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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

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THE STATE OF MONTANA, ex. rel. STANLEY C. BURGER,

Petitioner,

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

* * * * * * * * * * * * * * * * * *

No. 12310

FILED
SEP - 5 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

PETITION FOR REHEARING

COMES NOW, the Petitioner, Stanley C. Burger, and petitions this Court for a rehearing on the above entitled matter and decision of this Court, delivered on August 18, 1972, on the following grounds.

1. THE MAJORITY OPINION HAS OVERLOOKED THE DECISIVE QUESTION OF WHETHER THE SUPREME COURT OF MONTANA HAS AUTHORITY TO AMEND THE MONTANA CONSTITUTION BY INTERPRETATION.

The majority opinion, at Page 14, concludes that:

> "Accordingly, we hold "approval by the majority of electors voting at the election' as used in Article XIX, Section 8, of the Montana Constitution means approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution. We hold that it does not refer to or include those electors who failed to express an opinion by a vote on that issue."

The traditional rule, regarding the place of the Court, in matters dealing with a State Constitution, as stated in Knight v. Shelton, 134 Fed. 423, (E.D. Ark., 1905) is:

> "If there is no ambiguity in the language used, there is nothing to construe and Courts must follow the letter of the Constitution."

Our Montana Court, in Rankin v. Love, 232 P. 2d 998, 1000, 125 Mont. 184, put it this way:

> "It is the duty and responsibility of this Court to ascertain the meaning of the Constitution as written, neither to add to nor to subtract from, neither to delete nor to distort."

(63)

In arriving at the conclusion above, the majority opinion admitted, on Page 10:

> "Applying these rules to the quoted constitutional language, a literal construction would seem to support relators."

What the Court is saying is that "voting at the election" plainly means "voting at the election" and not "voting on issue one" or "voting on the proposed Constitution". Applying a literal construction to constitutional phrases is nothing new to this Court. For example, in the recent decision of Forty-Second Legislative Assembly v. Lemmon, 156 Mont. 416, 481 P. 2d 330, 335, this Court construed the phrase "elected in the same manner" under Section 8 of the same Article XIX of the Montana Constitution. There the Court stated:

> "We hold that the phrase 'elected in the same manner' means exactly what it says."

In this case, however, having so concluded the plain, literal meaning of the phrase "voting at the election", the majority opinion then goes further in an apparent search for ambiguity in the phrase "voting at the election" by asking the question "But voting on what?" The majority opinion recites:

> "The constitutional language does not exactly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors."

To say that the phrase "electors voting at the election" does not answer the question of "voting on what" and thereby creates an ambiguity, is to simply disregard the English language, the laws of Montana, and the recognition of the majority opinion.

This same majority opinion clearly analyzed the Montana law on Page 15 of the opinion by stating:

> "An 'elector' is a person possessing the legal qualifications that entitle him to vote. State ex. rel. Lang v. Furnish, 48 Mont. 28, 134 P. 297. The word 'voting' means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P. 2d 112. Thus 'electors voting in the election' within the meaning of Article XIX, Section 8 of the Montana Constitution means those persons entitled to vote who cast a properly marked ballot which is counted in the election. Electors casting blank ballots, unintelligible ballots, fouled, void, or illegal ballots are not included as 'electors voting in the election' because their ballots are not entitled to be counted in the election."

Therefore, the phrase "electors voting at the election" means simply, under Montana law, persons possessing the legal qualifications that entitle them to vote, who mark their ballot properly and deposit them in the ballot box in confirmity with the election laws, just so long as they do not turn in a blank, unintelligible, fouled, void or illegal ballot. There is no election law in Montana that requires the person to vote on each and every issue or candidiate on the ballot. Applying this definition to this case, to determine whether the first issue on the ballot, being the proposed basic Constitution, was adopted under Article XIX, Section 8, requires the Court to count the total number of electors who validly voted on one or more of the issues at the election, and one-half (½) plus one (1) must have voted for Issue Number 1 or it failed.

Since the question of "voting on what?" is, in effect, answered by the legal definitions of "elector" and "voting" there is no reason or right for the majority opinion to come up with the conclusion that the phrase "voting at the election" really means "voting on approval or rejection of the proposed Constitution". When the majority opinion does this, it, in fact, amends the Constitution by judicial interpretation, and the only

body that has a right to amend the Constitution is the legislature, with the approval of the people of Montana, under Article XIX, Section 9 of the Montana Constitution. The Court should be reminded that the original authority for the framing of a Constitution by the State of Montana was an authority granted by Congress of the United States under authority of the United States Constitution. The existing Constitution was so approved. Revisions, alterations and amendments were required to be made by a majority of electors voting at the election. Montana has no authority to revise or alter its Constitution other than as was approved by Congress of the United States. Therefore, under Federal law, this Court cannot change by interpretation the words used in the Constitution adopted in 1889. Further, the majority opinion's inconsistency of claiming an ambiguity exists, in the phrase in question, on Page 10, and then coming back on Page 15, and clearly recognizing that the words used in the phrase have a clear, definite and unambiguous meaning, should not be allowed to stand on such an important decision such as this one. It is respectfully submitted that the justices who participated in the majority opinion will want to reconsider their holdings in that opinion wherein the opinion is based on inconsistent premises, and wherein, as a result, the Court usurps the power of the legislature and the people of Montana, to amend their Constitution.

It is further pointed out to this Court, that to conclude that "voting at the election" means "voting on approval or rejection of the proposed Constitution", is to add and imply language not in the Constitution. This Court has recently, in the case of State ex. rel. Kvaalen v. Graybill, St. Rept. 29, Page 313, 496 P. 2d 1127, 1134, refused to imply that the language of Section 8 of Article XIX of the Montana Constitution gave the constitutional convention the power to educate the voters and

expend public funds therefor. The same justices who refused to imply language that didn't exist in the Kvaalen case are the same justices who now have determined to imply language from Section 8 that does not exist. Perhaps the majority will want to reconsider this inconsistency.

2. THE MAJORITY OPINION IS IN CONFLICT WITH A CONTROLLING DECISION, FORTY-SECOND LEGISLATIVE ASSEMBLY V. LENNON, 156 MONT. 416, 427, 481 P. 2d 330, TO WHICH THE ATTENTION OF THE COURT WAS NOT DIRECTED.

(a) Multiple Issues

On Page 10 of the opinion, the majority founds its conclusions that "voting at the election" does not mean what it says, by stating:

> "There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed Constitution itself."

On February 22, 1971, the same three justices who signed the majority opinion in this case, signed the opinion in the Forty-Second Legislative Assembly of the State of Montana, and Frank Murray, Secretary of State of the State of Montana v. Joseph L. Lennon, Clerk and Recorder of Cascade County, Montana, 156 Mont. 416, 481 P. 2d 330, 338. The Lennon case was a declaratory judgment action brought by the legislature and the Secretary of State seeking determination of certain legal rights concerning the calling, election of delegates, and implementation of the constitutional convention, which convention went on to submit the ballot at the election on June 6, 1972, all of which is the subject of this case. In determining some of the questions raised in the Lennon case, this Court was required to thoroughly analyze Article XIX, Section 8, of the Montana Constitution, which same Section 8 is in issue in this case. At the conclusion of the Lennon

opinion, this Court ruled, as follows:

> "A further observation, albeit unsolicited, is that since the referendum uses the language 'revise, alter, or amend the constitution' it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore, each Article might be separately submitted."

Thus, in the Lennon case, this Court found that the framers of the language of Article XIX, Section 8 of the Montana Constitution, "revisions, alterations, or amendments to the Constitution" contemplated that a constitutional convention could submit to the electors an issue-by-issue ballot to vote on concerning whatever revisions, alterations, or amendments to the Constitution were being proposed. The framers did not idly use the plural of the words. Obviously, the constitutional convention took the Supreme Court at its word, and it did submit a multiple issue ballot to the electors on June 6, 1972. The fact that three of the issues were contingent upon the passage of the first issue does not alter the fact that the multiple issues could be and were submitted to the electors. The same result must follow even if the Constitution was submitted item by item, or article by article, whether any one item or article was contingent upon any other item or article.

For the majority opinion, in this case, to now take a position completely opposite from the Lennon decision, to the effect that the framers of the Constitution did not contemplate a multiple issue ballot, would do great harm to the rule of law of stare decisis, not to mention the public confidence in the Courts. Perhaps the current majority of this Court simply forgot the Lennon decision and what it stated therein, as this decision was not brought to the attention of the Court by any of the twenty legal briefs filed herein. However, it is submitted that, in considering the Lennon decision, the majority of this Court will wish to reconsider its position as stated on Page 10 of the

majority opinion in this case. As there is nothing ambiguous about the phrase in Section 8 concerning the approval "by a majority of the electors voting at the election", this Court would have no right or power to interpret the phrase, and give it any other meaning than what it literally says, thereby leaving as the sole issue for the Court to determine the issue of whether one-half (½) plus one (1) of the electors who voted at the election, voted for Issue Number 1.

(b) Extraordinary majority

Referring again to this Court's holding in the Lennon case, that the framers of the Constitution contemplated multiple issue ballots, there can be no doubt that the framers also contemplated that when multiple issues were submitted to the electors, in fact, passage of each issue might require an extraordinary majority. This will occur because invariably, some of the electors will not vote on all of the issues, for various reasons, and, therefore, even though a majority of those voting on a specific issue might vote for the specific issue, it would not carry unless it was approved by a majority of those electors who voted at the election by casting a valid ballot. The effect of an extraordinary majority opinion at Page 12, that electors who abstain from voting on one of the issues, tend to help defeat the issue. However, the policy of adopting the extraordinary majority on multiple issue elections by the use of the language, "voting at the election" when altering, revising or amending our Constitution was the policy of the people of Montana when they adopted the Constitution in 1889. Whether this was a good or bad policy is not now the issue before the Court.

In this same regard, this Court's holding in the Lennon case is consistent with the policy and philosophy of government, as recited by this Court on Pages 13-14 of the opinion, in quoting from the case of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859.

That policy is simply that extraordinary majority requirements are given support by the Courts when the language of the Constitution clearly indicates such a purpose. Here, since the Lennon case, the Court has concluded that the Constitution contemplated multiple issue elections, and since the phrase "electors voting at the election" has clear and definite meaning under Montana law, such purpose is beyond cavil. Therefore, in order for this Court to determine whether the first issue on the ballot was approved, it must determine the count of the total number of electors who validly voted on one or more of the issues at the election, and then, by simple mathematics, compute one-half (½) plus one (1) of that total, and if the total of those who voted for Issue No. 1 is not more than that figure, Issue No. 1 must fail. Under the figures of the State Canvass Board, certified to by the Secretary of State, Issue No. 1 failed by 2,386 votes. (237,600 divided by 2 = 118,800 + 1 = 118,801. 118,801 - 116,415 = 2,386).

