

SENATE BILL NO. 25

Introduced: 1/3/83

Referred to Committee on Judiciary: 1/3/83

Hearing: 1/19/83

Died in Committee

1 SENATE BILL NO. 25
 2 INTRODUCED BY AKELSTAD
 3 BY REQUEST OF THE JOINT SUBCOMMITTEE ON JUDICIARY
 4
 5 A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE THAT THE
 6 MONTANA SUPREME COURT MAY, AFTER INITIAL REVIEW OF THE FACTS
 7 AND LAW OF A CASE DECIDED BY A DISTRICT COURT, BY WRITTEN
 8 ORDER GRANT OR DENY AN APPEAL ON THE MERITS OF THE CASE;
 9 REQUIRING THAT APPEALS ON THE MERITS BE HEARD IN CERTAIN
 10 INSTANCES; AMENDING SECTIONS 3-2-204, 3-2-601, 46-20-104,
 11 46-20-105, 46-20-201, 46-20-203 THROUGH 46-20-205,
 12 46-20-405, 46-20-406, 46-20-513, 46-20-603, AND 46-20-701,
 13 MCA; REPEALING SECTIONS 46-20-101 THROUGH 46-20-103 AND
 14 46-20-202, MCA; AND PROVIDING A CONTINGENT EFFECTIVE DATE."
 15
 16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 17 NEW SECTION. Section 1. Scope of rules. (1) After
 18 [the effective date of this act] review of criminal cases by
 19 the supreme court is governed by the provisions of Title 46,
 20 chapter 20, and [sections 1 and 2, 4 through 8 and 14
 21 through 20].
 22 (2) The provisions of Title 46, chapter 20, and
 23 [sections 1 and 2, 4 through 8 and 14 through 20] may not be
 24 construed to extend or limit the jurisdiction of the Montana
 25 supreme court as established by law.

1 NEW SECTION. Section 2. Suspension of rules by
 2 supreme court. In the interests of expediting any matter
 3 before it or for other good cause shown, the supreme court
 4 may suspend any or all of the requirements of Title 46,
 5 chapter 20, and [sections 14 through 20] on application of a
 6 party or on its own motion and may order proceedings in
 7 accordance with its direction.
 8 Section 3. Section 46-20-104, MCA, is amended to read:
 9 "~~46-20-104. Scope--of--appeal--by--defendant~~ Defendant's
 10 ~~appeal as of right--scope--procedure.~~ (1) An appeal may
 11 be taken by the defendant only from a final judgment of
 12 conviction and orders after judgment which affect the
 13 substantial rights of the defendant in the following
 14 instances:
 15 (a) when review is of a sentence of death pursuant to
 16 46-18-308;
 17 (b) when a defendant has been sentenced to a term of
 18 life imprisonment; or
 19 (c) when a substantial allegation is made that a state
 20 statute is unconstitutional or that the appellant has been
 21 denied his rights under the state or federal constitutions;
 22 however, if an issue of constitutional law raised by the
 23 defendant has been recently and conclusively settled by the
 24 opinions of the Montana Supreme court, the supreme court
 25 may, in its discretion, treat the appeal as a petition for

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~~appeal under 46-20-201, 46-20-203 through 46-20-205 and
[sections 14 through 19].~~

(2) Upon appeal from a judgment, the court may review the verdict or decision and any order or decision objected to which involves the merits or necessarily affects the judgment.

~~(3) An appeal under this section shall be taken by the filing of a notice of appeal in accordance with 46-20-201, and the provisions of this chapter apply thereto."~~

NEW SECTION. Section 4. Defendant's discretionary appeal -- scope -- procedure. (1) In all cases of a final judgment of conviction and orders after judgment affecting the substantial rights of the defendant, other than those cases provided for in 46-20-104(1), a defendant may petition the supreme court to grant an appeal to that court.

(2) Proceedings on a petition for appeal under this section shall be had in accordance with 46-20-201, 46-20-203 through 46-20-205, and [sections 14 through 19].

(3) If the supreme court grants the petition for appeal, the appeal shall be taken in accordance with [section 20] and 46-20-301 through 46-20-707.

(4) Upon appeal from a judgment, the court may review the verdict or decision and any order or decision objected to which involves the merits or necessarily affects the judgment.

NEW SECTION. Section 5. Contingent amendment. If Senate Bill No. 2 is passed and approved, subsection (4) of section 4 of this act reads as follows instead of as provided in section 4:

"(4) Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-702."

