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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.

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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,

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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.

BY: _____
James H. Morrow, Jr.

BY: _____
Edmund P. Sedivy, Jr.

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