warranting this highly restrictive act.

2) The act will not pass constitutional muster: 1) Breadth 2) Access to courts

3) The act prohibits recovery against non-law enforcement personnel for negligence not attributable to pursuit.

4) Case law in this state warrants rejection of this legislation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

EXHIBIT. NO. SENATE JUDICIARY

DATE

BILL NO. DATE 1/18/89

BILL NO. SB 106

NAME: Marian Waterman

ADDRESS: Box 745

PHONE: 442-5761

REPRESENTING WHOM? League of Charlie

APPEARING ON WHICH PROPOSAL: SB 106

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(did not testify)

SENATE JUDICIARY
EXHIBIT NO.
DATE 1-18-89
BILL NO. SB 106

January 18, 1989

Senator Crippen and members of the Senate Judiciary Committee:

My name is Mignon Waterman. I am from Helena, Montana, and I am here representing the Montana Association of Churches.

I appear as a proponent for SB106 because we would oppose the execution of a pregnant woman. However, having said that, I don't want to leave any of you with the impression that, after delivery of the child, we would condone the taking of the mother's life by the state.

The Montana Association of Churches opposes the death penalty because we believe killing is wrong, whether the killing is the act of violence by a criminal or whether it is an act of punishment executed by the state.

SB 106, 107, 108, 103
1/19/89

Great Falls Mercy Home, Inc.

P. O. Box 886 • Great Falls, MT 59403 • Crisis Line 406-453-6511

January 19, 1989

Sen. Bruce Crippen, Chairman
Senate Judiciary Committee
Capitol Station
Helena, MT 59620

Dear Senator Crippen,

Without claiming to represent any other person affiliated with Mercy Home, I am writing to say I oppose extending the death penalty to sex abusers on the ground it does nothing to eliminate violence in our society.

Although I agree that sex crimes against children are among the most heinous that human beings can contrive, I nevertheless fear for any society that punishes violence with violence.

When otherwise ordinary citizens stand outside the walls of prisons and cheer while another human being is executed, I believe we should take a hard look at our public policies!

I ask your support in defeating extension of the death penalty in Montana.

Sincerely,

Jane A. Basta

Jane A. Basta, Adm.

DATE Jan. 18, 1989

COMMITTEE ON ~~TAXATION~~ Judiciary

VISITORS' REGISTER

NAME (PLEASE PRINT)	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Mike Sherwood	MTLA	103+107		XX
Fr. Jerry Lowney	Diocese of Helena	106	X	
Kimberly A Kradolfer	Attorney General	106, 107, 108	X	
Fr. Jerry Lowney	Diocese of Helena	107		X
Dick Pinsoneault	SOBAP	106, 108	✓	
Mignon Waterman	MT. Assoc of Churches	108		
John Ortwein	MT Catholic Conf	106	✓	
~~Nick Rotering~~	~~Dept. of~~	107		✓
Nick Rotering	Dept of Institutions	108	✓	
W.E. J. Bigelow	NRA	103	✓	
A. M. Elwell	WC & M	103	—	
Gary S. Marbut	MRPA, MWFGA, MASC, BSPSC	103	✓	
John Connot	Dept. of Justice	103	✓	