NEW SECTION. Section 6. State's appeal as of right -- scope -- procedure. (1) In a criminal case, the state has the right to appeal from any court order or judgment the substantive effect of which results in:

- (a) dismissing a case;
- (b) quashing an arrest or search warrant;
- (c) suppressing evidence; or
- (d) suppressing a confession or admission.

(2) An appeal under this section shall be taken by the filing of a notice of appeal in accordance with 46-20-201, and the provisions of Title 46, chapter 20, apply thereto.

NEW SECTION. Section 7. State's discretionary appeal -- scope -- procedure. (1) In a criminal case, the state may petition the supreme court to grant an appeal to that court from any court order or judgment the substantive effect of

1 which results in:

2 (a) modifying or changing a verdict as provided in
3 46-16-702(3)(c);

4 (b) granting a new trial; or

5 (c) granting or denying a change of venue.

6 (2) Proceedings on a petition for appeal under this
7 section shall be had in accordance with 46-20-201, 46-20-203
8 through 46-20-205, and [sections 14 through 19].

9 (3) If the supreme court grants the petition for
10 appeal, the appeal shall be taken in accordance with
11 [section 20] and 46-20-301 through 46-20-707.

12 NEW SECTION. Section 8. Definitions. As used in Title
13 46, chapter 20, and [sections 1 and 2, 4 through 8 and 14
14 through 20], unless the context requires otherwise, the
15 following definitions apply:

16 (1) "Appellant" means the party who takes an appeal as
17 of right or whose petition for appeal has been granted.

18 (2) "Appellee" means the party against whom the appeal
19 is taken.

20 (3) "Petition" means the original pleading seeking an
21 appeal to the supreme court.

22 (4) "Petitioner" means the party who seeks the appeal
23 and who, upon the granting of the petition for appeal,
24 becomes the appellant.

25 (5) "Respondent" means the party against whom the

1 petition for appeal is made and who becomes the appellee
2 once the appeal is granted.

3 Section 9. Section 46-20-105, MCA, is amended to read:

4 "46-20-105. Appeal or petition by one codefendant.

5 When several defendants are tried jointly, any one or more
6 of them may take an appeal or file a petition for appeal,
7 but those who do not join in the appeal or file the petition
8 shall not be affected thereby."

9 Section 10. Section 46-20-201, MCA, is amended to
10 read:

11 "46-20-201. Procedure on for appeal or petition --
12 notice of appeal or petition. (1) An appeal as of right or a
13 discretionary appeal shall be taken by filing a notice of
14 appeal or a notice of petition for appeal, respectively, in
15 the court in which the judgment or order appealed or
16 petitioned from is entered or filed.

17 (2) The notice of appeal or petition shall specify the
18 party or parties taking the appeal or filing the notice of
19 petition and shall designate the judgment or order appealed
20 or to be petitioned from.

21 (3) The clerk of the district court shall serve notice
22 of the filing of a notice of appeal or petition by mailing a
23 copy thereof to counsel of record of each party other than
24 the appellant or petitioner, or, if a party is not
25 represented by counsel, to the party at his last known

address and shall mail a copy of the notice of appeal or
petition to the clerk of the supreme court. The clerk of the
 district court shall note on each copy served the date on
 which the notice of appeal or petition was filed. If an
 appellant or petitioner is represented by counsel, his
 counsel shall provide the clerk with sufficient copies of
 the notice of appeal or petition to permit the clerk to
 comply with the requirements of this rule. Failure of the
 clerk to serve notice shall not affect the validity of the
 appeal or petition. The notice of the clerk shall be
 sufficient notwithstanding the death of a party or his
 counsel. The clerk shall note in the docket the names of the
 parties to whom he mails copies, with the date of mailing."

Section 11. Section 46-20-203, MCA, is amended to
 read:

"46-20-203. Time for appeal from or filing of notice
after judgment. An appeal from a judgment may be taken A
notice of appeal or notice of petition for appeal shall be
filed within 60 days after the rendition of a judgment."

Section 12. Section 46-20-204, MCA, is amended to
 read:

"46-20-204. Stay of execution and relief pending
 appeal or petition. (1) If an appeal is taken, a sentence of
 death shall be stayed by order of the trial court until
 final order by the supreme court.

