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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

**FILED**

SEP 11 1972

*Thomas J. Kearney*  
CLERK OF SUPREME COURT  
STATE OF MONTANA

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.



1 A review of the court's discussion of Article XIX,  
2 section 8, Constitution of Montana, shows that rather  
3 than amending the constitution, the court has adhered  
4 closely to clearly established principles of interpreta-  
5 tion.

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

17 (Emphasis supplied)

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

24 As the phrase is ambiguous, this court certainly  
25 does not amend the constitution by applying an interpre-  
26 tation which gives preference to a natural right.

27 (Opinion, p. 10.)

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



1 stated on page 14 that:

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

6 II.

7 THE COURT'S OPINION IS NOT IN CONFLICT  
8 WITH FORTY-SECOND LEGISLATIVE ASSEMBLY v. LENNON,  
9 156 MONT. 416, 481 P.2d 330.

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

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

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

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

The case of Forty-Second Legislative Assembly v.



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

3 III.

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

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

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

15 "Upon consideration of the allegations contain-  
16 ed in the pleadings, the exhibits appended  
17 thereto, and the ex parte oral presentations  
18 before this Court, it would appear that the mat-  
19 ters raised thereby are to secure interpreta-  
20 tions of provisions of our present constitution  
21 in light of its wording and under precedents  
22 established in the case law of Montana and other  
23 states of the Union, and, further, that no fact  
24 questions arise which would require the taking  
25 of testimony, and in such a situation an adver-  
26 sary hearing before this court is all that  
27 would be required to present the legal issue  
28 for determination."

29 In the opinion, this court stated:

30 "The facts speak for themselves and only legal  
31 questions remain for our determination." Op-  
32 inion, p. 7.

33 The argument of relator Burger concerning representa-  
34 tions made to the electors of Montana does not concern  
35 facts that are material to the decision of the court. The  
36 presence or absence of statements or understandings of  
37 legislators or individual constitutional convention dele-  
38 gates has no materiality to the intent of the framers in  
39 drafting section 8, Article XIX, Constitution of Montana.



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

5 IV.

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

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

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

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

24 The court stated on page 7 of its opinion:

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

30 All discussion by the court of the affidavits of the  
31 secretary of state and the state board of canvassers are  
32 found following page 14 of the opinion. That discussion  
33 is dicta and merely shows that following relators' inter-  
34 pretation of the meaning of Article XIX, section 8,



1 Constitution of Montana, relators still would not prevail.

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

5 VI.

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

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

16 The bonding cases were cited by counsel on both sides  
17 in their briefs. The cases were discussed in oral argu-  
18 ment. The court in response to these cases and other  
19 cases from foreign jurisdictions stated:

20 "We recognize that there are two distinct and  
21 opposing lines of authority in other jurisdic-  
22 tions having the same or similar constitutional  
23 language. Earlier cases are collected in the  
24 Annotation appearing at 131 A.L.R. 1382. For  
25 examples of later cases see: State ex rel. Witt  
26 v. State Canvassing Board, 78 N.M. 682, 437 P.2d  
27 143; In re Todd, 208 Ind. 168, 193 N.E. 865;  
28 Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299.  
29 These cases are cited merely to indicate the two  
30 conflicting lines of authority but are not relied  
31 upon or determinative of our decision in the in-  
32 stant case. We prefer to look to Montana stat-  
utes 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



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

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

12 I hereby certify CONCLUSION of the attached objections

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

24 DATED this 11th day of September, 1972.

25 Respectfully submitted,  
26 ROBERT L. WOODAHL  
27 Attorney General

28 By: William N. Jensen  
29 WILLIAM N. JENSEN  
30 Assistant Attorney General  
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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  
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27 DATED this 11th day of September, 1972.

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29 Attorney General

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