In summary, after reviewing the unanimous decision of this Court in the Lennon case, decided only one year ago, it is submitted that the participants in the majority opinions in this case should consider changing their position, stated on Page 14 of the opinion, that "We are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed Constitution". As the framers of the Constitution contemplated multiple issue ballots, when they used the language "revisions, alterations, and amendments", and as the framers of the Constitution used the language, "electors voting at the election" as the criteria for adoption of each revision, alteration or amendment, which language is unambiguous under the Montana law, this Court should be satisfied that the framers of our Constitution intended the approval of each issue, no matter what, must be tested by the number of electors who voted a valid ballot at the election.

3. THE MAJORITY OPINION HAS OVERLOOKED THE FACTS THAT THE ELECTORS OF MONTANA WERE LEAD TO BELIEVE THAT "VOTING AT THE ELECTION" MEANT WHAT IT LITERALLY SAYS.

The majority opinion makes no mention of, so it apparently has overlooked, the various representations made to the electors that an issue would fail, including the first issue of voting for or against the proposed Constitution, unless the issue received a majority vote of all those voting at the election. First of all, the Montana Legislature enacted Section 17, Chapter 296 of the Session Laws of 1971, which is a public law, and published for all to read, whereby Subsection (9) reads:

> "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana."

Next, the electors were faced with the explanation contained in the supplement, entitled "The Proposed 1972 Constitution for the State of Montana" published in all newspapers throughout the State of Montana, a copy of which was attached to Affidavit of R. W. Harris. On Page 10, the authors, four of whom were delegates to the constitutional convention, stated:

> "There is also a special consideration peculiar to the Montana situation. Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot." (emphasis supplied)

The supplement closed with paragraphs containing the following words, directed to the voter:

> "If the proposed Constitution fails, your vote on the other measures--the make-up of the legislature, gambling, and the death penalty--will not count because they automatically fail if the proposed Constitution is rejected. Second, your vote on

these three questions will not count unless each is decided by a majority of those voting in the election. If you fail to vote on any item, you will aid in its defeat." (emphasis supplied)

The constitutional convention delegates will probably try to disown this newspaper representation, but they offered no proof that they did anything to alter or correct the representation, prior to the election. Either they agreed with the interpretation or they participated in the misrepresentation by remaining silent.

If there is any doubt by this Court that the members of the constitutional convention understood that "electors voting at the election" meant what it said, the Court should direct its attention to the comparable section in the new Constitution, Article XIV, Section 7, which reads:

> "The convention shall meet after the election of the delegates and prepare such revisions, alterations, or amendments to the constitution as may be demeed necessary. They shall be submitted to the qualified electors for ratification or rejection as a whole or in separate articles or amendments as determined by the convention at an election appointed by the convention for the purpose not less than two months after adjournment. Unless so submitted and approved by a majority of the electors voting thereon, no such revision, alteration, or amendment shall take effect."

Thus, we see the convention determined to change the language of "electors voting at the election", as appears in the old Constitution, to "electors voting thereon", so that there is no longer any need of determining how many electors voted on the particular issues.

Finally, the electors of the state were presented with an official ballot. In explaining to the elector how the election would work, the constitutional convention authors placed the following instruction on the center of the ballot, and outlined it in black:

> "The proposed Constitution will include a bicameral (two houses) legislature unless a majority of those voting in this election vote for a unicameral (one house) legislature in Issue 2."

Thus, it seems eveyone, including both the legislature and the constitutional delegates knew and recognized that the phrase in Section 8 "majority of the electors voting at the election" meant that each issue on the ballot could be enacted only if it received the affirmative vote for by a majority of those who cast a valid ballot at the election. It is submitted that the majority of the Court, after looking over these omitted facts and issues, should agree with these interpretations. However, if the majority of the Court determines to follow its current opinion of the language used, then at least the Court should grant relief to all the electors who labored under the representations made to them by the State Legislature and the constitutional convention, and upon which they relied in not voting on some of the issues. This relief should be that the Court declare this election to be void, and direct a new election with proper representations made to the electors as to what effect each vote or non-vote on each issue will have. Justice to the people of Montana demands no less!

4. THE COURT HAS OVERLOOKED THE FACT THAT THE LANGUAGE IN SECTION 8 AND 9 OF ARTICLE XIX, ON THE THREE DIFFERENT ELECTION PROCEEDINGS MUST REFER TO THE CRITERIA FOR ADOPTION, THEREBY EVIDENCING THE INTENT OF THE FRAMERS.

The majority opinion, on Pages 10-11, after erroneously concluding that the phrase "electors voting at the election" was ambiguous, went on to suggest that the language used by the framers in the three different elections contemplated in Sections 8 and 9 of Article XIX is no evidence of any differing intent by the framers of those Sections as to the criteria for adoption or passage of the issues to be determined in the three elections. The three elections and the language used are as follows:

> Section 8. In a call for a convention, the call is adopted "If a majority of those voting on the question shall declare in favor of such constitution."
>
> Section 8. As a result of a constitutional convention,

proposing revisions, alterations, or amendments, "unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."

Section 9. Concerning constitutional amendments submitted to the electors, "and such as are approved by a majority of those voting thereon shall become part of the constitution."

Now, if the language "voting on the question" and "voting at the election" and "voting thereon" is not evidence of the intent of the framers as to the type of majority needed to adopt or approve a proposal, what language would the majority ever look to to determine the intent of the framers? These language differences are more than the result of "inherent constitutional differences in the elections themselves, which, in turn, requires different language", as concluded by the majority opinion on Page 11.

To begin with, in calling a constitutional convention, Section 8 recites that:

"The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution."

The majority opinion suggests that this call is normally held at a general election, and, thus, the phrase requiring a "majority of those voting on the question" was employed only to distinguish the constitutional referendum question from other general election issues. (See Page 11 of opinion) However, since the call may be submitted "at any time" and not just at a general election, how could one conclude that the language "voting on the question" was used only to distinguish between the call issue and "general election issues"? Isn't it more reasonable to conclude that the language was used to give direction as to what percentage of electors must vote for the call, in order to determine if the call passed?

Secondly, the majority opinion recites, at Page 11, the following:

"The language of Section 8, that we must construe--- 'a majority of the electors voting at the election'

was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time."

Of course, this statement omits the fact that Section 8 reads:

"Said convention shall meet within three months after such election and prepare such revisions, alterations, or amendments to the constitution as may be deemed necessary...and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." (emphasis supplied)

Thus, from the language "revisions, alterations or amendments" it is clear, as this Court previously concluded in the Lennon case, that multiple issues were contemplated at the special election by the framers of Section 8. Therefore, there is a "need to differentiate between" the various issues. This is the very reason the language "approved by a majority of the electors voting at the election" becomes important in determining which issues are approved and which are not.

In summary, the premises upon which the majority opinion attempted to determine that the differences in the language used in the three elections was no evidence of a differing intent on the part of the framers, but only the result of differences in the elections themselves, simply do not stand the test under any sound logic or reasoning. The differences in the language used in the three elections can only indicate a differing intent on the part of the framers when it came to the approval or adoption of the various issues involved in the three different elections. This, the majority opinion overlooked.

5. THE MAJORITY OPINION HAS OVERLOOKED THE FACT THAT IF THE COURT IS TO ALLOW THE MEMBERS OF THE STATE BOARD OF CANVASSERS TO IMPEACH THEIR OWN CANVASS, BY MERE AFFIDAVIT, THAT THIS COURT DOES NOT HAVE THE INFORMATION BEFORE IT TO MAKE A VALID DETERMINATION AS TO THE TOTAL NUMBER OF ELECTORS VOTING AT THE ELECTION.

(a) The majority opinion, on Page 16 concludes:

> "Accordingly, the figure of 237,600 labeled 'total number of electors voting at the election' on the Secretary of State's Certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure (Section 93-1301-7)15)) must yield to the facts."

The majority opinion arrived at this conclusion from reading the affidavits of the State Canvassing Board and the Secretary of State all of which claimed that "the phrase 'total number of electors voting' as used in the canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots." All the affidavits give the Court no clue as to how the State Canvassing Board claims to have come by this wisdom, it can only be surmised that the affidavits were based on assumptions that the County Canvassing Boards arrived at their figures of "Number of Electors Voting" as appears on the County forms, from directions given to them in the letter from the Secretary of State dated June 2, 1972. In that letter, the Secretary of State requests that the County canvassers arrive at the figure of "Number of Electors Voting" by entering "The total number of votes cast taken from your poll book". The majority opinion has overlooked the fact that a poll book is not a mere registration book. A poll book is defined in Section 23-3610, R.C.M., 1947, as follows:

> "Each precinct shall keep a list of persons voting and the name of each person who votes shall be entered in it and numbered in the order of voting. This list is known as the poll book."

As the majority opinion recognized, on Page 15 of the opinion:

> "The word 'voting' means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws."

Thus, by definition, the poll book carries only the list of

electors who have affirmatively acted by marking their ballot properly and depositing it in the ballot box in conformity with the election laws. In effect, the poll book carries only a net figure, and not a gross figure, as concluded by the affidavits of the State Canvassing Board. Thus, the majority opinion has overlooked, and the Court should conclude that the affidavits are wrong and unsupported, and the Court should conclude that the County Canvassers' figures of "Number of Electors Voting" are correct. 237,600 electors properly voted at the election, and this Court has received no valid evidence to the contrary. In support of this, the affidavits of the County Clerk and Recorder of Gallatin and Big Horn Counties, have been filed in this matter, copies of which are attached as Exhibits "A" and "B" to this Petition. The Court will note that in both instances, these County Clerk and Recorders did just what the law requires, and submitted a poll book net figure of 11,658, in the case of Gallatin County, and 2,717 in the case of Big Horn County, as the "Number of Electors Voting".

In summary, the Secretary of State's Certificate is demonstrably correct, and this Court must presume it to remain correct, unless and until facts were presented to the Court showing otherwise. 237,600 electors did cast a valid ballot at the election.

(b) The majority opinion concludes on Page 16 of the opinion that it feels that it can make a determination of the correct figure on the total number of electors voting at the election, by looking at the printed report of the official canvass, county by county, thus avoiding the necessity of a recount or recanvass of the election of June 2, 1972. The majority opinion holds:

> "If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election."