(2) If an appeal is taken or notice of petition for
appeal is filed, and the defendant is admitted to bail, a
 sentence of imprisonment shall be stayed by the trial court.

(3) If an appeal is taken or notice of petition for
appeal is filed, a sentence to pay a fine or a fine and
 costs shall be stayed by the trial court or by the reviewing
 court.

(4) If an appeal is taken or notice of petition for
appeal is filed, and the accused was admitted to probation,
 he shall remain on probation or post bail."

Section 13. Section 46-20-205, MCA, is amended to
 read:

"46-20-205. Effect of an appeal or petition by the
 state. An appeal taken or petition filed by the state in no
 case stays or affects the operation of the judgment or order
 in favor of the defendant until judgment or order is
 reversed."

NEW SECTION. Section 14. Petition for appeal -- time
 for filing and form. (1) A petition for an appeal from any
 judgment, decree, or order must be filed and served in
 accordance with [section 15] within 130 days of the date
 such judgment, decree, or order is rendered, whether the
 state is a party to the case or not. However, the supreme
 court may for good cause shown, by order entered of record
 prior to the expiration of such period of 130 days, extend

1 and reextend such period, not to exceed a total extension of
 2 70 days, if a request for the transcript was made by the
 3 party seeking an appeal within 10 days of the entry of such
 4 judgment, decree, or order.

5 (2) A petition for an appeal shall state the
 6 following, in the order indicated:

7 (a) the kind of proceeding and nature of the ruling in
 8 the district court;

9 (b) a statement of the facts of the case, with
 10 references to pages or parts of the record in the manner
 11 required by 46-20-407;

12 (c) the assignments of error relied upon and the
 13 manner in which they were decided in the district court; and

14 (d) points and authorities relied upon, a discussion
 15 of law, and the relief prayed for.

16 NEW SECTION. Section 15. Number of petitions to be
 17 filed -- response -- effect of failure to file response. (1)
 18 Six copies of the petition shall be filed with the clerk of
 19 the supreme court unless otherwise ordered by the court, and
 20 one copy of the petition shall be served on counsel for each
 21 party separately represented. The clerk may not accept a
 22 petition for filing unless it is accompanied by
 23 acknowledgment or proof of service as required by 46-20-502.

24 (2) If a petitioner fails to file his petition within
 25 the time provided by [section 14] or within the time

1 extended, a respondent may move for dismissal of the
 2 petition. A respondent has 30 days to file a response with
 3 the clerk of the supreme court. If a respondent fails to
 4 file his response, he may not be heard at any oral argument
 5 except by permission of the court.

6 NEW SECTION. Section 16. Record on petition for
 7 appeal. (1) The record on a petition for appeal shall
 8 consist of the same material as a record on appeal as of
 9 right pursuant to 46-20-301. Title 46, chapter 20, part 3,
 10 applies to a record on petition for appeal, except as
 11 provided in subsection (2).

12 (2) The record on a petition for appeal must be
 13 requested, prepared, transmitted, and filed in the same
 14 periods of time following the filing of a notice of petition
 15 for appeal as provided for the record following the filing
 16 of a notice of appeal under Title 46, chapter 20, part 3.

17 (3) As applied to any proceedings for a petition for
 18 appeal, references in Title 46, chapter 20, part 3, to
 19 "appellant" mean "petitioner" and references to "appellee"
 20 mean "respondent".

21 NEW SECTION. Section 17. Hearing on petition. (1) At
 22 any time within 10 days after the transmission of the record
 23 to the clerk of the supreme court, the petitioner may
 24 request oral argument on the petition. Such request shall be
 25 made to the clerk of the supreme court in writing or by

1 telephone. Oral argument may be allowed only at the
2 discretion of the supreme court.

3 (2) Oral presentation shall be limited to 10 minutes,
4 unless additional time is granted by the court.

5 (3) At any time within 10 days after the transmission
6 of the petition and record to the clerk of the supreme
7 court, the petitioner may inform the clerk in writing that
8 an oral presentation is not desired, in which case the
9 petition will be considered by the court in chambers.

10 **NEW SECTION.** Section 18. Rejection of petition for
11 appeal -- effect -- renewal of petition. (1) Rejection of a
12 petition for appeal must be by written order pursuant to the
13 requirements of 3-2-204 and 3-2-601 and has the effect of a
14 judgment affirming the decision of the district court.

15 (2) If the petition for appeal is rejected by the
16 supreme court on the ground that the judgment or order
17 petitioned from is plainly right or that any appeal would be
18 frivolously taken, no other petition for appeal from that
19 judgment or order shall be permitted and the case shall be
20 remanded to the district court in accordance with 46-20-706.

21 (3) If the petition for appeal is rejected on any
22 other ground or if no ground is cited in the rejection, the
23 petitioner may request a rehearing in accordance with
24 46-20-705.

25 **NEW SECTION.** Section 19. Allowance of appeal --

1 effect. The grant of a petition for appeal shall be by
2 written order pursuant to the requirements of 3-2-204 and
3 3-2-601. If the petition for appeal is granted:

4 (1) the clerk of the supreme court shall docket the
5 petition in accordance with 46-20-316 and immediately send a
6 copy of the order granting the appeal to the petitioner's
7 counsel, or to the petitioner if there is no counsel of
8 record, to the respondent, and to the clerk of the district
9 court, who shall retain the order in his records;

10 (2) the order transmitted to the petitioner and to the
11 respondent must contain a notice of opportunity for
12 additional designation or agreement of record in accordance
13 with 46-20-302 and 46-20-305;

14 (3) any stay granted pursuant to 46-20-204 remains in
15 effect.

16 **NEW SECTION.** Section 20. Record on discretionary
17 appeal. (1) The record on a discretionary appeal granted by
18 the supreme court shall consist of the same material as a
19 record on appeal as of right pursuant to 46-20-301. Title
20 46, chapter 20, part 3, applies to a record on discretionary
21 appeal except as provided in subsection (2).

22 (2) The record on a discretionary appeal must be
23 requested, prepared, transmitted, and filed in the same
24 periods of time following the filing of the order granting
25 the petition for appeal as provided for the record following

1 the filing of a notice of appeal.

2 Section 21. Section 46-20-406, MCA, is amended to
3 read:

4 "46-20-406. References in briefs to parties. Counsel
5 will be expected in their briefs and oral arguments to keep
6 to a minimum references to parties by such formal
7 designations as "appellant" and "respondent" "appellee". It
8 promotes clarity to use names or descriptive terms such as
9 "accomplice", "decendent", etc."

10 Section 22. Section 46-20-513, MCA, is amended to
11 read:

12 "46-20-513. First page and cover of papers. All papers
13 shall be bound in cardboard or pasteboard covers unless
14 bound at the top under 46-20-512, in which case they may be
15 bound in cover paper. On the first page and cover of all
16 papers must be stated the title of the supreme court; the
17 title of the case as in the court below, adding to the words
18 "plaintiff" and "defendant", the words "appellant" and
19 "respondent" "appellee" as the case may require; the names
20 of counsel for ~~appellant--and--respondent~~ each party; the
21 title of the papers, as "Appellant's Brief", "Appendix to
22 Appellant's Brief", etc.; and the venue from which the
23 appeal is taken."

24 Section 23. Section 46-20-603, MCA, is amended to
25 read:

1 "46-20-603. Conduct of oral argument. (1) Upon oral
2 argument of an appeal or original proceeding, 40 minutes
3 will be allowed appellant or applicant and 30 minutes to
4 respondent the appellee. If counsel is of the opinion that
5 additional time is necessary for the adequate presentation
6 of his argument, he may request such additional time as he
7 deems necessary by motion filed reasonably in advance of the
8 date fixed for hearing. A party is not obliged to use all of
9 the time allowed, and the court may terminate the argument
10 whenever in its judgment further argument is unnecessary.

11 (2) The appellant or applicant is entitled to open and
12 conclude the argument. The opening argument shall include a
13 fair statement of the case, and the closing argument shall
14 be limited to rebuttal of respondent's the appellee's
15 argument. Counsel will not be permitted to read at length
16 from briefs, records, or authorities.

17 (3) If physical exhibits other than documents are to
18 be used at the hearing, counsel shall arrange to have them
19 placed in the courtroom before the court convenes on the
20 date of the hearing. After the hearing, counsel shall cause
21 the exhibits to be removed from the courtroom unless the
22 court otherwise directs. If exhibits are not reclaimed by
23 counsel within a reasonable time after notice is given by
24 the clerk, they shall be destroyed or otherwise disposed of
25 as the clerk shall think best."