The majority opinion then reasons that at least 230,298 electors

cast a valid ballot, because that was the totals voting on Issue Number 1. The majority finally reasons that another 290 more electors cast valid ballots because it finds that in 18 of the 56 counties, the gambling issue, Issue No. 3, received that many more valid votes that did the first issue. However, the majority opinion has overlooked the fundamental rules of mathematics in arriving at its conclusion that only 230,588 electors voted at the election.

Some elementary examples prepared by prominent statisticians should serve to point out to the majority its errors in mathematics.

Let us consider the following hypothetical example:

Suppose there are only two counties, A and B, and the election returns are reported as below:

County	Constitution	Legislature	Gambling	Death Penalty
A	2	0	0	0
B	1	1	2	1

Using the procedure on which the majority opinion's decision was based, it is determined that there were four (4) electors voting; two (2) in County A, because the constitutional issue received the highest total vote, and two (2) in County B, because the gambling vote exceeded the constitutional vote by one (1).

In County A the facts are evident: There were two (2) electors voting. But, in County B there are several possibilities listed below allowing for at least two (2) and as many as five (5) electors voting.

(In the following chart, X denotes a vote, and 0 denotes an omission to vote on the issue.)

POSSIBILITY 1

Voter Number	Constitution	Legislature	Gambling	Death Penalty
1	X	X	X	X
2	0	0	X	0
TOTALS	1	1	2	1

POSSIBILITY 2

Voter Number	Constitution	Legislature	Gambling	Death Penalty
1	X	X	X	0
2	0	0	X	0
3	0	0	0	X
TOTALS	1	1	2	1

POSSIBILITY 3

Voter Number	Constitution	Legislature	Gambling	Death Penalty
1	X	0	X	0
2	0	X	0	0
3	0	0	X	0
4	0	0	0	X
TOTALS	1	1	2	1

POSSIBILITY 4

Voter Number	Constitution	Legislature	Gambling	Death Penalty
1	X	0	0	0
2	0	X	0	0
3	0	0	X	0
4	0	0	X	0
5	0	0	0	X
TOTALS	1	1	2	1

There are, of course, other possible voting patterns. Consider just Possibility 1 with only two (2) electors voting. There are four (4) possible voting patterns.

1) X X X X
   0 0 X 0

2) X X X 0
   0 0 X X

3) X 0 X X
   0 X X 0

4) 0 X X X
   X 0 X 0

5) X 0 X 0
   0 X X X

6) 0 X X 0
   X 0 X X

7) 0 0 X X
   X X X 0

8) 0 0 X 0
   X X X X

NOTE: 5, 6, 7 and 8 are identical to 4, 3, 2 and 1 respectively in voting pattern. Therefore, we count only four (4) voting patterns.

When there are three (3) electors, as in Possibility 2, it is possible to find ten (10) voting patterns.

1) X X X 0
   0 0 X 0
   0 0 0 X

2) X X 0 0
   0 0 X 0
   0 0 X X

3) X 0 X 0
   0 X X 0
   0 0 0 X

4) X 0 X 0
   0 0 X 0
   0 X 0 X

5) X 0 X 0
   0 0 X X
   0 X 0 0

6) 0 X X 0
   0 0 X 0
   X 0 0 X

7) 0 X X 0
   0 0 X X
   X 0 0 0

8) X 0 0 0
   0 X X X
   0 0 X 0

9) 0 X 0 0
   X 0 X X
   0 0 X 0

10) 0 0 X 0
    0 0 X 0
    X X 0 X

When there are four (4) electors, as in Possibility 3, it is possible to find five (5) voting patterns.

1)	2)	3)
X 0 X 0	0 0 X 0	0 0 X 0
0 X 0 0	X X 0 0	0 X 0 0
0 0 X 0	0 0 X 0	0 0 X 0
0 0 0 X	0 0 0 X	X 0 0 X

4)	5)
X 0 0 0	X 0 0 0
0 X X 0	0 X 0 0
0 0 X 0	0 0 X 0
0 0 0 X	0 0 X X

And when there are five (5) electors, as in Possibility 4, then, of course, there is only one (1) voting pattern.

Thus, in this simple example the majority opinion's method of determining the number of electors voting would have been correct in only four (4) of the twenty possible voting patterns. In other words, the majority opinion has chosen to base its decision on a premise which, at best, has only a twenty per cent (20%) chance of accuracy. Does the majority consider that good enough for the electors and citizens of Montana?

A second example pointing up the inaccuracy of the attempted mathematics practiced in the majority opinion is based on the figures certified to as correct by the State Board of Canvassers for Big Horn County.

The following table presents a possible voting pattern for the reported balloting in Big Horn County and arrives at a number of electors voting at the election, which is in agreement with the majority opinion's method. From the Canvass returns 2,620 Big Horn electors voted for or against issue one (1) and another 6 more electors voted for issue three (3), the gambling issue. (Again, an X denotes a vote on the issue, and an 0 denotes a failure to vote on the issue; the first column contains a hypothetical total of persons who voted in a hypothetical pattern.)

When there are four (4) electors, as in Possibility 3, it is possible to find five (5) voting patterns.

1) X 0 X 0
0 X 0 0
0 0 X 0
0 0 0 X

2) 0 0 X 0
X X 0 0
0 0 X 0
0 0 0 X

3) 0 0 X 0
0 X 0 0
0 0 X 0
X 0 0 X

4) X 0 0 0
0 X X 0
0 0 X 0
0 0 0 X

5) X 0 0 0
0 X 0 0
0 0 X 0
0 0 X X

And when there are five (5) electors, as in Possibility 4, then, of course, there is only one (1) voting pattern.

Thus, in this simple example the majority opinion's method of determining the number of electors voting would have been correct in only four (4) of the twenty possible voting patterns. In other words, the majority opinion has chosen to base its decision on a premise which, at best, has only a twenty per cent (20%) chance of accuracy. Does the majority consider that good enough for the electors and citizens of Montana?

A second example pointing up the inaccuracy of the attempted mathematics practiced in the majority opinion is based on the figures certified to as correct by the State Board of Canvassers for Big Horn County.

The following table presents a possible voting pattern for the reported balloting in Big Horn County and arrives at a number of electors voting at the election, which is in agreement with the majority opinion's method. From the Canvass returns 2,620 Big Horn electors voted for or against issue one (1) and another 6 more electors voted for issue three (3), the gambling issue. (Again, an X denotes a vote on the issue, and an 0 denotes a failure to vote on the issue; the first column contains a hypothetical total of persons who voted in a hypothetical pattern.)

Possible Voting Pattern	Constitution	Legislature	Gambling	Death Penalty	Cumulative Total of Electors Voting
2,486	X	X	X	X	2,486
76	X	0	X	X	2,562
58	X	0	X	0	2,620
6	0	0	X	0	2,626
TOTAL CANVASS FIGURES	2,620	2,486	2,626	2,562	

There is a number of other possible voting patterns which could result in the same number of electors voting (2,626).

However, it is also possible to find a large number of voting patterns which result in other totals of electors voting. The table below gives one of the possible voting patterns which would provide for the number of electors voting to be that number (2,717) reported by the County Clerk in Big Horn County, which pattern is also consistent with the total votes cast on the four issues, as certified to by the Secretary of State.

Possible Voting Pattern	Constitution	Legislature	Gambling	Death Penalty	Cumulative Total of Electors Voting
2,486	X	X	X	X	2,486
76	0	0	X	X	2,562
43	X	0	X	0	2,605
91	X	0	0	0	2,696
21	0	0	X	0	2,717
TOTAL CANVASS FIGURES	2,620	2,486	2,626	2,562	

In summary, it is possible that using the premises it did, that the majority opinion might be correct in concluding from the State Canvass Report that only 2,626 electors voted in Big

Horn County. However, there is a large number of other voting pattern possibilities which are just as likely to have been the correct total number of electors voting, including the total of 2,717, as certified to by the Clerk and Recorder of Big Horn County. Are not the electors and citizens of Montana entitled to more than a mere chance guess by the Supreme Court as to what was the correct total number of electors who voted?

One final example.

The following table presents one possible voting pattern which would correspond with the total number of electors voting as reported by the Secretary of State.

(Again, an X denotes a vote on the particular issue, and an 0 denotes a failure of the elector to vote on that issue.)

Possible Voting Pattern	Constitution	Legislature	Gambling	Death Penalty	Cumulative Total of Electors Voting
217,684	X	X	X	X	217,684
7,072	0	0	X	X	224,756
3,139	X	0	X	0	227,895
9,475	X	0	0	0	237,370
230	0	0	X	0	237,600
TOTAL ELECTORS VOTING ON PARTICULAR ISSUE IN ACCORD WITH CANVASS	230,298	217,684	228,125	224,756	

Thus, we see that under this one and hundreds of thousands of other voting patterns, the electors of Montana could have voted, the totals of which would correspond with the figures arrived at by the State Canvassing Board. Is this Court really ready to conclude that the electors of Montana voted differently? And, if so, how differently?

In summary, it should be clear from the above examples that the majority opinion's attempt to determine the pattern of how the electors of Montana voted at the election is nothing more than a guess, and the probability of the guess being correct is exceedingly poor. Only a recount and recanvass of the votes will ever really show how the electors of Montana did vote. If the majority opinion belives that the Affidavits, devoid of facts as they may be, still create a question of fact to be determined, then this Court must order a recount, as requested by the dissenting justices.

IN CONCLUSION, it should be quite clear, from a study of this Petition for Rehearing, that the authors of the majority opinion in this case have overlooked a controlling decision and numerous facts and issues which make untenable the current majority holding that "approval by a majority of electors voting at the election" doesn't mean what it says. Rather, the participants in the majority opinion should, in good faith to the rules of law, determine that Issue No. One (1) can be deemed approved only if the number of electors who voted for Issue No. One (1) exceeds by one or more votes the total number of electors who cast valid ballots at the election.

The Secretary of State certified that the State Board of Canvassers determined that 237,600 electors voted at the election. This should be sufficient for the Court to make its determination that the issue was not approved. However, if the Court feels there is a question of the validity of the total of 237,600, then the Court should, as set forth in the dissenting opinion, order a recanvass of the County precincts to determine exactly, once and for all, the total number of electors who voted. Certainly, the majority opinion's erroneous mathematics must be corrected.

If, for any reason, a majority of this Court should determine to continue to hold that "approval by a majority of electors

voting at the election" does not mean what it says, then, at least, the majority of the Court should order the election to be declared void for the reason of the misrepresentations made to the electors of Montana by the members of both the Legislature and constitutional convention that electors did not have to vote against Issue Number One (1) in order to help to defeat it.