1 Section 24. Section 46-20-701, MCA, is amended to
2 read:

3 "46-20-701. Elements of record court considers on
4 review. Whenever the record on appeal shall contain any
5 order, ruling, or proceeding of the trial court against the
6 respondent ~~appellee~~ affecting his substantial rights on the
7 appeal of said cause, together with any required objection
8 of such respondent ~~appellee~~, the supreme court on such
9 appeal shall consider such orders, rulings, or proceedings
10 and the objections thereto and shall reverse or affirm the
11 cause on said appeal according to the substantial rights of
12 the respective parties, as shown upon the record. No cause
13 shall be reversed by reason of any error committed by the
14 trial court against the appellant unless the record shows
15 that the error was prejudicial."

16 Section 25. Section 46-20-405, MCA, is amended to
17 read:

18 "46-20-405. Filing and service of briefs. (1) The
19 appellant shall serve and file his brief within 30 days
20 after the date on which the record is filed. The respondent
21 ~~appellee~~ shall serve and file his brief within 30 days after
22 service of the brief of the appellant. The appellant may
23 serve and file a reply brief within 14 days after service of
24 the brief of the respondent ~~appellee~~, but except for good
25 cause shown, a reply brief must be served and filed at least

1 3 days before argument.

2 (2) Six copies of each brief shall be filed with the
3 clerk of the supreme court unless otherwise ordered by the
4 court, and one copy of each brief shall be served on counsel
5 for each party separately represented. The clerk will not
6 accept a brief for filing unless it is accompanied by
7 acknowledgment or proof of service as required by 46-20-502.

8 (3) If an appellant fails to file his brief within the
9 time provided by this section or within the time extended, a
10 respondent ~~an appellee~~ may move for dismissal of the appeal.
11 If a respondent ~~an appellee~~ fails to file his brief, he will
12 not be heard at oral argument except by permission of the
13 court."

14 Section 26. Section 3-2-204, MCA, is amended to read:

15 "3-2-204. Powers and duties of court on ~~petitions or~~
16 ~~appeals. (1) In any decision granting or denying a petition~~
17 ~~for appeal, the order of the supreme court must be in~~
18 ~~writing and is subject to the requirements of 3-2-601.~~

19 (2) ~~On appeal, the the~~ supreme court may affirm,
20 reverse, or modify any judgment or order appealed from and
21 may direct the proper judgment or order to be entered or
22 direct a new trial or further proceedings to be had.

23 (2)(3) The decision of the court ~~on appeal~~ must be
24 given in writing, and a syllabus thereof must be prepared by
25 the court and filed with the opinion.

1 ~~(3)(4)~~ In giving its decision on appeal, if a new
 2 trial be granted, the court must pass upon and determine all
 3 the questions of law involved in the case presented upon
 4 such appeal and necessary to the final determination of the
 5 case.

6 ~~(4)(5)~~ Its judgment in appealed cases must be remitted
 7 to the court from which the appeal was taken.

8 ~~(5)(6)~~ In equity cases and in matters and proceedings
 9 of an equitable nature, the supreme court shall on appeal
 10 review all questions of fact arising upon the evidence
 11 presented in the record, whether the same be presented by
 12 specifications of particulars in which the evidence is
 13 alleged to be insufficient or not, and determine the same,
 14 as well as questions of law, unless for good cause a new
 15 trial or the taking of further evidence in the court below
 16 be ordered. Nothing herein shall be construed to abridge in
 17 any manner the powers of the supreme court in other cases."

18 Section 27. Section 3-2-601, MCA, is amended to read:

19 "3-2-601. Decisions to be in writing. In the issuance
 20 of orders granting or denying an appeal and in the
 21 determination of causes on appeal, all decisions of the
 22 supreme court must be given in writing, the grounds of the
 23 decision must be stated, and each justice agreeing or
 24 concurring with the decision must so indicate by signing the
 25 decision. Any justice disagreeing with a decision must so

1 indicate by written dissent."

2 NEW SECTION. Section 28. Repealer. Sections 46-20-101
 3 through 46-20-103 and 46-20-202, MCA, are repealed.

4 NEW SECTION. Section 29. Contingent effective date.
 5 This act does not become effective until the supreme court
 6 has finally adopted rules of appellate civil procedure or
 7 rules of the supreme court, or amendments to those rules,
 8 implementing the provisions of Senate Joint Resolution 2.

-End-