The Constitution of Montana is the fundamental document of goverment for the people of this state. It is the heart of our free society. Under the laws of Montana, as they now exist, and the facts before this Court, the members of this Court cannot allow the current majority opinion to stand in its current form and direction.

The three justices comprising the majority opinion, may find it difficult to think of changing their minds, by allowing a rehearing, and subsequent change in the contents of the decision of this Court. However, it is this Court's sworn duty to uphold the law. Its goal is to seek truth and justice, under the law. Until each justice is sure that he has found truth and justice in this case, he should be willing and able to change his mind. A matter that may not have been called to the attention of this Court is that a newspaper reporter for the Great Falls Tribune, reported on the front page of the issue of July 18, 1972, the day after oral argument in this case, that it was the consensus of the lawyer delegates to the constitutional convention that the Court would vote on this issue along political lines, and he lined up this Court just the way the opinions came out. Regardless of this publicity, this Court must base its determination solely upon the correct law. With the errors in the majority opinion clearly pointed out herein, this Court now should grant a rehearing and amend its opinion.

In summary, this Court should grant this Petition for Rehearing because:

(1) The majority of this Court has overlooked the issue that this Court has no authority to amend the Montana Constitution by interpretation because, in fact, this Court's interpretation of the phrase "voting at the election" disregards the unambiguous, plain meaning of the words in the Constitution. "Electors voting at the election" means, under previously recognized definitions of this Court, "persons possessing the legal qualifications that entitle them to vote, who mark their ballot properly and deposit it in the ballot box in conformity with the election laws". The Court should uphold the literal meaning of this phrase, and not now change its meaning by interpreting it to mean "electors voting on the Constitution".

(2) The majority opinion of this Court is in conflict with a prior controlling decision of this Court, Forty-Second Legislative Assembly v. Lennon, wherein this same Court found that the framers of the Constitution contemplated multiple issue ballots. Having contemplated multiple issue ballots, the framers and the people who voted to adopt the 1889 Constitution made it clear that before any revisions, or alterations of that Constitution could be adopted, each issue must receive a positive vote by a majority of the electors who voted at the election. Since the constitutional issue did not receive such a vote at the June 6th election, the issue was not adopted under Montana law.

(3) The majority of the Court has overlooked the fact that if the constitutional issue is not to be judged by the number of electors who vote a valid ballot at the election, then the electors of Montana had the facts misrepresented to them, not only by the Legislature of Montana, but by the constitutional convention, all by way of statutes, newspaper supplement, and the very ballot they voted. Under all of this misrepresentation, the electors of Montana are entitled to relief and this Court should declare the election to be void, and direct another election to

be held.

(4) The majority opinion has overlooked the facts that the language in Sections 8 and 9 of Article XIX of the Montana Constitution, on the three different election proceedings stated therein, is further evidence to show that the framers intended the adoption of any revisions, alterations or amendments to be governed by the criteria of the number of electors who voted a valid ballot at the election. The language was not the result of "inherent constitutional differences in the elections themselves, which, in turn, requires different language."

(5) The majority opinion has overlooked the fact that if the Court is to allow the members of the State Board of Canvassers, being the Governor, the Secretary of State, and the Treasurer, to impeach the truth of their own canvass, by the insufficient affidavits they presented, the Court then does not have the facts before it to make a valid determination of how many electors voted at the election. It is demonstrated that the mathematics attempted by the Court to arrive at the figure of 230,588 is in reality a mere chance guess, and the chances of the guess being correct are exceedingly poor. Further, however, mathematically the figure of 237,600 could be the correct total, as demonstrated on Page 21 of this Petition. Thus, if the Court is to now believe that the State Board of Canvassers did not correctly perform their duties the first time they purportedly canvassed the votes, then the only way the citizens and electors of Montana are to ever really know how many electors voted at the election is for the Court to order a recount and recanvass down through the County precincts. Only then will Montanans know whether the proposed Constitution really was or was not approved by the electors voting at the election on June 6, 1972.

Respectfully submitted,

MORROW, NASH & SEDIVY, P.C.

BY: Edmund P. Sedivy, Jr. & John Morrow

Attorneys for Stanley C. Burger
208 East Main Street
Bozeman, Montana 59715

We, the undersigned, as Intervenors, join in the foregoing Petition for Rehearing.

DOUGLAS Y. FREEMAN
Hardin, Montana

HIBBS, SWEENEY, COLBERG & KOESSLER
P. O. Box 1321
Billings, Montana
Attorneys for Intervenors Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt

BY:

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Rehearing upon counsel of record by mailing a true copy thereo this date in an envelope with postage prepaid addressed to:

Joseph P. Monaghan
2218 Elm Street
Butte, Montana 59701

Marshall G. Candee
P. O. Box 617
Libby, Montana 59923

A. W. Scribner
Power Block Bldg.
Helena, Montana 5960

Gerald J. Neely
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Jerome T. Loendorf
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C. W. Leaphart, Jr.
Montana Club Building
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Diana S. Dowling
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D. Patrick McKittrick
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Donald C. Robinson
Silber Bow Block
Butte, Montana 59701

William F. Meisburger
Courthouse
Forsyth, Montana 59327

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Calvin A. Calton
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Billings, Montana

Forrest H. Anderson
Governor of the State of Montana
Helena, Montana

Keller, Reynolds and Drake
South Annex Power Block
Helena, Montana

Dated this 5th day of September, 1972.

MORROW, NASH & SEDIVY, P. C.

by _____
208 E. Main Street
Bozeman, Montana
Attorneys for Stanley C. Burger

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., and STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

No. 12309

AFFIDAVIT OF R. W. HARRIS

* * * * *

STATE OF MONTANA)
: ss.
County of Yellowstone)

R. W. HARRIS, of lawful age, being first duly sworn, on oath deposes and says:

He is now, and during the year 1972 he was, the Circulation Manager of The Billings Gazette, a newspaper of general circulation, printed and published at Billings, Yellowstone County, Montana.

On and before May 21, 1972, The Billings Gazette, for compensation, printed the supplement which is entitled "The Proposed 1972 Constitution for the State of Montana", a true and correct copy of which is to this affidavit annexed, and it, The Billings Gazette, shipped by freight a sufficient number of the copies of said supplement and for circulation to the following named newspapers which are regularly published in Montana, to-wit: Bozeman Daily Chronicle, Bozeman, Montana; Montana Standard, Butte, Montana; Dillon Daily Tribune-Examiner, Dillon, Montana; Great Falls Tribune, Great Falls, Montana; Daily Ravalli Republican, Hamilton, Montana; Havre Daily News, Havre, Montana; Helena Independent

Record, Helena, Montana; Kalispell Inter Lake, Kalispell, Montana; Lewistown Daily News, Lewistown, Montana; Livingston Enterprise, Livingston, Montana; Miles City Star, Miles City, Montana; and Missoula Missoulian, Missoula, Montana.

And on May 21, 1972, The Billings Gazette included a copy of said supplement with each copy of its regular Sunday edition of The Billings Gazette, a newspaper, which was given distribution to each purchaser and subscriber of said May 21, 1972, issue of the said newspaper.

R. W. HARRIS

Subscribed and sworn to before me this 10 day of July, 1972.

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires August 21, 1972

(NOTARIAL SEAL)

ORIGINAL

12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

ORIGINAL

No. 12309

The STATE OF MONTANA, ex rel.
WILLIAM F. CASHMORE, M. D. and
STANLEY C. BURGER,

Relators,

-vs-

FORREST H. ANDERSON, as
Governor of the State of
Montana,

Respondent.

PETITION FOR REHEARING
OF THE RELATOR, WILLIAM F. CASHMORE, M. D.

APPEARANCES:

PAUL T. KELLER
HELENA, MONTANA

Attorney for Relator,
WILLIAM F. CASHMORE, M. D.

(66)

In this matter, the Court has rendered its opinion on August 18, 1972, in a three to two decision in which the majority held that the proposed Constitution was adopted. The relator, WILLIAM F. CASHMORE, M. D., has obtained additional time in which to file a petition for rehearing, and the grounds for rehearing are as follows:

That a line of cases and controlling decisions were completely overlooked by the majority of the Court in entirety in arriving at its decision in this cause.

ARGUMENT

The law which was overlooked in this case by both the minority and the majority opinion was the matter of multiple subjects on one ballot. These are controlling cases. There is a line of cases which hold that when multiple issues are submitted at a separate election, a person voting on any one of the multiple issues is a voter at the election, and anyone of the items on the ballot must receive a majority of all the voters who voted on any one of the issues to carry any one of them. Those cases were completely overlooked by the majority and minority in either opinion. We wish to call them to the attention of the Court.

In the case of Law vs. City and County of San Francisco (1904) 144 Calif. 384, 77 P. 1014: There was one ballot submitting several items relative to a bond issue. The California Court made the following observation:

> "...But, upon the other hand, where the meaning of the law is plain, and permits of but one construction,

> naught is left for a court to do but to give legal effect to its provisions. Thus, in City of Santa Rosa v. Bowers, 142 Cal. 299, 75 Pac. 829, this court, by the language of the law, which in terms required that the proposition ordered submitted at a general or special election must receive the assent of the majority of the qualified electors voting at the election, was reluctantly compelled to hold that the proposition there under consideration had not been carried, notwithstanding the fact that it had received the requisite majority of those voting upon the proposition."

The case of City of Pasadena v. Chamberlain (1923) 192 Cal. 275, 219 P. 965 is to the same effect, as is the case of People ex. rel. Rowe v. West Side County Water District (1952) 112 Cal. App.2d 128, 246 P.2d 119.

Again, in the case of People ex. rel. Smith v. City of Woodlake (1940) 41 Cal. App.2d 119, 106 P.2d 71, the statute under which the election was held required that the voters approve whether the town should be incorporated and also that they vote on the various officers for the town. The question arose as to whether all of the voters at the election were to be counted or whether only those voting on whether the town should be incorporated would be counted on the main proposition. A majority of the electors who voted upon the proposition were in favor of it but a majority of all who voted at the election were not. The Court there held:

> "This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize."

* * *

"[2,3] The matter of electing officers was an indivisible part of the election. The law required the matters to be submitted at the same time and one the same ballot and under the same call. It would be a strained construction of the law to hold that a valid vote for officers was not a vote cast at the election. To strengthen the position we here assume, it should be noted that the Municipal Bond Act of 1901, under which many of the above-cited cases were decided, was amended, Stats. 1927, chap. 315, p. 527, to provide for the issuance of bonds when authorized by 'the votes of two-thirds of all the voters *voting on any such proposition*'. If the legislature had intended that the total votes cast the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. This should not be accomplished by judicial decision when the statute is clear and unambiguous. The governing statute is plain. It requires a clear majority of all votes cast at the election for the incorporation to succeed. Since that majority was not had, it follows that incorporation failed."

In the case of Carey v. Port of Seattle 27 Wash.2d 685, 179 P.2d 501, the Court had before it a question of whether a proposition had received a majority of the votes cast at an election. The Washington Court made the following observation:

"Each voter is not required to vote for each office or position appearing on the ballot. It is a matter of common knowledge that in elections, such as the 1944 general election, each voter does not vote for each office or proposition on the ballot. We know of no better method than the one prescribed by the statute of determining the number of votes case at an election. The argument that it must be assumed that the highest number of votes (256,846 for office of commissioner of third district) cast in the county as distinguished from the state election were the total number of votes cast in the general county election is without

substantial merit. To so hold, we would have to speculate whether those voting at the general election and voting only for the two offices of county commissioner were limited to 256,845.

"Under the statute, Rem.Rev.Stat. § 5346, the county canvassing board was authorized and required to find and declare the total number of votes cast at that 1944 election, and the statement contained in that board's abstract of votes is official and must be accepted as the standard of determination of the number of persons voting at an election until properly challenged and refuted. We have consistently followed the rule that the certificate of election officials as to the number of voters voting at an election, based upon the poll books, must be accepted until impeached by direct attack."

It thus becomes very clear to us that the ballot submitted by the Convention here was all one ballot and should have been considered as one election. As stated by the Washington Court in Carey vs. Port of Seattle, 179 P.3d 501, the voters are not required to vote for each proposition on the ballot. All one must do is to look at the final tallies, and it becomes quite evident that many voters only voted one or more items on the ballot but not all four.

So the Court should not assume what occurred if a challenge of the ballots is to be made; a recount should be ordered to determine exactly what did occur, if there is any question.

The Court in its opinion referred to the affidavits of the three canvassers being the Treasurer, the Governor and the Secretary of State and says that the figures are not correct. But that is purely an assumption. Their affidavits clearly show they made no study to determine that the various County Clerk and Recorders did not do their duty.

The only way that could be ascertained is to do as the minority says, mandamus a recount. The various attorneys that appeared on the side of the relators discussed this matter with several County Clerk and Recorders, and the County Clerk and Recorders are of the opinion that the figures submitted by them were net figures and did not include spoiled and void ballots.

The majority opinion completely disenfranchises those persons who only voted on one issue. They may have thought they were voting, and they were not because they did not vote on all four issues. There were no such instructions issued to the county clerks. Therefore, a new set of instructions should go out to the county clerks and a recount should be ordered.

RULES AND LITERATURE OF THE CONVENTION

The Court in the majority opinion also overlooked the rules laid down by the Constitutional Convention itself which set up a ballot containing four separate items. The Convention in appearing in Court tried to change the rules. The literature of the Convention, as pointed out by the briefs of amicus curiae supporting the relator's position in this case clearly showed that the Convention knew what the Constitution provided. They met that rule of law with their rule and advised all of the voters in their various pamphlets and literature that everybody should vote for all four issues because a vote on one of the side issues was a vote against the Constitution.

DECISIONS OF OTHER STATES

While the majority in its opinion in this

case said that the Tinkel and Morse cases were sufficient to justify the opinion, we feel that they cannot just brush aside those cases. A study of the history of the Montana Constitution of 1889 was not revealing in where the language which is contained in Section 8 of Article XIX therein came from. However, in studying the language of the various states and in their provisions for amendments by convention, Michigan has consistently followed one rule since at least 1848, and the Michigan decisions are very informative. In the list which we examined of constitutional provisions, Michigan is listed as having the same general requirement that Montana had of "a majority of those voting at the election." In the Michigan cases culminating in the final case of Stoliker v. White 359 Mich. 65, 101 NW.2d 299, the Court there stated that the voters knew that by failing to vote upon the Constitutional question their action would have the practical effect of a vote in the negative thereon. The Court went on to say that since there is no way of knowing how those people would have voted, the Court should not conjecture. In that case, the Michigan Court pointed out that for the adoption of an amendment, the Michigan Constitution required a majority of the electors voting thereon whereas in voting on a Constitution submitted by the Convention, the Constitution required a majority of the electors voting at such election. The Michigan cases historically followed the view that it must be a majority of all the electors voting at the election. Since this Court, in its majority

opinion, apparently overlooked those Michigan decisions, we wish to call them to the Court's attetion.

We, therefore, respectfully submit to this Court that a rehearing should be granted in this case, or at the very least as the minority opinion suggests, a recount should be had so the Court would be entirely familiar with what was actually done by the voters at the election in this case.

Respectfully submitted,

PAUL T. KELLER

Paul T. Keller

South Annex Power Block
Helena, Montana 59601

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Rehearing of the Relator, WILLIAM F. CASHMORE, M. D., upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid, addressed to:

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Forrest H. Anderson
Governor of the State of Montana
Helena, Montana 59601

Morrow, Nash and Sedivy, P. C.
208 East Main Street
Bozeman, Montana 59715

DATED this 6th day of September, 1972.

PAUL T. KELLER

Paul T. Keller

South Annex Power Block
Helena, Montana 59601
Attorney for the Relator,
WILLIAM F. CASHMORE, M. D.

12309

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * * * * * * *

THE STATE OF MONTANA, ex. rel. WILLIAM F. CASHMORE, M. D., and STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

* * * * * * * * * * * * * * * * * *

No. 12309

FILED
SEP - 5 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

A F F I D A V I T

STATE OF MONTANA)
: SS
County of Gallatin)

The undersigned, Carl L. Stucky, County Clerk and Recorder of Gallatin County, Montana, and ex officio Clerk of the Board of County Canvassers of Gallatin County, Montana, being first duly sworn, upon his oath, deposes and says:

1. That Affiant is the Clerk and Recorder of Gallatin County, Montana, and ex officio Clerk of the Board of County Canvassers of Gallatin County, Montana, and that he is the same Carl L. Stucky who affixed his hand and seal on the 9th day of June, 1972, to the full and complete Abstract of number of votes cast at the election for the ratification or rejection of the proposals of the constitutional convention on June 6, 1972 for the County of Gallatin, which Election Return Abstract was forwarded to the Office of the Secretary of State Frank Murray pursuant to law, a certified copy of which is attached hereto, marked as Exhibit "A" and by reference made a part hereof;

2. That on said Abstract there appears the phrase "number of electors voting 11658" and that the number 11658 was arrived at by the Gallatin County Canvassing Board and by myself as Clerk of the Board of said County Canvassers by reference to the poll

(65)

Exhibit A

books for each precinct in Gallatin County whereby the number of ballots issued to electors were totaled and the number of absentee ballots issued but not returned was subtracted therefrom, and the number of spoiled or voided ballots were subtracted therefrom leaving a total of 11,658 ballots that were voted on by the electors of Gallatin County, Montana, for one or more of the four issues on said ballot at said election.

Carl L. Stucky
County Clerk and Recorder of
Gallatin County, Montana and
ex officio Clerk of the Board
of County Canvassers of
Gallatin County, Montana

Subscribed and sworn to before me this 14th day of July, 1972.

Oleta A. Davis
Notary Public for State of Montana
Residing at ~~Bozeman~~ Bilgrade, Montana
My Commission Expires: 2-1-74

(SEAL)

Proposed Constitution

Number of Electors Voting 11658

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Gallatin

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in Gallatin County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this 9 day of June, 1972.

Joseph Armstrong
Clifford F. Boyle
Walter F. Boles

County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the ..... day of ..... 1972, at the hour of ..... M.

..... Secretary of State.

By ..... Deputy

STATE OF MONTANA
County of Gallatin } ss.

I, CARL L. STUCKY, County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this 9 day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

Carl L. Stucky
County Clerk and Clerk of said Board of County Canvassers of GALLATIN County, State of Montana.

	Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13	Precinct 14
1	1.														
2	FOR THE PROPOSED CONSTITUTION.	141	115	199	189	395	97	425	414	377	322	292	527	126	18
3	AGAINST THE PROPOSED CONSTITUTION.	199	232	264	156	275	140	292	248	297	182	221	164	179	54
4															
5	2.														
6	2A. FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.	150	116	189	147	315	102	338	337	292	267	255	415	123	17
7	2B. FOR A BICAMERAL (2 HOUSES) LEGISLATURE.	178	214	246	180	322	123	354	303	364	235	246	273	174	49
8															
9	3.														
10															
11	3A. FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.	218	110	225	167	340	133	353	342	355	265	293	390	134	40
12															
13	3B. AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.	125	133	230	173	325	100	360	312	320	233	219	304	173	31
14															
15	4.														
16	4A. FOR THE DEATH PENALTY.	224	206	304	214	382	155	443	389	470	281	321	357	216	51
17	4B. AGAINST THE DEATH PENALTY.	119	133	148	127	268	77	259	260	203	212	187	335	87	20
18															
19															
20															
21															
22															
23															
24															
25															
26															
27															
28															
29															
30															
31															

Precinct 15	Precinct 16	Precinct 17	Precinct 18	Precinct 19	Precinct 20	Precinct 21	Precinct 22	Precinct 23	Precinct 24	Precinct 25	Precinct 26	Precinct 27	Precinct 28	Precinct 29	Precinct 30	Precinct 31	Precinct 32	Precinct 33	TOTAL VOTES CAST
195	129	233	217	17	225	4		11	211	19	134	26	70						5514
109	150	443	229	55	275	24		39	329	71	297	103	281	27	187	66	13	93	5999
														87	272	111	29	192	
144	100	215	191	19	206	7		8	211	16	145	24	107	44	170	66	11	92	4839
151	163	406	226	48	273	20		38	297	67	266	91	205	66	269	101	30	176	6154
134	202	361	252	37	271	17		24	302	56	183	69	67	78	241	87	29	149	5924
								26	224	29	249	56	282						
169	77	305	182	33	218	11								37	214	88	13	132	5383
180	212	502	312	59	334	23		40	363	61	315	93	287	87	320	131	37	212	7581
122	63	154	120	9	151	5		9	161	21	110	34	58	26	133	46	5	62	3724

CERTIFIED TO BE A FULL, TRUE AND CORRECT PHOTOGRAPHIC COPY,
DATED AT BOZEMAN, MONTANA, June 20 1972
Carl L. Stucky
COUNTY CLERK & RECORDER, GALLATIN COUNTY, STATE OF MONTANA
BY Alta M Haugan DEPUTY

ORIGINAL

12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 12309

THE STATE OF MONTANA, ex. rel.,)
WILLIAM F. CASHMORE, M. D. and)
STANLEY C. BURGER,)
Relators,)
-vs-)
FORREST H. ANDERSON, as Governor of)
the State of Montana,)
Respondent.)

AFFIDAVIT

FILED
SEP - 5 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

STATE OF MONTANA,)
) ss.
County of Big Horn.)

The undersigned, Joyce Lippert, County Clerk and Recorder of Big Horn County and Ex-officio Clerk of the Board of County Canvassers of Big Horn County, Montana, being first duly sworn upon her oath, deposes and says:

I.

That affiant is the County Clerk and Recorder of Big Horn County and Ex-officio Clerk of the Board of County Canvassers of Big Horn County, Montana, and that she is the same Joyce Lippert who affixed her hand and seal on the 9th day of June, 1972, to the full and complete abstract of number of votes cast at the election for the ratification or rejection of the proposals of the Constitutional Convention on June 6, 1972 , for the County of Big Horn, which election return abstract was forwarded to the Office of the Secretary of State, Frank Murray, pursuant to law, a certified copy of which is attached hereto marked as "Exhibit A", and by reference made a part hereof.

(64)

Exhibit B

II.

That on said abstract there appears the phrase "Number of Electors Voting: 2,717 " and that the number 2,717 was arrived at by the Big Horn County Canvassing Board and by myself as Clerk of the Board of said County Canvassers by references to the poll books of each precinct in Big Horn County whereby the number of ballots issued to electors were totaled and the number of absentee ballots but not returned was subtracted therefrom and the number of spoiled or voided ballots were subtracted therefrom, leaving a total of 2,717 ballots that were voted by the electors of Big Horn County, for one or more of the four issues on said ballot at said election.

Joyce Lippert
County Clerk and Recorder of Big Horn County
and Ex-officio Clerk of the Board of County
Canvassers of Big Horn County, Montana

Subscribed and sworn to before me, a notary public for the State of Montana, this 14th day of July, A. D., 1972.

Notary Public for the State of Montana
Residing at Hard in, Montana
My commission expires: August 25, 1972

STATE OF MONTANA)
) ss.
County of Big Horn)

I, Joyce Lippert, the duly elected, qualified and acting County Clerk and Recorder and Ex-Officio Registrar of Big Horn County, do hereby certify that the attached copy of election returns for the ratification or rejection of the proposals of the Constitutional Convention, held June 6, 1972 as reported by the County Canvassing Board of Big Horn County, Montana and done on the 9th day of June, 1972, is a true and correct copy of that submitted to the Secretary of State of the State of Montana, said original of the copy being mailed by certified mail June 12, 1972.

Done at Hardin, Montana this 14th day of July, 1972.

Joyce Lippert
County Clerk and Recorder and
Ex-Officio Registrar

Proposed Constitution

Number of Electors Voting 2,717

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Big Horn

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

Big Horn County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this 9th day of June, 1972.

John Beach
Dick Hagen
Alex Nagel

County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the ..... day of ..... 1972, at the hour of ..... M.

..... Secretary of State.

By ..... Deputy

STATE OF MONTANA }
County of Big Horn } ss.

I, Jacqueline Lippert, County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this 9th day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

Jacqueline Lippert
County Clerk and Clerk of said Board of County Canvassers of Big Horn County, State of Montana.

Proposed Constitution

Number of Electors Voting 2,217

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Big Horn

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

Big Horn County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this 9th day of June, 1972.

John Beads
Dick Gregory
Alex Nayes

County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the ..... day of ..... 1972, at the hour of ..... M.

..... Secretary of State.

By ..... Deputy

STATE OF MONTANA
County of Big Horn } ss.

I, Jacque Lippert, County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this 9th day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

Jacque Lippert
County Clerk and Clerk of said Board of County Canvassers of Big Horn County, State of Montana.

Precinct 15	Precinct 16	Precinct 17	Precinct 18	Precinct 19	Precinct 20	Precinct 21	Precinct 22	Precinct 23	Precinct 24	Precinct 25	Precinct 26	Precinct 27	Precinct 28	Precinct 85	Precinct 86	Precinct 87	Precinct 88	TOTAL VOTES CAST	
																			1
																		1119	2
																		1501	3
52		149	122	131	65					67	51								4
47		187	182	158	137					134	38								5
																		1009	6
50		144	115	109	77					53	29							1477	7
48		177	171	163	111					141	58								8
																			9
																			10
61		195	177	145	97					123	51							1469	11
																			12
45		145	121	135	98					83	48							1157	13
																			14
																			15
51		190	151	152	118					128	45							1431	16
52		143	144	131	74					75	40							1131	17
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	Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13	Precinct 14
1	1.														
2	FOR THE PROPOSED CONSTITUTION.	25	49	32			12	193	60	59	8	7	0		57
3	AGAINST THE PROPOSED CONSTITUTION.	34	37	72			55	143	78	70	36	34	11		48
4															
5	2.														
6	2A. FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.	24	35	43			23	132	48	58	8	14	6		41
7	2B. FOR A BICAMERAL (2 HOUSES) LEGISLATURE.	34	48	48			52	161	80	59	32	25	5		64
8															
9	3.														
10															
11	3A. FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.	31	61	57			37	175	82	83	20	20	4		50
12															
13	3B. AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.	29	25	45			48	130	53	42	24	22	7		57
14															
15	4.														
16	4A. FOR THE DEATH PENALTY.	39	60	56			41	131	82	56	38	34	5		54
17	4B. AGAINST THE DEATH PENALTY.	21	25	41			22	177	49	66	7	7	5		52
18															
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IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 12310

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M. D., and STANLEY C. BURGER,

Relators,

-vs-

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

MEMORANDUM IN SUPPORT OF

OBJECTIONS TO PETITIONS

Introduction

Upon examination of the two petitions for rehearing by relators, respondent is convinced that relators do not fairly raise any matters which would justify a rehearing under Rule 34, Montana Rules of Appellate Procedure. The effect of relators' petitions is to take the opinion of the court, quote portions of that opinion, and reiterate the same argument made in their briefs and oral arguments prior to the submission of this cause.

Respondent, therefore, urges that the petitions for rehearing be summarily denied.

I.

THE SUPREME COURT OF MONTANA HAS NOT AMENDED THE MONTANA CONSTITUTION BY INTERPRETATION

On pages 1 - 5 of his petition, relator Burger seeks to have this court grant a rehearing because the court has amended the constitution by interpretation.

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A review of the court's discussion of Article XIX, section 8, Constitution of Montana, shows that rather than amending the constitution, the court has adhered closely to clearly established principles of interpretation.

On page 9 of the opinion, this court indicates the rules of statutory construction it applies to the Montana Constitution. Those rules are: 1. The intent of the framers is paramount; 2. To determine intent, resort is first made to the plain meaning of the words used; 3. To construe an instrument the court's function is to ascertain and declare what is in terms or substance contained therein; 4. "A statute must be read and considered in its entirety and the legislative intent may not be determined from the wording of any particular section or sentence, but only from a consideration of the whole." (Emphasis supplied)

Relator seeks review because the court's language on page 10 indicates that a literal construction of the phrase "electors voting at the election" would seem to support his position. The court, however, clearly indicated that the phrase viewed in the light of the total constitutional provision was at most ambiguous.

As the phrase is ambiguous, this court certainly does not amend the constitution by applying an interpretation which gives preference to a natural right. (Opinion, p. 10.)

Relator's statement that the phrase is not ambiguous based on the language of the court found on page 15 of its opinion overlooks the fact that the language found in pages 14-17 is based on an assumption that relator's interpretation of the phrase is correct. This court

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stated on page 14 that:

> "Even under relators' interpretation of the constitutional requirement in question which we expressly reject, relators still cannot prevail." (Emphasis supplied)

II.

THE COURT'S OPINION IS NOT IN CONFLICT WITH FORTY-SECOND LEGISLATIVE ASSEMBLY v. LENNON, 156 MONT. 416, 481 P.2d 330.

The language quoted and discussed by relator Burger on pages 5-8 of his petition is dicta and refers to the language found in Chapter 65, section 1, Laws of 1969, not Article XIX, section 8, Constitution of Montana, and is not in point in the controversy at bar.

The issues in Forty-Second Legislative Assembly v. Lennon, supra, concerned the qualifications of delegates to the constitutional convention, not whether the framers of the constitution had a multiple-issue ballot where contingent alternative issues were submitted to the electors in addition to the question of approval or rejection of the proposed constitution.

Assuming the dicta in the Lennon case is in point, the matter of a multiple-issue ballot has been thoroughly discussed in the briefs of the parties to this lawsuit and the Lennon dicta does not speak to any intent of the framers that more than one issue would be voted on in a separate election for a constitutional revision.

As to relator's reassertion of the question of extra-ordinary majorities, we believe the court is correct in its interpretation of the Montana Constitution that, absent a clear intent by the framers, an extraordinary majority violates the constitutional philosophy expressed in Tinkel v. Griffin, 26 Mont. 426, 431, 68 P. 859.

The case of Forty-Second Legislative Assembly v.

Lennon, supra, did not speak to the extraordinary majority principle and is not therefore controlling.

III.

THE COURT HAS NOT OVERLOOKED PRE-ELECTION STATEMENTS TO THE ELECTORS OF MONTANA

Relator Burger alleges that this court has overlooked representations made to the electors of Montana prior to the election on the proposed constitution because the court makes no mention of those representations.

In raising this matter, relator is simply repeating facts alleged in the brief of intervenors, and submitted to this court. In its order dated June 22, 1972, based partially on the ex parte representations made by relators, this court said:

> "Upon consideration of the allegations contained in the pleadings, the exhibits appended thereto, and the ex parte oral presentations before this Court, it would appear that the matters raised thereby are to secure interpretations of provisions of our present constitution in light of its wording and under precedents established in the case law of Montana and other states of the Union, and, further, that no fact questions arise which would require the taking of testimony, and in such a situation an adversary hearing before this court is all that would be required to present the legal issue for determination."

In the opinion, this court stated:

> "The facts speak for themselves and only legal questions remain for our determination." Opinion, p. 7.

The argument of relator Burger concerning representations made to the electors of Montana does not concern facts that are material to the decision of the court. The presence or absence of statements or understandings of legislators or individual constitutional convention delegates has no materiality to the intent of the framers in drafting section 8, Article XIX, Constitution of Montana.

After relator has sought this forum alleging the absence of factual questions, equity would not allow the raising of questions of fact even if the facts were material.

IV.

THE COURT HAS NOT OVERLOOKED THE DIFFERENCE IN THE LANGUAGE IN THE THREE DIFFERENT ELECTION PROCEEDINGS FOUND IN SECTIONS 8 AND 9 OF ARTICLE XIX, CONSTITUTION OF MONTANA

Relator Burger, in raising this question, does not raise a question of law that has not heretofore been argued before this court. The interpretation given by the court concerning the meaning of the language found in Article XIX, sections 8 and 9, Constitution of Montana, supra, on page 11 of its opinion, shows that this question has been given fair consideration by this court.

V.

THE COURT HAS NOT ALLOWED MEMBERS OF THE STATE BOARD OF CANVASSERS TO IMPEACH THEIR OWN CANVASS BY AFFIDAVIT

While relators have failed to show why this court could not use the affidavits signed by the secretary of state and the state board of canvassers in its opinion, the issue is not material as the affidavits were not used by the court in arriving at its decision.

The court stated on page 7 of its opinion:

> "Neither do we consider the pleading conflict raised by the Attorney General concerning the meaning and effect of the Secretary of State's certification of the 'total number of electors voting' germane."

All discussion by the court of the affidavits of the secretary of state and the state board of canvassers are found following page 14 of the opinion. That discussion is dicta and merely shows that following relators' interpretation of the meaning of Article XIX, section 8,

Constitution of Montana, relators still would not prevail.

Thus relator's conjecture that the manner of count used by the court on pages 14-17 of its opinion is inaccurate, is simply not material to the holding of the court.

VI.

THE COURT HAS NOT OVERLOOKED A LINE OF CASES AND CONTROLLING DECISIONS IN ARRIVING AT ITS DECISION IN THIS CAUSE.

Relator Cashmore states that, because the court did not refer to the California bonding cases in its opinion, and that because the dissenters did not refer to the cases, they were overlooked. Relator cannot merely, through using the phraseology of appellate rule 34, reiterate his argument made prior to submission of this case.

The bonding cases were cited by counsel on both sides in their briefs. The cases were discussed in oral argument. The court in response to these cases and other cases from foreign jurisdictions stated:

> "We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. Earlier cases are collected in the Annotation appearing at 131 A.L.R. 1382. For examples of later cases see: State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143; In re Todd, 208 Ind. 168, 193 N.E. 865; Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299. These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions." Opinion, p. 9.

It should be noted that the early bonding cases cited by relator are noted and discussed in the annotation cited above. Even if the court were to reconsider those bonding cases, it would find that the California courts

used the total number of votes cast for the proposition or office receiving the largest number of votes as the test to determine the extraordinary majority clearly required by statute. City of Pasadena v. Chamberlain, 192 Cal. 275, 219 P. 965 (1923).

All cases raised by petitioner have been thoroughly discussed in the briefs submitted to this court. The fact that this court chose to apply only Montana authority because of the split of authority in foreign jurisdictions clearly means that the cases were considered and rejected as authority, not overlooked.

CONCLUSION

This case has had some twenty briefs submitted which explore exhaustively all aspects of the application of Article XIX, section 8, Montana Constitution, to the separate election of June 6, 1972. Relators have not raised any matters in their petitions for rehearing that were not raised by one of the briefs submitted to the court. Nor have relators raised any points of law or facts omitted which are sufficiently material to the matter to justify a reheating. Because relators have not raised any material objections to the opinion of the court, the petitions should be denied.

DATED this 11th day of September, 1972.

Respectfully submitted,

ROBERT L. WOODAHL
Attorney General

By: William N. Jensen

WILLIAM N. JENSEN
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601

STATE PUBLISHING CO. HELENA, MONT.

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 12310

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M. D., and STANLEY C. BURGER,

Relators,

-vs-

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Objections to Petitions for Rehearing and Memorandum In Support of Objections to Petitions upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

Joseph P. Monaghan
2218 Elm Street
Butte, Montana 59701

Hibbs, Sweeney, Colberg & Koessler
P. O. Box 1321
Billings, Montana 59101

Douglas Y. Freeman
Courthouse
Hardin, Montana 59034

Marshall G. Candee
P. O. Box 617
Libby, Montana 59923

A. W. Scribner
Power Block Building
Helena, Montana 59601

Gerald J. Neely
2822 First Avenue North
Billings, Montana 59101

Jerome T. Loendorf
Professional Building
Helena, Montana 59601

C. W. Leaphart, Jr.
Montana Club Building
Helena, Montana 59601

STATE PUBLISHING CO. HELENA, MONT.

Diana S. Dowling
519 North Rodney
Helena, Montana 59601

D. Patrick McKittrick
1713 Tenth Avenue South
Great Falls, Montana 59401

Lawrence Eck
310 North Higgins
Missoula, Montana 59801

Franklin S. Longan
Securities Building
Billings, Montana 59101

John Layne III
1301 University Avenue
Helena, Montana 59601

Clayton R. Herron
P. O. Box 783
Helena, Montana 59601

Donald C. Robinson
Silver Bow Block
Butte, Montana 59701

William F. Meisburger
Courthouse
Forsyth, Montana 59327

Robert L. Kelleher
2108 Grand Avenue
Billings, Montana 59103

Calvin A. Calton
P. O. Box 1178
Billings, Montana 59101

Forrest H. Anderson
Governor of the State of Montana
Helena, Montana 59601

Keller, Reynolds and Drake
South Annex, Power Block
Helena, Montana 59601

Morrow, Nash & Sedivy
208 East Main Street
Bozeman, Montana 59715

DATED this 11th day of September, 1972.

ROBERT L. WOODAHL
Attorney General

By: William N. Jensen
WILLIAM N. JENSEN
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601

STATE PUBLISHING CO. HELENA, MONT.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12310

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., and STANLEY C. BURGER,

Relators,

-vs-

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

FILED
SEP 11 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

OBJECTIONS TO

PETITIONS FOR REHEARING

NOW COMES ROBERT L. WOODAHL, duly elected, qualified and acting attorney general of the state of Montana, and on behalf of respondent, Forrest H. Anderson, himself, and the executive branch of the government of the state of Montana, objects to the petitions for rehearing filed by petitioner Stanley C. Burger and petitioner William F. Cashmore, M.D., as follows:

1. The court has not overlooked facts material to the decision.

2. The court has not overlooked questions decisive of the case submitted by counsel.

3. The decision is not in conflict with a controlling decision.

WHEREFORE, this intervening respondent, on his own behalf, on behalf of respondent, FORREST H. ANDERSON, and on behalf of the executive branch of the government of the state of Montana, prays this honorable court that

STATE PUBLISHING CO. HELENA, MONT.

(68)

the petitions for rehearing of Stanley C. Burger and William F. Cashmore be denied.

DATED this 11th day of September, 1972.

ROBERT L. WOODAHL
Attorney General of
the State of Montana

By: William N. Jensen

WILLIAM N. JENSEN
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601

12309

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

FILED
SEP 15 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

The State of Montana on the relation of WILLIAM F. CASHMORE, M. D. and STANLEY C. BURGER,

Relators,

v.

FORREST H. ANDERSON as Governor of the State of Montana,

Respondent.

MEMORANDUM OF AMICUS CURIAE

ON PETITIONS FOR REHEARING

The presentation and argument of the parties and both the majority and dissenting opinions overlook a central issue with regard to which all other points are peripheral.

The electorate was provided with no information of the content and language of the existing constitution which is to be discarded for the new one. This fact is established if not directly at least satisfactorily in the record. From the election returns one is led inescapably to conclude the failure to provide that information prevented an intelligent vote upon the proposed new constitution and resulted in the inability of many voters conscientiously to mark their ballots at all. While the people have a sovereign right to adopt or discard any constitution whatever, they can not make a valid choice

law office
m candee
libby
montana

(67)

unless they are apprised of what the choice consists. Here demonstrably they were not so apprised.

The constitution should be resubmitted after the electorate has been furnished a side by side comparison or other text of the old and the new constitution in compliance with the requirement for adequate voter information.

Rehearing should be granted so those circumstances which produced this controversy can be fully considered and passed upon.

Respectfully submitted,

M. CANDEE
Postoffice Box 617
Libby, Montana 59923

law office
m candee
libby
montana

CERTIFICATE OF SERVICE

The undersigned certifies service by mail of the foregoing memorandum on the 14th day of September 1972 upon -

Hon. Forrest H. Anderson
Governor
Helena, Montana 59601

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THE STATE OF MONTANA, ex. rel. STANLEY C. BURGER,

Petitioner,

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

* * * * * * * * * * * * * * * * * *

No. 12310

FILED

SEP 18 1972

Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

ADDENDUM TO PETITION FOR REHEARING

COMES NOW, the Petitioner, Stanley C. Burger, and as an Addendum to his Petition for Rehearing on file in this Court, sets forth additional matters not previously presented to this Court, which matters are deemed relevant and important for the determination of the extremely important issue before this Court.

1. THE MAJORITY OPINION IS IN CONFLICT WITH ARTICLE III, SECTION 29, OF THE MONTANA CONSTITUTION AND THE CONTROLLING DECISION IN STATE V. TOOKER, TO WHICH THE ATTENTION OF THIS COURT WAS NOT DIRECTED.

The majority opinion has concluded that it was permissible for the Governor of Montana to declare that the new proposed Constitution was adopted at the election held on June 6, 1972, although the new proposed Constitution did not receive an affirmative vote by a majority of the electors voting at the election. Article III, Section 29, of the Montana Constitution, to which the attention of this Court has not previously been directed, provides:

> "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

The majority opinion in this case is, by construction, declaring that the specific requirement found in Article XIX,

(69)

Section 8, that any proposed revisions, alterations, or amendments to the Constitution shall not take effect "unless so submitted and approved by a majority of the electors voting at the election" is not mandatory, but that such revisions, alterations, or amendments may become effective "by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution." (See Page 14 of majority opinion.) To arrive at its position, the majority relies on what it terms a philosophy of government stated in the Tinkel and Morse cases involving bond issue for county courthouses. But those cases fail to give any consideration to the philosophy expressed in Article III, Section 29, which philosophy has been thoroughly explained in the long line of cases stemming from the earlier decision of State ex. rel. Woods v. Tooker. We may note that the philosophy of government expressed in Tinkel and Morse has not been followed in any subsequent decision by our Courts, whereas the philosophy expressed in Article III, Section 29, and in the Tooker case has been continuously followed in many decisions.

This action of construing a constitutional provision as being merely directory, as indicated by the majority, and not mandatory, was rejected by the Montana Supreme Court in the case of State ex. rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560 (1894). In the Tooker case, the question presented was whether a constitutional amendment which had been proposed and voted on by the electors at a general election (1892) was, in fact, approved and made part of the Constitution, under Article XIX, Section 9, of the Montana Constitution. The facts showed that the proposed amendment had only been published by the Secretary of State in the newspapers for two weeks prior to the election, and Section 9 provided for

three weeks' publication. The Court held that the provision was [redacted] mandatory and not directory, and further held that the amendment was not adopted, nor was it effective. The unanimous opinion, written by Justice DeWitt, stated as follows:

> 'We cannot better introduce this consideration than by quoting from Judge Cooley, whose language we find cited, and his doctrine largely followed, by the courts which have treated the subject of the construction of constitutional provisions. Judge Cooley says: 'But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and, if it descents to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised, as well by the delegate, as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directors are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the power delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered, that we feel warranted in saying that the judicial decisions, as they now stand, do not sanction the application.' (Cooley's Constitutional Limitations, 4th ed., 94, 95.) 'And we concur fully in what was said by Mr. Justice Emmot, in speaking of this very provision, that 'it will be found, upon full consideration, to be difficult to treat any constitutional

provision as merely directory, and not imperative.'' (Page 99.)

At another place in the same work this distinguished authority on constitutional law says: 'But the will of the people to this end (that is, amending a constitution) can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought; or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.' (§30, Page 39.)

In another place in the same work we find the following language: 'The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be, therefore, habitually disregarded. To say that a provision is directory seems, with many persons, to be equivalent to say that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all it must be treated as mandatory. And, if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by an habitual disregard, by any department of the government, of a plain requirement of tha nstrument from which is derives its authority, and which ought, therefore, to be scrupulously observed and obeyed.' (§150, Page 183.)"

The Court went on to say:

"It seems to us that the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not, at their pleasure, is fraught with great danger to the government. We can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. 'We are taught by the constitution itself that those who administer this government are divided into three co-ordinate departments; each of these can only act within its own limited sphere, and they, respectively, are the servants of the sovereign power, the people. There is no power above the people. There is no discretionary power granted in the constitution for either of these departments, nor for all of them united, to exercise a discretionary expansion and flexible power against its rigid limitations, even though such limitations were imposed by improvident jealousy. If abuse exists by reason of defects in the constitution, present or prospective, the true source of authority, the people, have the power, and doubtless the wisdom and

patriotism, to correct them; and this, in the American idea, is the safe and only depository.' (Potter's Dwarris on Statutes, 665.) . . .
Upon the weight of authority, and, to our minds, upon the soundest of reasons, we conclude that the provision of the constitution under consideration, and all other provisions of our constitution, are mandatory, and can in no case be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments united of the government.' (Hunt v. State, 22 Tex. App. 399, 400. See also, Opinion of the Justices, 6 Cush. 573.)"

The Court then concluded that the proposed amendment was null and void, setting forth the reasoning as follows:

"In considering the provisions of our own constitution, and in the light of the decisions, we are clearly of the opinion that the requirement to publish notices of a proposed amendment for three months is not only mandatory, but that it is an essential provision, and that it must be obeyed. We may add further that it seems to us to be a prudent and expedient provision. This requirement of the constitution provides a method for amending that instrument. It is also provided that the constitution may be amended, or a new one compiled, by a convention. (Const., art. XIX, §8.) This method, of course, is not now under consideration. But it may be said with us as it was said in Pennsylvania: There are only three methods by which a constitution may be changed: 1. The method by amendment, as provided by article XIX, section 9; 2. By convention, as provided by article XIX, section 8; and 3. By revolution. (Wells v. Bain, 75 Pa. St. 39; 15 Am. Rep. 563.) The first method was attempted. But that method was not followed as prescribed. Instead, another method was followed; that is, a method identical with that provided in article XIX, section 9, except that the advertisement was for two weeks only, and not for three months. As remarked in California, the constitution framers ordain and declare that no other form or mode or machinery is permissible to secure certainty in doing the act permitted. It is also held in the Alabama case above cited that an amendment cannot be made by a method other than that provided. We therefore have this situation: The method for amendment is provided by the solemnity of the constitutional enactment, and another method of amendment has been attempted to be invoked. We can see no other result but that such attempt is nugatory, and of absolutely no avail."

The Court then noted:

"If it is held that the command to the secretary of state to publish a proposed amendment for a certain period is nonessential, and may be disregarded, why may not the legislative department of the government follow the same practice, and disregard the requirement that the proposed amendment shall be voted for by two-thirds of the members elected to each house,

or the requirement that the proposed amendment, with the ayes and noes of each house, shall be entered in full on their respective journals? If one requirement is nonessential, why is not another? And who is to say what is essential and what is not? And by what rules are such distinctions to be made? The constitution does not itself make them. The framers of that instrument made no distinction in the requirements. They made them all mandatory; and, if a court commences to nullify their commands by construction, we do not know where the court would commence, or where it would end, or where it would draw the line which the constitution says shall not be drawn."

The Court finally concluded:

"We have felt wholly satisfied that the omission to publish the proposed amendment, as required by the constitution, is fatal to its adoption; but we have considered the question at perhaps some length, and have quoted from the authorities with much liberality, because this is the first time that such a question of construction has been before us. We cannot but be of opinion, with Judge Cooley, that we would be treading upon extremely dangerous ground were we to hold that a solemn constitutional provision was simply directory and nonessential when we face the express mandatory language of the provision, and also the additional and separate command of the constitution that the provision is mandatory. The command of the constitution is in no uncertain voice. We cannot misunderstand it. We cannot do other than render to it the obedience which our duty demands. It provides that an amendment may be adopted by certain methods. These methods were not employed. Another method was resorted to. That method accomplished nothing. The amendment was not adopted."

The rules set forth in the Tooker case have been repeatedly followed: Palmer v. City of Helena, 19 Mont. 61 at 68, 47 P. 209 (on municipal bond issue); Durfee v. Harper, 22 Mont. 354 at 363, 56 P. 582 (on calling in of District Judges where amendment to the Constitution was not in journals of legislative assembly); In re Weston, 28 Mont. 207 at 211, 72 P. 512 (on extending jurisdiction of District Judges); Tipton v. Mitchell, 97 Mont. 429, 35 P. 2d 110 at 113 Syllabi 1 and 2 (on requirement to publish amendment in house journal); State v. Regan, 113 Mont. 343, 126 P. 2d 823 (on the question of validity of initiative act regarding qualification of Sheriff; the Court stating at Page 826 of the Pacific citation under Syllabus 30: "Since the provisions

of the Constitution are conclusive upon the legislative power, the people under their reserved initiative power are no less subject to it than is the legislature", and citing State ex. rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 Syllabus 15, and State ex. rel. Woods v. Tooker, Vaughn & Ragsdale Co. v. State Board, 109 Mont. 52, 96 P. 2d 420 at 424 Syllabi 18 to 20 (involving license fees on chain stores which this Court misuses in its majority opinion at Page 9); State v. Bottomly, 148 P. 2d 545, 116 Mont. 96 (the particular value of this case is the preservation of the dissenting opinion of the Brief of District Court Judge Leiper); State v. Murray, 354 P. 2d 552 at 556 to 558 Syllabi 4 and 5, 137 Mont. 568 (concerning the problems of publication of proposed amendment to the Constitution). With this lengthy precedence, our current Court will surely wish to reconsider the conclusion of the majority opinion which allows for the passage of the proposed Constitution without compliance with the mandate of the Constitution that such revisions, alterations, or amendments to the Constitution can be adopted only with the approval of "a majority of the electors voting at the election". The provision of Article XIX, Section 8, of the Montana Constitution was not merely directory, but it was mandatory, and this Court has no power or discretion under the Montana Constitution to change the requirement. As indicated in the Tooker case, only the people have the power to change the voting requirement. By the opinion of the current majority of this Court, the will of the people of Montana, as provided in Section 8, of Article XIX of the 1889 Constitution, has been circumvented.

Respectfully submitted,
MORROW, NASH & SEDIVY, P.C.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., and STANLEY C. BURGER,

Relators,

-vs-

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

ADDENDUM TO MEMORANDUM

IN SUPPORT OF

OBJECTIONS TO PETITIONS.

FILED
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ADDENDUM TO MEMORANDUM IN SUPPORT OF OBJECTIONS TO PETITIONS

Introduction.

On September 15, 1972, relator Stanley C. Burger filed with this court a document titled, "Addendum to Petition for Rehearing". Respondents, by this addendum, continue to rely on their Objections to Petitions for Rehearing filed on September 11, 1972.

Argument.

Petitioner Burger's Addendum should be summarily denied by this court for the reasons indicated on pages 1 through 3 of respondent's Memorandum in Support of Objections to Petition.

Relator relies heavily on the older case of State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840 (1894). In the Tooker case a constitutional amendment was proposed and voted upon, but had not met the specific publication

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requirements of Article XIX, section 9, Constitution of Montana. The court interpreted a clear constitutional provision and said in effect: "The provision is clear, and as it is a constitutional provision it is mandatory." In the matter at bar, the constitutional provision is at most ambiguous. This court properly determined what the ambiguous provision means, using proper rules of interpretation. This court then applied the constitutional provision under consideration as is required by the Tooker decision. The effect of the court's action is: The provision is ambiguous. The provision is interpreted to determine the meaning of the framers. After proper interpretation, the provision is mandatory. (The constitution must receive a majority of valid votes cast thereon before passage.)

Respondent agrees that the Tooker decision is binding as to the application of clear constitutional requirements and as to the application of ambiguous constitutional requirements upon determination of the meaning of the ambiguous requirement. Respondents submit, however, that the decision is not in point in the interpretation of an ambiguous constitutional provision.

Respectfully submitted this 21st day of September, 1972.

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DATED this 21st day of September, 1972.

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Attorney General Robert H. Woodhal
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Helena, Montana 59601

Inreconcase Brief Quote Unless so submitted and approved unquote cannot be denied means Ratified quote by a majority of the electors unquote means duly qualified voters stop voting at the election does not mean: On the issue this is not ambiguous in any way by majority decisions in the U.S.A. stop As a President in his pocket MAY VETO bold so the people can withhold stop To vote for something I do not know I'd rather go out and sleep in the snow. And so this type of vote equates to " No "

Joseph P. Managhan
Attorney for Pun

I, the undersiged attorney, hereby certify that I served all counsel of record in the case of State of Montana, ex rel. William F. Cashmore vs. Forrest H. Anderson, Cause No. 12309, with the above reply brief.

Joseph P. Managhan
Attorney for " PUN "

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ADDENDUM TO MEMORANDUM